Vols. I. to LXI. Now Ready. 1785 to 1844.

The price for each Volume is £1 5s., cloth, net
or £1 8s., half brown calf, net.

THE REVISED REPORTS

A REPUBLICATION OF SUCH

REPORTS OF CASES IN THE ENGLISH COURTS
OF COMMON LAW AND EQUITY
AS ARE STILL OF PRACTICAL UTILITY.

The following Reports have been dealt with in Volumes 1 to 61 of the Revised Reports.

Adolphus & Ellis
Anstruther
Arnold
Ball & Beatty
Barnewall & Adolphus
Barnewall & Alderson
Barnewall & Cresswell
Bavan
Bingham
Blackstone, H.
Bligh
Bosanquet & Puller
Broderip & Bingham
Campbell
Carrington & Payne
Chitty
Clark & Finnelly
Cooper, G.
Cooper temp. Brougham
Cooper Pr. Cas.
Cox
Craig & Phillips
Crompton & Jervis
Crompton & Meeson
Crompton, Meeson and Roscoe
Daniell
Danson & Lloyd
Dow
Dow & Clark
Dowling, P. C.
Dowling & Ryland's K.B.
Dowling & Ryland's N.P.
Drinkwater
Drury & Walsh
Drury & Warren
Durnford & East
East
Espinasse
Forrest
Gale & Davison
Gow
Haggard's Adm.
Hare
Harrison & Wollaston
Hodges
Hogan
Holt
Horn & Hurlstone
Hurlstone & Walmsley
Jacob
Jacob & Walker
Jurist
Keen
Knapp
Law Journal
Lloyd and Welsby
McClelland and Younge
Maddock
Manning and Granger
Manning and Ryland
Marshall
Maule and Selwyn
Meeson and Welsby
Merivale
Moody and Malkin
Moody and Robinson
Moore, C. P.
Moore and Payne
Moore, P. C.
Moore & Scott
Murphy and Hurlstone
Mylne and Craig
Mylne and Keene
Nevile and Manning
Nevile and Perry
Peake
Perry and Davidson
Price
Queen's Bench
Russell
Russell and Mylne
Russell and Ryan
Ryan and Moody
Schoales and Lefroy
Scott
Simons
Simons and Stuart
Smith
Starkie
Swanston
Tamlyn
Taunton
Turner and Russell
Tyrwhitt
Tyrwhitt and Granger
Vesey, Jr.
Vesey and Beames
West
Wightwick
Willmore, Wollaston and Davison
Willmore, Wollaston and Wilson's Chy. [Hodge
Wilson's Ex. Eq.
Younge and Collyer
Younge
Younge and Jervis

ROMAN LAW.

Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

http://www.archive.org/details/systematichistor00huntuoft

Soan Rom. H9476.3

A Systematic and Historical Exposition

OF

ROMAN LAW

In the Order of a Code.

William Alexander

BY

W. A. HUNTER, M.A., LL.D.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

EMBODYING THE INSTITUTES OF GAIUS
AND
THE INSTITUTES OF JUSTINIAN,

TRANSLATED INTO ENGLISH BY

J. ASHTON CROSS,
B.A. OF BALLIOL COLLEGE, OXFORD,
AND OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

6276
28 | 7 | 04

Fourth Edition

LONDON: SWEET & MAXWELL, LIMITED,
3 CHANCERY LANE;
HODGES, FIGGIS & CO., AND E. PONSONBY, DUBLIN;
THACKER, SPINK & CO., CALCUTTA;
C. F. MAXWELL, MELBOURNE;
LAW BOOK CO. OF AUSTRALASIA, LTD., SYDNEY.
MDCCCCIII.

The Right of Translation is reserved.

EDINBURGH:
COLSTON AND COY. LIMITED, PRINTERS.

PREFACE TO THE SECOND EDITION.

THE object of this work is to present, in a clear, systematic arrangement, so much of the Digest and Code of Justinian as is likely to be of use to students of modern law. At the same time, the leading steps in the evolution of Roman Law, from the time of the XII Tables to Justinian, are set forth.

For the convenience of students, a translation of the Institutes of Justinian, and (where any difference exists) of the Institutes of Gaius, is embodied in the text as part of the exposition. The passages taken from Gaius and Justinian are distinguished by a difference of type. It has not been deemed advisable to translate Latin technical phrases by doubtful English equivalents. No one can hope to master the doctrines of the Roman jurists without some acquaintance with their technical language. It has therefore been thought best to familiarise the reader with the Latin terms by retaining them in the original, along with paraphrase or explanation. The text of Huschke has been almost invariably followed; and as that is published in a cheap and convenient form, it has been determined not to print the Institutes in Latin. Studemund's revision of Gaius has been followed, where it makes any substantial difference in the meaning.

In the present edition, a full but concise account of

the External History of Roman Law, from the pen of Professor Murison, University College, London, gives completeness to the work as a systematic exposition of Roman Law.

The chief alterations in the text relate to the topics of Possession, Correality and *Bonorum Possessio.* The chapter on Possession has been entirely rewritten and much enlarged. The accidental and anomalous character of the Roman doctrine of Possession has now, it is hoped, been clearly and fully demonstrated.

Errors and misprints in the first edition—many of which were brought to my notice by the kindness of readers—have been corrected.

FOUNTAIN COURT, TEMPLE.
January 1885.

TABLE OF CONTENTS.

INTRODUCTORY.

A Short History of Roman Law, 1-121.
Classification of Roman Law, 122-142.

BOOK I.

RIGHTS *IN REM*.

FIRST DIVISION.

RIGHTS *IN REM* IN RESPECT OF ONE'S PERSONALITY, 145-156.

SECOND DIVISION.

RIGHTS *IN REM* IN RESPECT OF OTHER HUMAN BEINGS.

I. Slavery, 157-188.
II. The Paternal Power. *PATRIA POTESTAS*, 188-222.
III. The Marital Power. *MANUS*, 222-227.
IV. *MANCIPIUM*, 227-230.

THIRD DIVISION.

RIGHTS *IN REM* IN RESPECT OF ANIMALS AND THINGS.

FIRST SUB-DIVISION.

Independent Rights, *i.e.*, Rights created for their own Sake.

First.—Absolute Ownership.
I. *Dominium*, 231-340.
II. *Possessio*, 341-393.

Second.—Rights Indefinite in point of User, but limited in Duration. (Personal Servitudes), 394-396.
I. *Ususfructus*, 396-409.
II. *Usus*, 409-411.
III. *Habitatio*, 411.
IV. *Operae Servorum*, 411.
V. *Precarium*, 411-412.

Third—Rights Definite in point of User, unlimited in Duration. (Praedial Servitudes,) 412-426.
Fourth.—Perpetual Leases. *Emphyteusis and Superficies*, 426-430.

SECOND SUB-DIVISION.

DEPENDENT RIGHTS, *i.e.*, RIGHTS CREATED IN SECURITY FOR DEBTS, 430-434.

1. *Fiduciae Contractus*, 434-436.
2. *Pignus* and *Hypotheca*, 436-448.

BOOK II.

RIGHTS *IN PERSONAM.*

FIRST DIVISION.—CONTRACTS.

ARRANGEMENT OF THE SUBJECT, 451-458.

FIRST SUBDIVISION.

CHARACTERISTICS OF DISTINCTIVE KINDS OF CONTRACTS.

PART I.

ONE CREDITOR AND ONE DEBTOR ONLY.

I. Formal Contracts. *Nexum, Stipulatio, Literis*, 459-471.
II. Equitable Contracts. *Mutuum, Commodatum, Depositum, Mandatum*, 471-490.
III. Contracts for Valuable Consideration. Sale, Hire, Partnership, 490-524.
IV. History and Classification of Contracts, 524-540.
V. Innominate Contracts *re*, 540-545.
VI. Pacts, 545-550.

PART II.

MORE THAN ONE CREDITOR OR DEBTOR.

Correality [Solidarity], 551-562.

PART III.

ACCESSORY CONTRACTS.

A. To Creditor. *Adstipulatio*, 563-565.
B. To Debtor—Sureties. *Sponsio, Fidepromissio, Fidejussio, Mandatum, Pecunia constituta*, 565-579.

SECOND SUB-DIVISION.

ELEMENTS COMMON TO ALL CONTRACTS.

I. Rights and Duties, 579-580.
II. Investitive Facts. (See Table, p. 580), 580-626.
III. Transvestitive Facts, *Novatio*, 626-632.
IV. Divestitive Facts (*Solutio, Acceptilatio, Pactum de non petendo, Prescriptio, Confusio, Litis Contestatio*), 632-650.
V. Actions and Remedies, 650-654.

SECOND DIVISION—QUASI-CONTRACT AND STATUS.

A. Quasi-Contract.

1. Trusts, 655-657.
2. *Condictio indebiti*, 657-661.
3. *Negotiorum Gestio*, 661-666.

B. Status.

1. *Patronus* and *Libertus*, 666-676.
2. Parent and Child, 676-678.
3. Husband and Wife, 678-696.
4. *Tutela impuberum*, 696-727.
5. *Tutela Mulierum*, 727-731.
6. *Cura*, 732-735.

BOOK III.

INHERITANCE AND LEGACY.

PART I.—INHERITANCE.

First.—Universal Successors, 739-744.
Second.—Rights and Duties of *Heres* and *Bonorum Possessor*, 745-763.
Third....Investitive Facts :—

CHAP. I.—TESTAMENTARY SUCCESSION.

1. *Testamentum*, 764-811.
2. *Fideicommissa* and *Codicilli*, 812-830.

CHAP. II.—INTESTATE SUCCESSION.

First.—Succession to Free-Born Persons.

I. First Period.—XII Tables, 833-840.
II. Second Period.—From XII Tables to Institutes of Justinian, 840-863.
III. Third Period.—Novels 118 and 127, 863-866.

Second.—Succession to Freedmen, 866-874.

CHAP. III.—*Aditio Hereditatis*, 875-881.

Fourth.—Transvestitive and Divestitive Facts and Remedies, 881-887.

PART II.—LEGACY.

First Period.—*Legata* and *Fideicommissa* (prior to Justinian), 887-896.
Second Period.—Legacy, as settled by Justinian, 897-952.

PART III.—INTERPRETATION, 953-964.

BOOK IV.

CIVIL PROCEDURE.

PART I.—From the Summons to the Appearance of Parties, 967-973.

PART II.—From Appearance till Judgment.

FIRST PERIOD.—*Legis Actiones*, 973-980.

SECOND PERIOD.—System of *Formulæ*.

(1) Proceedings *in Jure*, *Formulæ*, *Interdicta*, *Confessio in Jure*, *Interrogatio in Jure*, *Jusjurandum in Jure*, 980-1006.

(2) Proceedings *in Judicio*, 1006-1011.

THIRD PERIOD.—Extraordinary Procedure, 1012-1029.

PART III.—Execution of Judgments, 1029-1044.

PART IV.—Appeals, 1044-1048.

PART V.—Evidence, 1049-1060.

APPENDIX.

CRIMINAL LAW, 1061-1072.

PASSAGES OMITTED FROM GAIUS AND JUSTINIAN, 1073-1075.

INDEX, ... 1077-1111

INDEX TO THE TEXTS OF THE INSTITUTES OF GAIUS, . . 1113-1118

INDEX TO THE TEXTS OF JUSTINIAN'S INSTITUTES, . . 1118-1122

EXPLANATION OF ABBREVIATIONS.

J. is Institutes of Justinian. (J. 3, 1, 1.) The first figure indicates the book, the second the title, and the third the section referred to. Thus, J. 3, 1, 1 means 3d book, 1st title, 1st section.

G. is Institutes of Gaius. (G. 2, 6) means 2d book and 6th section. Gaius is not arranged in titles.

D. is Digest or Pandects. (D. 39, 3, 1, 17) means the 39th book, 3d title, 1st fragment, and 17th section of that fragment.

C. is Code of Justinian. (C. 4, 8, 1) means 4th book, 8th title, and 1st constitution. (C. 6, 30, 18 pr.) means 6th book, 30th title, 18th constitution, and the *principium* or preliminary section.

Nov. is the Novels of Justinian. They are numbered separately, the longer ones being divided into sections. (Nov. 81, 3) is the 81st novel and 3d section.

C. Th. is the Code of Theodosius, which is divided in the same way as the Code of Justinian.

Paul. Sent. 2, 7, 2 is the 2d book, 7th title, and 2d section of the *Sententiae* of Julius Paulus.

Ulp. Frag. 25, 2 is the 25th title and 2d section of the Fragments of Domitius Ulpianus.

Ulp. Inst. is the fragments of Ulpian's Institutes.

Mos. et Rom. Legum Collat. 6, 4, 2 is the 6th title, 4th chapter, and 2d section of the Mosaicarum et Romanarum Legum Collatio.

Frag. Vat. is the Vatican Fragments.

Vet. cujusd. jur. consult. is Veteris cujusdam jurisconsulti consultatio, a short collection of moot points in law.

The above, beginning with Paul, Sent., are to be found in HUSCHKE's "*Jurisprudentiae Antejustinianae quae supersunt.*"

N.B.—It is important for the student to bear in mind that the Institutes of Gaius are more than 300 years older than the Institutes of Justinian.

Passages in the translation enclosed in square brackets are to be found in Gaius only, and not in Justinian.

A SHORT HISTORY

OF

ROMAN LAW.

CHAPTER I.

INSTITUTIONS OF THE REGAL PERIOD (B.C. 754-509).

THE Sources of Early Roman History.—The credibility of the early history of Rome rests upon the character of the sources whence it was derived.[1] The chief ancient writers that supply the extant information flourished some seven or eight centuries after the reputed foundation of Rome, and not one of them possessed a single scrap of contemporary evidence as to the truth of his statements regarding the early history. They speak, indeed, of the existence in their own day of laws dating from the period of the kings. Dionysius, for example, tells us that some of the laws of Numa were carved on tablets of oak (bronze columns not being then in use), and Cicero refers to the laws of Numa as extant in his time. There existed also the *Jus Papirianum*, a collection of laws professing to be enactments of the regal period (*leges regiæ*), the compilation of which was ascribed to Sextus (or Caius) Papirius, who was supposed to have lived in the reign of Tarquinius Superbus.[2] The Twelve Tables are not assigned to an earlier date than three centuries after the foundation of Rome, and half a century after the establishment of the republic. The ascription of laws and institutions to the period of the kings, and of particular laws and institutions to particular kings, must be regarded in the same light as the attribution of ancient laws to Solon by the Attic orators; it is probably no more than an expression of ignor-

[1] See especially Sir G. C. Lewis, *Credibility of Early Roman History*. The history of the Regal Period is most concisely and effectively sifted by Professor Seeley, *Livy*, Book I., *Historical Examination*, pp. 11-98. Mr Seeley gives abundant references to authorities, ancient and modern. See also Professor Ihne's *Roman History*, I. *passim* (Books I.-III.)

[2] Pomp. *D.* 1, 2, 2, 2. Dion. 3, 36, says that the ritualistic formularies of Numa, which Ancus Marcius had caused to be inscribed on tablets and set up in the forum had, in process of time, wasted away; and that, after the expulsion of the kings, C. Papirius, the Pontifex Maximus, caused them to be reinscribed and set up in public.

ance counterfeiting knowledge as to the origin of such laws and institutions. Dionysius also refers to treaties still extant in his day, concluded between Servius Tullius and the Latin cities, and between Tarquinius Superbus and Gabii; and other writers make similar references to a few other treaties of the early times of the republic. No reliance, however, can be placed on such records. There were also the documents in the possession of the magistrates—the registers kept by the Pontifex Maximus, the various books of the pontiffs (containing ritualistic rules, with incidental historical statements, and the forms of civil procedure), and the official formularies and other records of the censors and the prætors. The chronological lists of magistrates would be an important, if somewhat scanty, source; but we cannot tell when they began to be kept. Livy refers sometimes to the linen rolls (*libri lintei*), preserved in the temple of Juno Moneta. Funeral orations, inscriptions on public monuments and in private houses, and the poems of Ennius and Nævius and traditional songs, would all be temptingly open to falsification and forgery. There were also the chronicles of neighbouring Latin towns. Of all these sources Professor Ihne considers that the two principal were the family traditions and the lists of magistrates.

But it cannot be admitted that any written chronicles dating as far back as the Regal Period ever existed in Rome; and the earliest historical documents of the time of the republic, the date of which is extremely doubtful, certainly referred to contemporary events, and not to times long past. It was not till the Roman state stood in power and dignity above the other towns of Latium that curiosity arose regarding the history of the city and of its institutions. The earliest historian of Rome that we know of, Q. Fabius Pictor, served in the war in Gaul in B.C. 225; that is to say, more than 500 years after the reputed foundation of the city, and not much less than 300 years after the expulsion of Tarquin. Livy acknowledges that, up to the capture and sack of Rome by the Gauls in B.C. 388, the history was extremely obscure and uncertain, owing to the fact that "what records there were among the commentaries of the pontiffs, and other memorials, both public and private, perished, for the most part, in the conflagration of the city," so that anterior events were thus committed to the uncertain keeping of oral tradition. The generation immediately following the Gallic capture is really as obscure as any period in the century preceding. Down to the middle of the fourth century B.C., and indeed to a still later time, the writers of history can have had but little trustworthy material for their meagre compilation of annals. There is little reason, therefore, to wonder at the utter uncertainty of every portion of the early narrative in the minds of the Romans of historical times. "We have to conclude, generally, that for the Regal Period the ultimate authorities are a small number of public documents and untrustworthy inscriptions in private houses that may have escaped the Gauls, and beyond this, nothing but unwritten tradition." In addition to the misfortune of scanty materials, "the Roman antiquarians were most credulous, and, moreover, inaccurate and superficial." And, indeed, the early history may, to a very large extent, rest, not on such possible authorities at all, but on pure invention. That most of it was artificially constructed from the beginning, partly out of euhemeristic explanations, and partly out of ætiological conjectures, is just as probable as that it is a tradition more or less

varied in the course of oral transmission from original contemporary and trustworthy witnesses. Palpable marks of fiction abound in the narrative : supernatural stories, gross improbabilities, and extreme inconsistencies both with itself and with other ascertained history.

The conclusion of historical criticism is thus stated by Professor Seeley . That, from the history books taken alone, it is impossible to know anything about the early history of Rome ; and that it is impossible to learn anything from any source about that part of the history that deals with particular persons. "But concerning the relation of the Romans to other nations and other Italian tribes, the growth of the State, the time and mode of the introduction into it of the different arts which constitute civilisation, the development of its political, religious, and legal ideas, we may gather sufficient information to form an outline history." The principal sources of this information are these : physical geography and topography, comparative philology, mythology, and law (including usages of every kind), archæology, and the later history of Rome.

The Beginnings of the Roman Commonwealth.—The Latins, who were probably the first branch of the Italian race to enter Italy, were apparently followed by the Umbro-Sabellian branch, which gradually hemmed them in on the east and south, confining them, at the supposed dawn of Roman history, to the narrow limits of Latium, "a district of about 700 square miles, not much larger than the present canton of Zurich." Before the Italians parted from the Hellenes, the united people must, on the evidence of language, have made considerable progress in civilisation ; and it may be accepted that the Latins had advanced still further by the middle of the eighth century before Christ. The traditional three tribes, the Ramnes, Tities, and Luceres, were all at this time substantially Latins,[1] tilling their fields from their several villages, and visiting in due course their common stronghold on the Palatine. The Roman territory appears to have extended not more than five miles from the city on the east and south, and not more than six on the south-west ; while it included both banks of the Tiber from the Janiculum to the sea. According to Mommsen's estimate, it covered at the utmost 115 square miles. At length the people of the Roman canton woke up to recognise in their frontier fortress, unhealthy and unattractive as it must have been to a settler, a great position for an emporium of the Latin river and sea traffic, as well as for military defence. "Whether it was a resolve of the Latin confederacy, or the clear-sighted genius of some unknown founder, or the natural development of traffic, that called the city

[1] Mommsen is very indignant at the "irrational opinion that the Roman nation was a mongrel people," and at the attempt "to transform a people which has exhibited in language, polity, and religion, a pure and national development such as few have equalled into a confused aggregate of Etruscan and Sabine, Hellenic, and, forsooth ! even Pelasgic fragments." The Ramnes, he maintains, were undoubtedly Latins, and the predominant element ; the Luceres were as probably Latins as not ; and the Sabines belonged to a closely-related stock, having probably been introduced through the remote incorporation of a Sabellian community in a Latin canton-union. "With the exception perhaps of isolated national institutions transplanted in connection with ritual, the existence of Sabellian elements can nowhere be pointed out in Rome." —*Roman History*, I. 45, 46 (Bk. I. ch. iv.)

of Rome into being, it is vain even to surmise."[1] The town became increasingly frequented by the Romans of the canton, and "by the side of the cultivator of the soil, there must have been a numerous non-agricultural population, partly foreigners, partly natives, settled there from very early times." In strong contrast to the rustic towns of Latium, Rome had begun to develop a civic and mercantile character, which favoured rapid political growth. For a long time, however, the settlers on and about the several Mounts of Rome "probably felt themselves to be as yet more separated than united, and Rome as a whole was probably rather an aggregate of urban settlements than a single city."[1] To whatever extent these settlers may have been welded together, "the Romans, when they first appear on the stage of history as a separate people, had passed through a long period of national development, along with kindred races, and the groundwork of their religious, legal, and social life was already formed." (Ihne, *Roman History*, I. 109 (Bk. I. ch. xiii.)).

Early Divisions of the Roman Population.—The existence of a ruling and a subordinate class, which may be traced to the very beginning of Roman history, has been considered to "point indisputably to a conquest of the lands, and to the subjection of the former inhabitants." (Ihne, *Roman History*, I. 109 (Bk. I. ch. xiii.)). The ruling class, at all events, was composed of the patricians, who alone had the full privileges of burgesses or citizens. These enjoyed exclusive possession of all political rights and honours in the state; they alone were eligible to all public offices and priesthoods; they alone had access to the legal and religious traditions of the state; they alone enjoyed the possession of the auspices, the means of intercourse between the gods and the state; they alone were, in the first instance, the *Populus Romanus*.

The subordinate and subject population were of two principal classes. First, the Clients (or "listeners"), who were dependants of the various patrician houses, and whose patrician lords were called in relation to them *patroni*. The interests of patron and client were supposed to be identical. The patron was bound to extend a general protection to his client, and especially to make the client's case his own in all matters of law. The client was bound to uphold generally the cause of his patron, and especially to contribute for his benefit on all the great public and private occasions of his life involving any considerable expenditure—for instance, towards marriage portions for his daughters, ransom money, law costs, or the expenses of a public office. Yet the client was, legally, wholly at the mercy of the patron, whose anger or caprice was in some measure controlled, if not by a prudent dread of the vengeance of the gods, yet by his own interest, by custom, and by public opinion. Towards the latter portion of the regal period, the ties binding patron and client began to be loosened, primarily through the subjection of clients, independently of their relation to their patrons, to military service, under the Servian organisation of the army.

The second class of the subject population embraced the unfranchised freemen that had no patron—independent freemen without political rights, freemen having no special connection with patricians, and subject only to

[1] Mommsen, *Roman History*, I. 50 (Bk. I. ch. iv.).

the patricians collectively, that is, to the state. Whether or not the clients were in regal times a portion of the plebeians—a view that seems opposed by the relations of patron and client as set forth by Dionysius, if indeed any regard can be paid to his statements—at any rate such independent freemen would seem to constitute the basis of the class that soon emerged into prominence as the plebeians (*plebs*, *plebes*). Like the clients, these plebeian freemen were destitute of political rights. They were bound to obey the law, but originally they had nothing to expect from its protection; under the earliest kings they probably were citizens only in so far as they enjoyed the right of acquiring, holding, and transferring property in accordance with Roman law (*jus commercii*); and they apparently first obtained the right of voting in the popular assemblies (*jus suffragii*) under the constitution of Servius Tullius. During the regal period neither the plebeians nor the clients possessed the right of intermarriage with patricians (*jus conubii*);[1] and thus the children of patrician and client, and of patrician and plebeian, would swell the plebeian ranks. The plebeians would also be reinforced, steadily by the expansion of the city, and largely on every extension of the Roman state by conquest. There would, further, be a small addition of emancipated slaves.

In regal Rome, slaves, who had no rights of any kind, and were regarded simply as animals or pieces of property, were probably far from numerous. The quasi-slavery of the clients was a sort of substitute. From the latter part of the regal period onwards, slaves regularly and completely manumitted thereby attained to the rights and privileges of plebeians.

The Household.—Manus; Patria Potestas.—The household was the foundation of the Roman social organisation. The father of the household (*paterfamilias*) alone possessed legal rights. His house was his castle, and within his family he was absolute monarch. The family included all the father's legitimate descendants (except such persons as were specially released from his power—for example, males that had ceased to be Roman citizens, or had been adopted into other families, and females that had been received into other families by marriage or adoption, or had become vestal virgins), all females that had married any of the male members of the family, and all persons adopted into the family. Over all the members he exercised judicial powers. He was also high priest of the family.

The position of the wife was one of complete subjection. As wife, she was in the hand (*manus*) or power of her husband; as member of the household, she was, legally, her husband's daughter (*in loco filiæ*). Her situation, however, was softened and hallowed by the religious marriage ceremony (*confarreatio*), and by her regular share in the rites of the family altar. No doubt, either party might divorce the other, as a private act, without the intervention of the state.

The power of the father (*patria potestas*) over his dependants was absolute. He might punish any of them—even a grown son that had filled the highest offices in the state—in life and limb. He might even sell his son into slavery—slavery if to a stranger, quasi-slavery if to another Roman citizen. It was extremely difficult for a son to escape from the father's

[1] The *Conubium* was granted to the plebeians by the *Lex Canuleia*, B.C. 445.

power. Even a slave, if sold by the house-father and then emancipated by his new master, at once became a freeman; but a son, if similarly sold and emancipated, at once fell back into the power of the father, and only a third sale could finally release him.

A married daughter escaped from her father's power only to fall into the power of her husband (or of the head of her husband's family); henceforth neither she nor her children were legally of kin to her original family.

In respect to the state, the family was the father. In case of any wrong done or suffered by any member of the family, the father stood forward in the courts of the state to claim or to render the necessary redress. Between him and his family the state did not interfere; but in process of time certain softening influences were brought to bear. If three children were born at one birth, the state is represented as willing to assume their upbringing till the age of puberty. By religious prescription, exposure of infants under three years of age was forbidden, except in the case of deformed births, and of daughters subsequent to the first, and unless five neighbours expressed their approval; and the sale of a wife or of a son was an act of impiety. If the husband had occasion to sit in judgment on his wife's serious misconduct (such as adultery or wine-drinking), he was expected to hear the opinion of his own and of his wife's nearest male blood relations before pronouncing sentence. Still the legal power of the father was practically absolute: he might nerve himself to disregard the sanctions of religion, and though he might listen to what the relations had to say, he might neglect their opinion in giving judgment.

On the death of the father, the sons at once succeeded to the rights of independent house-heads. The widow and the fatherless unmarried daughters fell under the common guardianship (*tutēla*) of their now independent sons and brothers (or nearest male relations—*agnati*). Widow, and unmarried daughter, and son, all shared equally in the inheritance.

The families of the plebeians were constituted and governed on the same principles as the families of the patricians.

The Clans (*Gentes*).—The union of several households constituted a clan (*gens*). The successive elevation of sons to the rights of independent householders would soon result in the existence of a number of households more or less closely related by blood, claiming (even if in some cases no longer able definitely to trace) descent from a common ancestor, called by a common family name, celebrating common religious rites, and cherishing many other interests with a markedly common feeling. Such a group of households was a *gens*, and the members were *gentiles*. Although at first exclusively related by blood, and jealous of the admission of strangers, the members of a clan did not always, or perhaps very long, continue so; the intense desire of family early prompted the system of adoption, which, however, was guarded by a ceremony of a public and religious character; but the fiction of blood-relationship was to a late period consistently maintained. All clan members always bore the clan name.

The clans were the most primitive element in Roman society; and "the clan's lands must, in the primitive period of joint possession, have been the smallest unit in the division of land." At the same time, "the clanships were from the beginning regarded, not as independent societies,

but as integral parts of a political community (*civitas, populus*)." (Mommsen, *Roman History*, I. 38 (Bk. I. ch. iii.)).

The Wards (Curiæ) and the Assembly of the Wards (Comitia Curiata).—A combination of clans formed a ward (*curia*). Thirty wards embraced the whole body of the Roman people; ten wards comprehending each of the three tribes (or "parts")—that is, each of the separate communities whose fusion resulted in the one people. The members of the wards (*curiales*) assembled at stated times to celebrate common festivals and sacrifices. They also assembled as a legislative body (*comitia curiata*)—the most ancient popular assembly at Rome that was known to historical times, and indeed the sovereign power.

The sovereign assembly acted alone only in case of necessity; ordinarily it was summoned by the king (or by his representative). It took no concern with the business of the executive; its functions were to express its opinion on proposed changes in the existing law. It elected kings and priests, passed laws, declared war, and concluded peace; and it was the court of final appeal in all matters affecting the life and privileges of a patrician. It also decided a variety of family and clan questions; for instance, it sanctioned or vetoed adoption (*arrogatio*). The king proposed the question; and the assembly of wards, without debate, simply voted "Yes" or "No." by wards, in answer to the question of the king.

The assembly of the wards (*comitia curiata*) received its death-blow from the institution of the Assembly of the Centuries (*comitia centuriata*), which is ascribed to Servius Tullius, the sixth king of Rome. It was preserved for many hundred years from sacrilegious extinction by respect for the religious associations connected with the granting of the *imperium* and the *auspicia*, and with the ceremony of adoption. But all real power was taken out of its hands by the Servian reform; and the pretensions of the patricians to the last word in legislation were conclusively repudiated by the *lex Publilia* (B.C. 339), which required the *patres* to ratify beforehand the votes of the *comitia centuriata*.

The Senate.—Besides the *comitia curiata*, there was another body concerned in the government of the state. This was the senate (*senatus*), the council of chiefs or "elders" of the clans. The members were chosen by the king, at his will and pleasure, and they held office during life. For some centuries under the republic, the number was 300; probably this was the number also under the later kings; the traditions regarding the original establishment of the senate and the increase of members by successive kings are hopelessly inconsistent, although pointing to the divisions of the tribes, *curiæ*, and *gentes*. The king was president. The senate was summoned by the king, when he thought fit; and its functions were confined to giving him advice on such questions only as he chose to submit to it. It had no means of enforcing its views; the king might accept or reject its advice as he chose, subject always to the pressure of public opinion and custom. How far the details of government were entrusted to it would depend on the personal character of the king. On a vacancy of the throne, the senate provided for the conduct of the government, and no doubt guided the selection of the new king. But on the whole, its power, though probably influential with the king, was very much less than it afterwards became under the republic.

The King.—The king (*rex*, "leader" or "director") was the one supreme magistrate; he alone held power in the state. Yet he was simply a free burgess—a husbandman, a warrior, possibly a trader—selected probably by the senate, and elected to hold office for life by the voice of his fellow-burgesses assembled in their *comitia curiata*. The king was no doubt the formal head of each of the great departments of the state. He was commander-in-chief and high priest: he was not fully king till the *comitia curiata* had conferred on him, by a special law, proposed by himself (*lex regia* or *lex curiata de imperio*), the right of supreme command in war and in peace (*imperium*), and authority to hold intercourse with the state-gods in the name of the state (*auspicia*). He called new members to the senate; he summoned and presided in both the senate and the *comitia curiata*. He was also supreme judge, in civil as well as in criminal trials. He might delegate particular functions to men of skill in special departments; but all the officials of the earliest period "were mere royal commissioners, and not magistrates in the subsequent sense of the term." (Mommsen, *Roman History*, I. 68 (Bk. I. ch. v.)). For example, he probably delegated judicial authority to two law officers, called quæstors, from whose judgment there lay a right of appeal to the *comitia curiata*. When the king sat in person in great trials, it probably came to be usual for him to have senatorial assessors (*consilium*), of his own selection, who, as in the like case of the house-father, might advise but could not enforce their advice. If the king could not pardon, and if at first there was no appeal from his judgment, at any rate he may in process of time have permitted an appeal to the *comitia curiata*, which afterwards came to be a rightful privilege. The power of the king, judicially and politically, seems to have been dangerously open to tyrannical abuse. In the absence of a written code of laws, the king would, in the very process of administering the laws, actually (though informally and invalidly) make law. Again, no one might speak in the *comitia curiata*, unless with the permission of the president, and such permission the king might refuse. Still there was ever present the controlling influence of custom and public opinion; and, although the king was formally irresponsible, yet "he was bound by the terms of a contract with his people, which, if not formally expressed in words, was fully implied and understood." (Ihne, *Roman History*, I. 116 (Bk. I. ch. xiii.)).

The Assembly of the Centuries (*Comitia Centuriata*).—The institution of the *comitia centuriata* is ascribed to Servius Tullius, the reputed sixth king of Rome. By this reform, political power was transferred from the basis of blood and descent to a new basis of property, with a certain regard for age and experience. In the preceding reigns there must have been a great increase of population and of wealth, and most probably the patricians would constitute a small minority. These may now have found it desirable, or inevitable, to share with the plebeians the burden of military service, even at the expense of letting the plebeian wedge into the jealously-guarded privileges of political power. Whether or not the new reform grew out of the constitution of the wards in the course of a gradual and natural development, after the manner indicated by Ihne (*Roman History*, I. 67 (Bk. I. ch. vii.), at all events the general political situation must have tended towards some such re-constitution.

Like the probable original organisation of the Roman people, the Servian constitution was fundamentally military. The whole *populus*, now including plebeians as well as patricians, were classed for military purposes on a common census of real property. At the head of all stood the knights, or cavalry (*equites*), in eighteen centuries. Then followed five "classes," which were graduated according to the value of the real estate of the individual members, and armed at their own expense in proportional completeness. They were divided into 170 centuries, and each class contained an equal number of centuries of seniors (age, 46 to 60) and juniors (age, 17 to 46); the former defended the city, while the latter served in the field. The number of centuries in each class appears to have been fixed, but the number of men in a century must have varied greatly. "In this elasticity of the century lay the possibility of stamping the *comitia* with a peculiar political character, aristocratic or democratic. We see how the opportunity was used. In the first place, the number of centuries was so arranged that the knights and the first class should have either a majority or almost a majority; in the second place, the men between 46 and 60 were equal in influence to those between 17 and 46, though necessarily less numerous. Thus wealth and age were decidedly favoured." There were six (or five) centuries of smiths and carpenters, etc. (*fabri*), trumpeters, etc. (*tubicines, etc.*), and proletarians. The total number of centuries was 194 (or 193).[1]

[1] Liv. 1, 43. Dion. 4, 16; 7, 59. The following table shows Livy's arrangement:—

Classes.	Census or Rateable Property in Land.	Centuries.			Arms. Defensive.	Arms. Offensive.
es, . .	None	6 Patrician (old)+12 Plebeian (new)=	18	100	Full suit: helmet, large round shield, cuirass, greaves — all of bronze	Long spear and sword
Class, . .	100,000 ases, or pounds of copper, and upwards	40 Seniores + 40 Juniores = 80	82			
abri, . .	None	2			*Fabri* bore no arms	
d Class, .	75,000 to 100,000 ases	10 Seniores + 10 Juniores =	20	93	Helmet, lighter oblong shield, greaves	Long spear and sword
Class, .	50,000 to 75,000 ases	10 Seniores + 10 Juniores =	20		Helmet, lighter oblong shield	Long spear and sword
n Class, .	25,000 to 50,000 ases	10 Seniores + 10 Juniores =	20		None	Long spear and light javelin
Class— *si*, . *npeters*, *blowers*,	11,000 (Dionysius says 12,500) ases	15 Seniores + 15 Juniores = 30	33		None	Slings and stones, &c.
		3				
		Military Centuries, .		193		
		Those whose *census* did not amount to 11,000 ases formed one century, and were (ordinarily) exempt from military service, ...		1		
		Total Number of Centuries,		194		

Dionysius gives 193 centuries, omitting Livy's *Accensi*. He places the *Fabri* with the Second Class, and the Trumpeters, etc. (only *two* centuries) with the Fourth Class; and he makes a Sixth Class out of Livy's extra century. These last-mentioned citizens were called *Proletarii* (men of no substance, mere "children-begetters;" afterwards of substance estimated under 1500 ases), and *Capite censi* (men of no substance, merely "counted by the head").

The army (*exercitus*) thus constituted, whether immediately or gradually, came at last to act as a national assembly. The vote was taken by centuries —the knights voting first (and the senators with them), the classes following in order; and, as soon as a majority had voted in favour of a proposition submitted to the assembly, the voting ceased. The fact that the knights and the first class together commanded a majority indicates how decidedly the chief power yet remained in the hands of the wealthy and the few; for the lower classes must have been much the more numerous. The *comitia centuriata* practically superseded the *comitia curiata;* but its power was long formally limited in two ways—(1) no measure could, in usual course, be submitted to it without the sanction of the senate; and (2) no measure it passed became law until sanctioned by *patres* (the *comitia curiata*, or, rather, the senate).

Local Tribes.—To Servius Tullius is ascribed also the division of the plebeians into local tribes—the city into four tribes, the country into an uncertain number, perhaps not over sixteen. Under the republic the number rose to thirty-five. The tribes at first discussed and settled the purely local tribal affairs. Their meetings did not assume the form of a regular Assembly of the Tribes during the regal period. This division was intended purely for practical convenience, and superseded the older religious arrangement whereby a district was grouped round a central place of sacrifice.

Religion.—The regal period was marked by very strong religious feeling, expressed in simple and inexpensive ceremonies and ritual. Nothing could be done in private or in public life without consultation of the gods. "The whole of nature was to the Romans pervaded by divine power. A simple spear—even a rough stone—sufficed as a symbol; a consecrated space, a sacrificial hearth, as temple or altar. For 170 years, it is said, Rome knew no religious images." (Ihne, *Roman History*, I. 119 (Bk. I. ch. xiii.)). Every temple had a priest, to perform the sacred rites, as well as a sacristan; but every magistrate, in the course of his official duties, and every private citizen, within his own house, performed religious rites. A few public priests were held in high reverence. There were three colleges or guilds of priests, or rather of "professors of theology"—the pontiffs, the augurs, and the fetials. The pontiffs were the most intimately connected with the law. In the earliest times they were in exclusive possession of the civil as well as of the religious law. They alone regulated the calendar, and determined the *dies fasti*, on which alone legal business could be lawfully transacted; they alone were in possession of the technical forms according to which lawsuits must be conducted; they convoked the assembly of the wards when wills were to be received or adoption (*arrogatio*) was to take place. In some cases of deep moral offence they might even pronounce sentence of death; but a right of appeal lay to the people. In spite of the intensity of Roman religious feeling, the religion of the state was always absolutely subject to the political authority.

CHAPTER II.

EARLY REPUBLICAN INSTITUTIONS, TO THE TWELVE TABLES.

(B.C. 509-449.)

THE Political Revolution.—The expulsion of the kings and the establishment of the Republic is dated B.C. 509, some two and a-half centuries after the reported foundation of the city. Whatever inferences may be drawn, neither the cause nor the course of the revolution can be stated with confidence, and it is not likely that the republic at once emerged full-grown, but probably it rather passed into settled form through some dubious period of dictatorial government. The immediate result was the lodgment of exclusive power in the hands of the patricians. "What the patricians gained was gained at the expense, not of the community, but of the magistrates' power." The plebeians were not eligible for any of the offices or honours of the state; they were excluded from the auspices, and even from knowledge of the laws; they could not lawfully intermarry with patricians; and they possessed practically no influence in the assembly of the centuries. To them the revolution was directly helpful only in so far as it enabled them to feel such power as they had, and taught them a political lesson. Little more than half a century was to elapse before their steady and persistent struggles compelled the patricians to recognise special plebeian magistrates, armed with far-reaching powers for the legal protection of their interests.

The Assembly of the Centuries (*Comitia Centuriata*).—The assembly of the centuries had now entered practically upon the functions of the assembly of wards, superseding it in all respects, except in the matter of certain unavoidable formalities, which lay under a strong religious sanction. It was the sovereign power in the state; it elected the chief magistrates (and, indirectly through them, the senate), it passed the laws, it decided questions of peace and war, and it formed a court of final appeal in capital cases. "The *de facto* influence of the aristocracy, exercised by the magistrates and the senate, had no independent legal foundation, but was always dependent on the will of the people." (Ihne.) The *comitia centuriata* embraced the whole body of the citizens, plebeian as well as patrician, each voting according to his census; but, in spite of the appearance of political equality, the power lay really with the patricians. For measures submitted to the *comitia centuriata* during the next century and a half could not pass into law without patrician or senatorial sanction.

The Consuls.—In place of the king there were now elected by the *comitia centuriata* two consuls[1] as joint chief magistrates. Naturally, at first, they were of patrician rank.[2] As security against a return to regal and tyrannical government, they held office only for one year, and, although each possessed

[1] Down to B.C. 449 the designation was not *consules* ("colleagues"), but *prætores* ("goers before," "leaders").

[2] Till B.C. 366 the consuls were always patricians

supreme power, neither could act alone in opposition to the will of his colleague. Their powers were the powers of the kings, more or less modified; but, as time went on, many of the original functions of the consuls were distributed to other officials, and curtailed by the rising influence of the plebeians. The priestly functions of the king were at once transferred to a special officer (*rex sacrorum*, or *rex sacrificulus*), who was excluded from all political offices, and officially subordinated to the chief pontiff; but this was no loss of power to the chief magistrates, who were always able to bend religion to what they considered to be the true service of the state. The nomination of the priests, however, did not remain with the consuls. The consuls were invested with the supreme military power. As civil heads of the state, they convoked the senate and the assemblies of the people, conducted the business of the meetings, and directed the executive administration. As judges, the consuls administered justice, both in civil and in criminal cases, to patricians and plebeians equally, either in person or through delegates. But in capital cases, while plebeians were tried by the consuls, patricians were tried before the *comitia centuriata;* the plebeians, however, had the right of appeal from the judgment of the consuls, and, at a later time, the tribunes might interpose on their behalf. In certain cases the delegation of the consul's theoretical jurisdiction was prescribed. It is probable, for example, that at this period the right of a magistrate, after the adjustment of a cause, to commit to a private person the investigation of its merits, was converted into an obligation to do so. Besides these parts of civil processes, there were delegated such criminal cases as the king had appointed the two "trackers of murder" (*quæstores paricidii*) to investigate; and to them was added the charge of the state-chest and of the state-archives. These latter functions were devolved on the Quæstors (*quæstores*), who now became regular annual magistrates; on the other hand, there were cases where only the personal action of the consul was permitted; for example, he could not delegate the adjustment of a civil process. The consular exercise of judicial powers ceased, or became quite exceptional, on the establishment of the prætorship. Similarly, the censors, on their appointment, relieved the consuls of other portions of their functions. In international business the consuls represented the state, but all their agreements required the sanction of the senate. In connection with their own official business, the consuls issued proclamations or orders (*edicta*).

Such edicts, or commands of a magistrate not based on a law, were recognised as valid during the magistrate's tenure of office. If approved by his successor, they might be continued, either unchanged or amended, also during his tenure of office. During the regal life-presidency, edicts would be apt to become established as laws. Under the annual magistracy, there was opportunity for frequent revision and more abundant suggestion, leading to a rapid development of law, and securing a more certain administration of justice.

The Senate.—The senate remained for a long time a purely patrician body; "a whole century elapses after the beginning of the republic before we find a single plebeian in the senate." It had no independent legislative or executive power, but was simply an administrative council, appointed, convened, and presided over by the consuls. It advised the consuls when

they thought fit to ask its advice, but it had no legal or formal means of controlling their action. "Yet, owing to the annual change of consuls, and the great influence which the senate, as a permanent body, exercised on the election of consuls, the practical result was, that, in all essential and important questions, the senate decided the policy which the consuls had no alternative but to adopt." (Ihne, *Roman History*, I. 134-137.) It underwent no legal change, however, at the revolution. In usual course, the consul laid a proposition before the senate, which, after discussion, adopted a resolution (*senatus-consultum*) on the subject. This resolution one of the magistrates (consuls) laid before the people in the *comitia centuriata*. If approved by the people, it returned to the senate, and the confirmation of the senate (*patrum auctoritas*) gave it the force of law. This senatorial right of confirmation was of especial importance in cases where the magistrates laid a proposition before the people without previously submitting it to the senate. It was a great bulwark of patrician predominance.[1]

The Valerian Laws.—One of the earliest of the consuls, P. Valerius Publicola, in B.C. 508, proposed to the *comitia centuriata* and carried certain important enactments suggested by the circumstances of the revolution. The most popular of these were the following two :—(1) that whoever should attempt to obtain royal power should be devoted, person and property, to the infernal gods—a substantial security for regular annual magistrates ; and (2) a law of appeal, securing to every citizen the right of appeal to the *comitia centuriata* from a sentence of death or scourging[2] pronounced by a magistrate (that is, in the first instance, a consul). This Valerian law of appeal has been called the Roman Habeas Corpus Act. As regards patricians, an identical (unwritten) law probably existed under the kings ; but if it did, it must have been grossly ignored. As regards plebeians, Ihne maintains that the law did not extend to them ; and that "it was this denial of justice which forced the plebeian class to create for themselves in the Tribunes of the people legal protectors of their own."[3] This may be the fact, practically, considering the overwhelming power of the patricians in the *comitia centuriata ;* but, in form, there seems to be no reason why they should not have been, and we apprehend they were, included in the right of appeal. The law did not apply to strangers or to slaves ; it did not interfere with the power of the house-father ; and it did not operate beyond a mile from the city.

The Tribunes of the Plebeians.—Whether the tribunate took origin in the

---

[1] The *patrum auctoritas* was reduced to a mere formality, as to legislation, by a *lex Publilia*, B.C. 339. and as to the election of magistrates, by the *lex Mœnia*, B.C. 287 (?). Mommsen, I. 265 (Bk. II. ch. i.), considers *patres*, not as the senate, but as "a convention of patricians." Others regard them as the *comitia curiata*.

[2] This right of appeal was extended to cases of heavy fines some time before B.C. 451.

[3] Ihne, *Roman History*, I. 141 (Bk. II. ch. i.) Mommsen, I. 267 (Bk. II. ch. i.), includes the whole of the plebeians, as well as the patricians, in the right of appeal. On the other hand, Dr Smith's *Smaller Dict. of Antiqq.* (*Leges Valeriæ*) argues that "this law probably related only to the plebeians, to whom it gave the right of appeal to the plebeian tribes, and not to the centuries."

exceeding poverty of the poor, and more immediately in the strict enforcement of the law of debt against the farmers at large, and the intolerable oppression of the wealthy and patrician, or whether it was solely an outcome of the class-struggle for larger and more assured political privileges, the plebeians appear to have wrung from the patricians about B.C. 494 the right of legal protection through special plebeian officers, called Tribunes of the Plebeians. At first two tribunes seem to have been appointed; presently (B.C. 471) the number was increased to five, and soon afterwards (B.C. 457) to ten, which remained the number down to the end of the empire. It is not easy to believe that they were elected even at first by the *comitia curiata*, or even by the *comitia centuriata*, except by way of mere formal confirmation; at any rate, from B.C. 471 they were elected in accordance with the *lex Publilia*, by the Assembly of Tribes (*comitia tributa*)—a body that had hitherto consisted formally of patricians and plebeians according to their local divisions, although the patricians had ignored its meetings, but that henceforward consisted of plebeians alone, the patricians being now definitively excluded.

The tribunes had no military or other secular means of enforcing their orders, except the services of a single messenger or attendant (*viator*). But the office and the person of the tribune were guarded by the strongest sanctions of religion, which was but a covert way of legalising the rough and ready application of whatever popular force or violence might be needed to support his authority. Originally the sole function of the tribunes was to protect plebeians from injustice and to shelter them from violence. This they accomplished by merely forbidding the injurious action, by pronouncing the word *Veto*.[1] Their power was thus solely prohibitive,—but unlimited, for even the consul had to submit to their veto. It grew rapidly, however. The veto was extended to all acts of the executive wherein the tribunes chose to see danger to plebeian interests. The *comitia tributa* also was active, and disdained to confine itself to local business, as in its earlier days. Its resolutions, however, were not yet in themselves legally binding on the whole people; their importance lay in their being the expression of the will of the great majority of the people. Though the tribunes at first were only privileged to watch the proceedings of the senate, sitting on benches outside the door of the senate-house, they were by-and-by to find entrance, and liberty to address the house.

The power of the tribunes at no time extended further than the first milestone from the city. Thus it was powerless against the military *imperium*—that is, against the authority of the dictator, or of the consul beyond the limits mentioned. The doors of the tribunes' houses stood open day and night, to afford unimpeded access to plebeians requiring their aid. The chief limitation of their power lay in the right of mutual veto; for any one tribune might veto the order of a fellow-tribune as well as of a consul. Hence the increase of their numbers would increase the patricians' chances of being able to neutralise their power by gaining over one of their number. But probably the mutual veto was a development of a later time than the first part of the fifth century B.C.

[1] This act was called their "intercession," or interference (*intercedere, intercessio*).

The Ædiles.—At the same time as the tribunes were first elected, two *Ædiles* also were appointed, as their assistants, holding towards them somewhat the same relation as the quæstors held towards the consuls. The persons of the ædiles were similarly inviolable. The primary duty assigned to them was the charge of the temple where the resolutions of the tribes (and, after B.C. 446, the decrees of the senate) were deposited. Probably this arrangement was considered necessary to secure that the tablets containing the laws should not be tampered with in a sense adverse to plebeian interests. The ædiles also possessed inferior judicial power, extending to the imposition of fines.

"*Judices Decemviri.*"—With the tribunes and the ædiles are later mentioned as invested with inviolability *judices decemviri.* Whether these words indicate one or two classes has been much disputed, as well as what class or classes are intended. The *decemviri* were certainly plebeian officers; and, if Livy's account is to be accepted, they were probably *decemviri stlitibus judicandis.* See further under *Centumviri*, p. 49.

The Decemvirs.—The constant clash of co-ordinate jurisdictions, and the constant operation of acrid political bias, corrupted and reduced to miserable uncertainty the administration of the law. It was useless for the plebeians to possess special officers for their legal protection, if the interference of the tribunes could be thwarted by the opportune production of a forgotten or wholly unknown law by the representatives of the patricians. Such written laws as existed, and the law of custom, which was chiefly followed in legal proceedings, were guarded by the patricians, with the intense jealousy of self-preservation, and under the veil of religious mystery, from the knowledge of the plebeians. This state of matters could no longer be endured. Accordingly, in B.C. 462, Terentilius, a tribune, proposed a bill for the election of five (plebeian) commissioners to draw up laws defining and regulating the powers of the consuls. This the patricians resisted with all their might. Smaller concessions were futile. In B.C. 457 the tribunes were increased from five to ten; in B.C. 456 certain lands in the possession of patricians were resumed by the state, and portioned out to plebeians; and in B.C. 454 the consuls themselves proposed to the *comitia centuriata* a bill limiting the amount of the fines that they should have a right to impose.[1] At length, in B.C. 452 a bill was carried sanctioning the appointment of ten commissioners for one year, with sole and supreme power, for the enlarged purpose of compiling a complete code of laws. Next year, B.C. 451, the ten commissioners (*decemviri legibus scribendis*) took office, with absolute power,[2]

---

[1] It is also alleged that in B.C. 454 the patricians agreed to the despatch of three commissioners to Athens, to bring home a copy of the laws of Solon, and such information as they could obtain regarding the laws and customs of other Greek states; and that a portion at least of such foreign laws was incorporated in the Ten Tables of B.C. 450. But this story may safely be neglected. Liv. iii. 31. Lewis, *Credibility of Early Roman History*, ii. 222.

[2] There was, strictly, no appeal from their decisions. Liv. iii. 32. Still the first decemvirs are said to have permitted an appeal to a colleague, and to have referred certain questions to the people. Liv. iii. 36.

all the other magistracies being suspended. All the ten were patricians.[1] Each commissioner administered the government in turn for a single day. They drew up a body of laws, which was approved by the senate and the *comitia centuriata*, and was straightway set forth in public on ten tables of bronze.

The further history of the decemvirate is in confusion inextricable, and one can only conjecture the course of events. The work apparently having been represented as not complete, the decemviral form of government was continued for another year. The new decemvirs are said to have included three, or even five, plebeians, who were indebted for their election to the influence of Appius Claudius—the only one of the first decemvirs that secured re-election, and that by an irregularity. Ihne conjectures that Appius aimed, in opposition to the extreme patricians, at establishing the long wished-for equality of rights between the two orders, so that the restoration of the tribunate should be unnecessary. The additional laws drawn up by the second decemvirs appear to have presented to the patricians insuperable objections; and the decemvirs refused to resign until their laws should be passed. This, however, was an unconstitutional position that could not be maintained. The decemvirs accordingly demitted office in B.C. 449, and the dual system of consulship and tribuneship was re-established.

The new consuls, Valerius and Horatius, immediately drew up two tables of laws—no doubt the two tables of the decemvirs, more or less modified—which were duly passed and published.

The Twelve Tables.—The ten sections of the decemviral laws, and the two sections of the consular (Valerian-Horatian) laws constitute the famous Laws of the Twelve Tables. They form a collection of the earliest known laws of the Roman people, and are the foundation of the whole fabric of Roman law.

It is by no means certain that the extant fragments of the Twelve Tables have come down to us in their precise original form and expression. The language has probably been somewhat modified by the subsequent Latin usage; and the fragments have been picked out and pieced together from numerous references in the later literature. The probable order of the fragments has been inferred from various statements and other indications of ancient writers. Cicero and Dionysius, for example, mention certain provisions as belonging to particular tables. Gaius, again, is known to have written six books on the Twelve Tables; and twenty fragments from this work occur in the Digest, with mention of the book that each is taken from. It was supposed that each book treated of two tables; and this conjecture served as somewhat of a clue to the probable order.

It is to be noted that these laws are not fresh enactments, but merely a written statement of the law as it actually already stood; although it is to be admitted that the mere fact of formulating customary law in writing

[1] It was stipulated, however, that all plebeian privileges should be respected. Liv. iii. 32. Mommsen and Ihne consider that the plebeians were deceived and outwitted; the election of plebeian representatives to the decemviral board having been first agreed to and then thwarted.

would necessarily involve a certain amount of unessential modification. Bruns puts the view fairly enough when he says that the Twelve Tables constituted substantially a codification, and not merely an incorporation, of the ancient customary law of the people. "That Greek elements are also taken into consideration," Bruns proceeds to remark, "is beyond doubt. But when the Romans point out among other things the laws of Solon as principal sources, this is decidedly false. What is due to this source is but little and unimportant. Law and procedure are essentially Roman." (Bruns, *Gesch. u. Quellen des Röm. Rechts*, § 14, in Holtzendorff's *Encyclopädie d. Rechtswiss.* (3te. Aufl. 1877), p. 92.) Except in a very few points, general principles alone are set forth. The style is most rugged and concise, direct and sternly imperative.

"The excessive curtness of these provisions implies the existence of an all but unlimited discretion in those who had to administer the law. We know indeed, from other sources, that in ancient Rome the courts and magistrates practically made their own laws to a great extent. The laws of the Twelve Tables were of less importance in the history of the development of Roman law than the institutions by which they were carried into execution." (Stephen, *History of the Criminal Law of England*, I. 11.)

The following is the substance of each Table[1] :—

TABLE I.—*Proceedings Preliminary to Trial.*

1. If the complainant summon the defendant before the magistrate, he shall go ; if he do not go, the plaintiff may call a bystander to witness, and take him by force.

2. If the defendant attempt evasion or flight, the complainant may lay hands upon him.

3. If the defendant be prevented by sickness or old age, the complainant shall provide a conveyance ; but he need not provide a covered carriage, unless he choose.

4. A freeholder (or taxpayer, or man whose fortune is valued at not less than 1500 ases) shall find a freeholder (or taxpayer) as *vindex* or surety (for his appearance at trial) ; a proletary (or man of less fortune) shall find such surety as he can.

5. Where the parties agree (as to preliminaries), the plaintiff shall open his case at once. [Otherwise : Where the parties come to terms, let the matter be settled.]

6. If the parties do not agree, the plaintiff shall state his case in the comitium or in the forum before midday. Let both parties appear, and argue out the matter together.

[1] The first important attempt to construct the Twelve Tables from the various references in later literature was made by Jacques Godefroy in his *Fragmenta XII. Tabularum* (Heidelberg, 1616), reprinted in his *Fontes IV. juris civilis* (Geneva, 1638 and 1653). A stricter criticism was applied by Haubold in his *Instit. juris Rom. privat. hist. dogm. epitome* (Leipzig, 1821), and by H. E. Dirksen in his *Uebersicht d. bisher. Versuche zur Kritik u. Herstellung d. Textes d. XII. Tafel Fragmente* (1824). More recently (1866) the whole subject has been thoroughly discussed by Rud. Schoell in his *Legis XII. Tab. Reliquiae*. Nothing essential has been added by later writers.

The references to the particular passages that have preserved relics of the Twelve Tables may be very conveniently seen in Bruns, *Fontes Iuris Rom. Antiqui* (ed. 4ta. 1879-81), pp. 14 follg., and in Nasmyth and Prichard's Ortolan's *History of Roman Law*, pp. 102 follg.

7. If one of the parties has not appeared by midday, the magistrate shall then give judgment in favour of the party that has appeared.

8. If both have appeared, at sunset the court shall rise.

9. Both parties shall enter into recognisances for their reappearance (*vades, sub-vades*).

Table II.—*The Trial.*

1. The amount of the stake to be deposited by each litigant shall be either 500 ases or 50 ases; 500 when the subject of dispute is valued at 1000 or upwards, 50 when at less than 1000. But when the subject of dispute is the freedom of a man, then, however valuable the man may be, the deposit shall be only 50 ases.

2. A dangerous illness, or a day appointed for the hearing of a cause in which an alien is a party. . . . If any one of these circumstances occur to a *judex* or to an *arbiter*, or to a party, the cause shall be adjourned.

3. A party that is in want of a witness, shall go and cry aloud at the door of his house, thus summoning him to attend on the third market day following.

4. Theft may be the subject of compromise.

Table III.—*Execution.*

1. In the case of an admitted debt or of awards made by judgment, 30 days shall be allowed for payment.

2. In default of payment, after these 30 days of grace have elapsed, the debtor may be arrested [or proceeded against by the action of *manus injectio*], and brought before the magistrate.

3. Unless the debtor discharge the debt, or some one come forward in court to guarantee payment, the creditor may take the debtor away with him, and bind him with thongs or with fetters, the weight of which shall not be more (but, if the creditor choose, may be less) than 15 pounds.

4. The debtor may, if he choose, live on his own means. Otherwise the creditor that has him in bonds shall give him a pound of bread a day, or, if he choose, more.

5. In default of settlement of the claim, the debtor may be kept in bonds for 60 days. In the course of this period he shall be brought before the prætor in the *comitium* on three successive market days, and the amount of the debt shall be publicly declared. After the third market day the debtor may be punished with death or sold beyond the Tiber.

6. After the third market day the creditors may cut their several portions of his body; and any one that cuts more or less than his just share shall be held guiltless.[1]

Table IV.—*Patria Potestas.*

1. Monstrous or deformed offspring may be put to death.[1]

2. The father shall, during his whole life, have absolute power over his legitimate children. He may imprison the son, or scourge him, or keep him working in the fields in fetters, or put him to death, even if the son held the highest offices of state, and were celebrated for his public services. He may also sell the son.

3. But if the father sell the son a third time, the son shall be free from his father.

4. A child born within ten months of the death of the mother's husband shall be held legitimate.

---

[1] Dion., 2, 15, says the law of Romulus required that such offspring should first be shown to five neighbours, and that these should approve of the course proposed.

TABLE V.—*Inheritance and Tutelage.*

1. All women shall be under the authority of a guardian ; but the vestal virgins are free from tutelage.

2. The mancipable things belonging to a woman that is under the tutelage of her agnates are not subject to usucapion, unless she herself deliver possession of them with the authority of her tutor.

3. The provisions of the will of a paterfamilias concerning his property and the tutelage of his family, shall be law.

4. If the paterfamilias die intestate and without *suus heres*, his nearest agnate shall succeed.

5. Failing an agnate, the *gentiles* shall succeed.

6. In default of a testamentary tutor, the male agnates shall be tutors by operation of law.

7. If a man cannot control his actions, or is prodigal, his person and his property shall be under the power of his agnates, and, in default of these, of his gentiles . . . if he has no curator.

8. If a freedman die intestate, and without *suus heres*, his patron shall succeed.

9. Debts due to or by a deceased person are divided among his co-successors, by mere operation of law, in proportion to their shares in the inheritance.

10. The rest of the succession is divided among the co-successors by the action *familiæ erciscundæ*.

11. A slave freed by will, upon condition of giving a certain sum to the heir, may, in the event of being alienated by the heir, obtain his freedom by payment of this sum to the alienee.

TABLE VI.—*Ownership and Possession.*

1. The legal effect of every contract, and of every conveyance (made with the money and the scales) shall rest upon the declarations made in the transaction.

2. Any one that refuses to stand by such declarations shall pay a penalty of double damages.

3. A prescriptive title is acquired after two years' possession in the case of realty ; after one year's possession in the case of other property.

4. If a wife (not married by *confarreatio* or *coemtio*) wishes to avoid subjection to the hand of her husband by usucapion, she shall absent herself for a space of three nights in each year from his house, and thus break the *usus* of each year.

5. No length of possession by an alien can vest in him a title to property as against a Roman citizen.

6. In the case where the parties plead by joining their hands on the disputed property, in the presence of the magistrate [the actual possessor shall retain provisional possession ; but, when it is a question of personal freedom], the magistrate shall award provisional possession in favour of liberty (that is, in favour of the party that asserts the man's freedom).

7. If a man finds that his timber has been used by another in building a house, or for the support of vines, he shall not remove it.

8. But he shall have a right of action against the other for double its value.

9. Between the first pruning and the vintage [the owner may not recover the timber by *vindicatio?*]. [*Otherwise :* And when they become separated, then they may be claimed by the owner.]

10. Things sold and delivered shall not become the property of the vendee until he has paid or otherwise satisfied the vendor.

11. Conveyance by bronze and scales (*mancipatio*), and surrender in court (*in jure cessio*) are confirmed.

Table VII.—*Real Property Law.*

1. A clear space of two feet and a half shall be left around every house. [That is to say, every two houses must stand at least five feet apart.]

2. Boundaries shall be regulated (according to the commentary of Gaius) by the provisions of Solon's Athenian code: [if a man plants a fence between his own land and his neighbour's, he shall not go beyond the boundary line; if he builds a wall, he must leave a foot of space; if a house, two feet; if he digs a ditch or a trench, he must leave a space equal in breadth to the depth of the ditch or trench; if a well, six feet; and olives and fig-trees may not be planted within nine feet of a neighbour's land, nor other trees within five feet].

3. Conditions relating to villas, farms, and country cottages.

4. A space of five feet between adjoining lands shall not be liable to usucapion.

5. For the settlement of disputes as to boundaries, three arbiters shall be appointed.

6. The breadth of road over which there is right of way is eight feet in the straight, and sixteen feet at the bends.

7. The neighbouring proprietors shall make the road passable; but if it be impassable, one may drive one's beast or vehicle across the land wherever one chooses.

8. If one's property is threatened with damage from rain-water that has been artificially diverted from its natural channels, the owner may bring an action *aquæ pluviæ arcendæ*, and exact compensation for any damage his property may sustain.

9. The branches of trees that overshadow adjoining land shall be lopped to a height of fifteen feet from the ground.

10. Fruit that falls from one's trees upon a neighbour's land may be collected by the owner of the tree.

Table VIII.—*Torts.*

1. Whoever shall publish a libel—that is to say, shall write verses imputing crime or immorality to anyone—shall be beaten to death with clubs.

2. If a man break another's limb, and do not compromise the injury, he shall be liable to retaliation.

3. For breaking a bone of a freeman, the penalty shall be 300 ases; of a slave, 150 ases.

4. For personal injury or affront, 25 ases.

5. [Accidental] damage must be compensated. [On the whole of this subject see Sell, *Die Actio de rupitiis sarciendis der XII. Tafeln.* This provision was followed up by the *Lex Aquilia.*]

6. A quadruped that has done damage on a neighbour's land, shall be given up to the aggrieved party, unless the owner of it make compensation.

7. He that pastures his animals on a neighbour's land is liable to an action.

8. A man shall not remove his neighbour's crops to another field by incantations, nor conjure away his corn.

9. For a person of the age of puberty to depasture or cut down a neighbour's crop by stealth in the night, shall be a capital crime, the culprit to be devoted to Ceres and hanged; but if the culprit be under the age of puberty, he shall be scourged at the discretion of the magistrate, and be condemned to pay double the value of the damage done.

10. If a man wilfully set fire to a house, or to a stack of corn set up near a house, he shall be bound, scourged, and burned alive ; if the fire rose through accident, that is, through negligence, he shall make compensation, and, if too poor, he shall undergo a moderate punishment.

11. If a man wrongfully fell his neighbour's trees, he shall pay a penalty of 25 ases in respect of each tree.

12. A person committing theft in the night may lawfully be killed.

13. But in the day-time a thief may not be killed, unless he defend himself with a weapon.

14. If theft be committed in the day-time, and if the thief be taken in the fact, and do not defend himself with a weapon, then, if a freeman, he shall be scourged and adjudged as a bondsman to the person robbed ; if a slave, he shall be scourged and hurled from the Tarpeian rock. A boy under puberty shall be scourged at the discretion of the prætor, and made to compensate for the theft.

15. A person that searches for stolen property on the premises of another, without the latter's consent, shall search naked, wearing nothing but a girdle, and holding a plate in his hands ; and if any stolen property is thus discovered, the person in possession of it shall be held as a thief taken in the fact. When stolen property is searched for by consent in the presence of witnesses (without the girdle and plate), and found in a person's possession, the owner can recover by action of *furti concepti* against the person on whose premises it is found, and the latter can recover by action *furti oblati* against the person who brought it on his premises, three times the value of the thing stolen.

16. For theft not discovered in commission, the penalty is double the value of the property stolen.

17. Title to property in stolen goods cannot be acquired by prescription.

18. A usurer exacting higher interest than the legal rate of ten per cent. per annum is liable to fourfold damages.

19. A fraudulent bailee shall pay double the value of the deposit.

20. Any citizen may bring an action for the removal of a tutor suspected of maladministration, and the penalty shall be double the value of the property stolen.

21. A patron that wrongs his client shall be devoted to the infernal gods.

22. If any one that has consented to be a witness, or has acted as scale-bearer (in mancipation), refuses to give his evidence, he shall be infamous and incapable of giving evidence, or of having evidence given on his behalf.

23. False witnesses shall be hurled from the Tarpeian rock.

24. If one kill another accidentally, he shall atone for the deed by providing a ram to be sacrificed in place of him.[1]

25. For practising incantations or administering poisonous drugs [the penalty shall be death].

26. Seditious gatherings in the city during the night are forbidden.

27 Associations (or clubs) may adopt whatever rules they please, provided such rules be not inconsistent with public law.

TABLE IX.—*Public Law.*

1. No laws shall be proposed affecting individuals only.

2. The assembly of the centuries alone may pass laws affecting the *caput* of a citizen.

---

[1] "To depasture one's crops by stealth was a capital crime by the Twelve Tables—a more severe punishment than was inflicted in case of homicide."—Plin., *Hist. Nat.*, 18, 3, 12. Compare Table VIII. 9 (above).

3. A *judex* or arbiter, appointed by the magistrate to decide a case, if guilty of accepting a bribe, shall be punished with death.

4. Provisions relating to the quæstors (or court appointed for the investigation of cases) of homicide.—There shall be a right of appeal from every decision of a *judex* (*judicium*), and from every penal sentence (*poena*).

5. Whoever stirs up an enemy against the state, or betrays a citizen to an enemy, shall be punished capitally.

6. No one shall be put to death, except after formal trial and sentence.

Table X.—*Sacred Law.*

1. A dead body shall not be buried or burnt within the city.

2. More than this shall not be done. The wood of the funeral pile shall not be smoothed with the axe.

3. Not more than three mourners wearing *ricinia*,[1] one wearing a small tunic of purple, and ten flute-players may attend the funeral.

4. Women shall not tear their cheeks, nor indulge in wailing.

5. The bones of a dead person shall not be preserved for later burial, unless he died in battle or in a foreign country.

6. Regulations regarding [prohibiting?] unction, drinking (banquets), expensive libations (of wine perfumed with myrrh), chaplets, and incense boxes.

7. But if the deceased has gained a chaplet, by the achievements either of himself or of his slaves or his horses, he or his parents may legitimately wear such, in virtue of his honour and valour [while the corpse is ly ng within the house or is being borne to the sepulchre].

8. No person shall have more than one funeral, or more than one bier.

9. Gold shall not be burned or buried with the dead, except such gold as the teeth have been fastened with.

10. A funeral pile or sepulchre for burning a corpse shall not be erected within sixty feet of another man's house, except with his consent.

11. Neither a sepulchre for burning nor its vestibule can be acquired by usucapion.

Table XI.—Supplementary.

1. Patricians shall not intermarry with plebeians.

Table XII.—Supplementary.

1. An action of distress shall lie, on default of payment, against the purchaser of a victim, and also against the hirer of a beast of burden that has been lent for the purpose of raising money to spend on a sacrifice.

2. If a slave commit a theft, or do any other injury, the master may, as an alternative to paying the damages assessed, surrender the delinquent.

3. If any one wrongfully obtain possession of a thing that is the subject of litigation, the magistrate shall appoint three arbiters to decide the ownership; and, on their adverse decision, the fraudulent possessor shall pay as compensation double the value of the temporary possession of the thing in question.

4. A thing whose ownership is the subject of litigation shall not be consecrated to religious purposes, under a penalty of double its value.

5. The most recent law repeals all previous laws that are inconsistent with it.

---

[1] *Ricinium*, a small square sheet of woollen cloth, doubled and wrapped over the head and shoulders; a mourning dress assumed more especially by females.

Magistrate and Judge.—The law was administered publicly in the *forum* by the magistrate (that is, in the early times of the republic, the consul, or, as he was at first named, the prætor) and the *judex* or *arbiter*. The magistrate, the personal state-representative of the law, having heard a case stated before him, declared the law on the subject, and instructed the *judex* on what lines to proceed in the investigation of the merits. The *judex* heard the evidence, and delivered judgment, which was enforced by the authority of the magistrate. The proceedings before the magistrate were called *jus*, and were said to take place *in jure*; the proceedings before the *judex* were called *judicium*, and were said to take place *in judicio*. The two functions were kept distinct, with but few exceptions, down to the general introduction of the *judicia extraordinaria* in the reign of Diocletian, at the close of the third century after Christ (A.D. 294). "To that separation the private law of Rome was indebted for its logical clearness and practical precision."

Criminal cases involving the *caput* of a citizen were decided by the *comitia centuriata*. The right of appeal from the sentence of a magistrate affecting any of the elements of the *caput*, was established and confirmed by successive Valerian laws. The magistrate summoning the assembly was the accuser, and the defendant pleaded his own cause, being sometimes assisted by his nearest relations. No professional assistance was afforded till more than a century before the end of the republic (B.C. 149). But subject to the prisoner's right of appeal, the consul might sentence him to be flogged, or even to undergo a severer punishment.

Statute-Process (*Legis Actiones*).—The law did not go abroad to take concern in a civil dispute, except in so far as it authorised the plaintiff to compel, in the presence of a witness or witnesses, an unwilling defendant to come before the magistrate. If there was no witness at hand, or if the plaintiff was not strong enough to make the arrest, or if the defendant could contrive to make off, the law did not stir in aid of the aggrieved party. A defendant might also avoid immediate appearance by obtaining some friend of equal social standing with himself to act as his bail. And when both parties at length appeared before the magistrate, the procedure wore the aspect of a voluntary arbitration. In reality, however, the reference to arbitration was compulsory; for, the parties having invoked the decision of the law, the civil jurisdiction at this point asserted itself. The earliest mode of settling disputes, the trial by battle, had fallen away into the symbolical mock-combat preceding the most essential stage of the *sacramentum*, namely, the wager; and in order to decide the wager, the law prescribed that the case should be investigated and pronounced upon by an arbitrator (*judex*). The first step had been taken in civil jurisdiction, and the first judges were simply arbitrators.

The forms of procedure in an action at law were called *legis actiones* ("statute-process," Mr Poste translates the expression), either says Gaius, because they were appointed by statute before the days of the prætor's edict, or because they followed the letter of a statute, and were as incapable of variation in form as law. So rigid were they that, if a man brought an action against another for cutting down his vines, and in his action called them *vines*, he was nonsuited, because he ought to have called them *trees*, for the Twelve Tables, from which the right of action was derived, speak.

not of vines, but generally of trees. (G. IV. 11.) They are fully described in Book IV., *Law of Procedure.*

These *legis actiones* were not permitted to be used by any but Roman citizens. They required the parties to appear personally in court; but an *assertor libertatis* was allowed to claim the freedom of a person alleged to be unjustly held as a slave. They maintained an absolute rigidity of form. They exhausted the cause of action, in any event whatever—even if the case ended in a nonsuit on the slightest technical error. The sentence commonly awarded the subject in dispute, and not damages.

Even with the publication of the Twelve Tables, and the settlement of the forms of procedure, the plebeians remained at serious disadvantage. Between the rigidity of the forms and the inability of plebeian suitors to adapt their particular cases to them, it was but too easy for justice to miscarry. Besides, the calendar was in the hands of the pontiffs—that is to say, of the patricians, who sedulously preserved the mysterious knowledge of the days when it was lawful for the magistrates to sit in court (*dies fasti*). The veil was not lifted till a century and a-half after the date of the Twelve Tables.

Jus Civile.—When we speak of the Roman Civil Law, we mean the whole system of usages and rules of private law adopted by the Roman people; their *jus privatum* as opposed to their *jus publicum* (including Criminal and Sacred Law). The *Corpus Juris Civilis* as left by Justinian was the result of a gradual modification and enlargement of the code of the Twelve Tables, under three great influences—the Jurisconsults, the Prætor, and Legislation. The institutional definition of the *jus civile* as the peculiar law of Rome, in contrast with the *jus naturale* and *jus gentium*, is a mere philosophical flourish; by late writers *jus civile* was confined to the *responsa prudentum* alone; what the Roman jurists had chiefly before their mind when they used the expression was the old law of the Twelve Tables, as contrasted generally with the newer developments of the *jus honorarium.*

CHAPTER III.

FROM THE TWELVE TABLES TO THE CLOSE OF THE REPUBLIC (B.C. 449-31).

I. POLITICAL DEVELOPMENTS.

PATRICIANS and Plebeians.—If the purpose of Appius Claudius was to effect a reconciliation of the hostile orders in the state, the well-meant attempt proved a complete failure. Inveterate patrician selfishness and pride stood opposed by well-grounded plebeian aspiration and distrust, and there was no alternative but to fight the matter out to a conclusive issue. It was a great achievement for the plebeians to have extorted from the patricians the publication of the laws, and to have secured at least formal

admission to the decemvirate, then the highest office in the state. But the abolition of the decemvirate and the re-establishment of the consulship and the tribuneship was a step backwards, which it was necessary to regain. The negative influence of the tribuneship, even when supplemented by the occasional assumption of independent authority on matters of exceptional urgency touching the privileges of the plebeians, must be advanced to a regular and equal positive influence in legislation and in the administration of the law.

In B.C. 445 a very important breach was made in the exclusive patrician barriers by the passing of the Canuleian law legalising the intermarriage of patricians and plebeians. The prohibition of the *conubium* in the Twelve Tables was certainly not a new enactment, but only the record of an institution as old as Rome itself. By the concession of the *conubium*, it was open to plebeians to share in the peculiar religious observances of the patrician caste, and in the *auspicia* by which was ascertained the will of the gods (not to mention the will of the patrician magistrates) in respect to the Roman state. The levelling effects of this legal mixture of patrician and plebeian blood, socially and politically, are not to be easily over-estimated. But the political results, the removal of intolerable political disabilities, formed, beyond all other considerations, the aim and object of the plebeian contention.

The political conflict continued to rage. Every inch of ground was disputed with the utmost pertinacity. The great policy of the patricians was, while satisfying temporarily the formal claim of the plebeians, to reserve as much as they possibly could of the actual substance of the supposed concession. Thus the persistent plebeian demand for admission to the consulship led to the successive separation from the original consular functions of all those duties that originally appertained to the quæstors, the censors, the prætors, and the curule ædiles. In process of time, however, the plebeians gained admission to every one of these offices of state. The quæstorship was opened to them, formally in B.C. 421, actually in B.C. 409; the consulship in B.C. 367; the curule-ædileship in B.C. 366; the dictatorship in B.C. 356; the censorship in B.C. 351; and the prætorship in B.C. 336. By one of the Licinian laws of B.C. 367 the charge of the Sibylline books was transferred from *duumviri* to *decemviri*, half of whom were to be plebeians; and by the Ogulnian law of B.C. 300, four of the eight pontiffs and five of the nine augurs were henceforth to be plebeians. The complete triumph of the plebeians was achieved in B.C. 287, when the Hortensian law enacted that the resolutions of the assembly of the tribes should be directly, without modification or control or delay, binding on the whole Roman people. From this date the reconciliation and fusion of the two orders, which had been progressing more or less slowly amid the internal conflicts of the preceding century and a half, issued in a great expansion of national prosperity and victorious conquest.

The Restored Tribuneship and the Assembly of the Tribes.—In B.C. 449, immediately upon the re-establishment of the tribuneship, the privileges of the plebeians were confirmed by the *leges Valeriæ et Horatiæ*, passed by the *comitia centuriata* on the proposal of the consuls Valerius and Horatius. By one of these laws it was enacted that henceforth the resolutions of the *comitia*

tributa (*plebiscita*, also called *leges tribuniciæ*, and simply and commonly *leges*) should be binding on the whole people. As yet the confirmation of the *patres* (or the senate) would seem to have been essential in order to give the force of law to the plebiscites; but in B.C. 339 one of the *leges Publiliæ* practically annulled this check, and the *lex Hortensia* of B.C. 287 removed it altogether.[1] By a second Valerian-Horatian law the right of appeal was also renewed, under the severest sanctions; whoever should procure the election of a magistrate from whose sentence there should be no appeal was threatened with outlawry and death. The plebeians were thus confirmed in their right of appeal from the decision of a patrician magistrate to the assembly of the tribes.[2] A third provision revived and confirmed by law the sacred and inviolable character of the tribunes and the ædiles, with whom were now joined in sacrosanctity the legal officers called *judices decemviri*, or *judices* and *decemviri*.[3]

The expulsion of the kings and the establishment of the republic would seem to have had a considerably disturbing effect on the condition of the local tribes, for in B.C. 495 twenty-one tribes were constituted. With the extension of the Roman territory new tribes were from time to time added. In B.C. 241 there were thirty-five tribes, and this number was never afterwards changed. For the *Lex Julia* of B.C. 90 and the *Lex Plautia Papiria* of B.C. 89, in so far as they enacted the creation of eight or ten new tribes for the enrolment of the citizens of the newly admitted Italian states, were immediately superseded by the *Lex Sulpicia* of B.C. 88, which distributed the Italian citizens among the existing tribes.

Although the *comitia tributa* was limited to the infliction of a fine, and cases involving the *caput* of a Roman citizen were reserved for the judgment of the *comitia centuriata*, the judicial authority exercised by the assembly of the tribes might readily enough be turned to the heavy punishment of obnoxious patricians. Not only do the tribunes exercise the right of intercession against objectionable acts of the highest magistrates or ordinances of the senate, but the senate itself appeals to the tribunes to control the action of the consuls. In B.C. 431 the tribunes, on the appeal of the senate, compelled the consuls, under a threat of imprisonment, to comply

---

[1] Liv. iii. 55; viii. 12. Mommsen distinguishes the *comitia tributa* from the *concilium plebis*. He holds that an enactment of the *comitia tributa* was always designated *lex*, while a *plebiscitum* was always and only a resolution of the *concilium plebis*. That the *lex Valeria-Horatia* established the *comitia tributa*, and that the *lex Publilia* invested it with power to legislate under the presidency and on the proposal of the prætor. That the *lex Hortensia* applied to the *concilium plebis*, rendering its enactments binding on the whole of the citizens without the necessity of the approval of the *patres*. See Mommsen, *Röm. Forsch.*, I. 163-6, 200-1, 215-17. Also Muirhead, *Gaius*, i. 3, note 2. As to *patres*, see p. 13, note 1.

[2] Some scholars consider that the *lex Valeria* of B.C. 509 gave the *provocatio* to the patricians alone, and that this *lex Valeria et Horatia* extended it for the first time to the plebeians. But compare p. 13, note 3. A *lex Valeria* of B.C. 300 re-enacted the right for the third time.

[3] Whether the two words (Liv. iii. 55) should be read together or separate is matter of endless dispute. See further under *Centumviri*, p. 49, below.

with a decree of the senate and appoint A. Postumius Tubertus dictator. The official right of the tribunes to appear in the senate, and to take part in its discussions, is at length acknowledged. It was probably about B.C. 394 that the action of the tribunes became considerably hampered by the power of a single member of the college, instead of the majority as before, to render void a resolution of his colleagues. This check, so useful for patrician purposes, was not removed till it was overborne by Tiberius Gracchus. The office did not cease to exist on the achievement of equality of legal security, or even of political privileges. For two centuries following the Hortensian law of B.C. 287 the tribuneship was the most powerful office in the state, and enforced the resolutions of the *comitia tributa*, which now took cognisance of public interests of every kind. Then came a temporary reverse : by the *lex Cornelia* of Sulla the tribunes were stripped of all their powers excepting the original *jus intercessionis* alone. In B.C. 70, however, they were restored to all their former rights and privileges by Cn. Pompeius. In the latter period of the republic the selection of tribunes was in the hands of the senate. And during the last struggles of the republic their action was more energetic and more corrupt than at any former period of their existence. But on the rise of the personal predominance of Julius Cæsar, the office sank into a feeble and humble dependence, whence it never emerged thereafter.

The Consulship.—The desperate struggle for the admission of plebeians to the consulship went on for about eighty years, B.C. 445 to B.C. 367, when the *lex Licinia* enacted that one of the consuls should be a plebeian. The first compromise extorted from the patricians was the concession of liberty to the *comitia centuriata* to elect, in place of consuls, "Military Tribunes with Consular Power;" but at the same time the patricians reserved the most highly prized consular functions, assigning them to a new department, the censorship, administered by patrician officers. During those eighty years, the patricians contrived to have consuls elected no less than twenty-three times. On the compulsory admission of the plebeians to the consulship in B.C. 367, the patricians again reserved certain consular functions to be performed by patrician officers solely,—the prætors and the curule-ædiles. Presently, of course, they developed their old tactics, and in one-half of the years B.C. 355 to B.C. 342, they elected both consuls from the patrician ranks. In the last-mentioned year, however, the *lex Licinia* was re-enacted, with the further concession that both consuls might be chosen from the plebeians. Further resistance on the part of the patricians proved wholly fruitless.

Consular Tribunes (*Tribuni Militares consulari potestate*, or *imperio*).—In B.C. 445, C. Canuleius, the tribune of the plebeians that proposed the law for permitting *conubium* between patricians and plebeians, also proposed a law declaring plebeians eligible for the consulship. To this the patricians opposed a fierce resistance, but at length they prudently turned the attack by a concession that wore the appearance of reality, while intended to be little more than merely formal. In B.C. 444 it was agreed that the *comitia centuriata* should in each year elect either consuls, as usual, or, in their place, magistrates called "Military Tribunes with Consular Power," who should be equally eligible from both patricians and plebeians. It would seem, however, to have lain with the senate to decide which of the two classes of magistrates should be appointed in each year. Further, the

"Consular Power" was very far from complete; the consul's functions in connection with the census being detached and relegated to a new patrician office—the Censorship. The number of the consular tribunes was at first three; from B.C. 426 to B.C. 406, it was (except on two occasions) four; in B.C. 405 it was increased to six; and when we sometimes hear of eight, this number most probably includes the censors, who divided with the consular tribunes the functions of the consulship, and were regarded as in a manner their colleagues. Apparently one place at least was always reserved for a patrician, perhaps the one charged with the administration of justice,—the forerunner of the prætorship. At the first election, in B.C. 444, one plebeian, if not two, happened to get elected, but the election was soon discovered to be invalid through some irregularity of procedure, and the plebeians were promptly replaced by patrician magistrates. During the next forty-four years, down to B.C. 400, not a single plebeian was elected consular tribune; and during those years consular tribunes were elected only twenty-three times, while in the thirty-five years B.C. 444 to 409, consuls were elected twenty times. From B.C. 400 onwards, great tides of popular feeling bore plebeians into office. But the modes of controlling and thwarting the popular will were numerous, and the patrician policy was thoroughly unscrupulous and was worked by a well-tried organisation, so that the equality of political privileges remained purely nominal, except for the occasional outbursts of plebeian agitation, until the first of the Licinian laws in B.C. 367 opened the consulship to the plebeians, sweeping away the consular tribuneship, and breaking down the long and disgraceful predominance of the patricians. The first plebeian consul was elected in B.C. 366.

The Censorship.—The severance from the consulship of the duties of the consul in connection with the census was an astute move in maintenance of patrician influence. The consuls, holding the census, regulated the military service of every citizen, and carried out the quinquennial revision of the list of voters in the *comitia centuriata*, which was accompanied with the performance of the solemn sacrifice of the *lustrum*; and they nominated new senators. Such far-reaching and even sacred powers the patricians could not endure to commit to the hands of the consular tribunes, who might be mere plebeians, and accordingly they contrived to reserve them under patrician control. The censorship was established in B.C. 443. The censors, two in number, were elected by the *comitia centuriata*. At first they held office for five years (*lustrum*), the stated period intervening between two registrations; but in B.C. 434 it was enacted by the *lex Æmilia* that they should hold office for one year and a half only, the office remaining vacant for the rest of the five years. The first plebeian censor was elected in B.C. 351, almost a century after the institution of the office. The way was now open for the easy admission of plebeians to the senate. In B.C. 339 one of the *leges Publiliæ* provided that one of the two censors must be a plebeian; but it was not till B.C. 280 that the solemn sacrifice of the *lustrum* was performed by a plebeian censor. In addition to the original and extremely important duties of the Registration the censors, in process of time, undertook the general oversight of public morals, punishing such improper conduct as the laws did not provide against. "Not only gross breaches of morality in public and private life, cowardice,

sordid occupations, or notorious irregularities, fell under their corrective discipline, but they were in the habit of denouncing those who indulged in extravagant or luxurious habits, or who, by the careless cultivation of their estates, or by wilfully persisting in celibacy, omitted to discharge obligations held to be binding on every citizen." (Ramsay, *Roman Antiquities*, p. 168.) They also superintended certain of the arrangements for the collection of the revenue, fixing the amount of property-tax each citizen should pay, and at a later period framing the leases or contracts on which the greater part of the imposts were farmed out to contractors. Finally, they exercised a general superintendence of public works; making the contracts and overseeing the execution of new undertakings, and keeping in good repair all existing buildings and other works. After a vigorous existence of some four centuries, the censorship was first directly attacked by a *lex Clodia*, B.C. 58, and, although this was repealed a few years later, the office fell into abeyance during the civil wars, and, after a fitful revival, virtually expired. Under the empire, the title of censor was assumed by some of the emperors, while the emperors generally acted as *præfecti morum*, regulating the public morals and choosing the new senators.

The *Prætorship* and the *Ædileship* are reserved for the separate heading —*The Judicial Officers* (page 34).

Progress of Roman Conquest.—Leaving on one side for a little the magistracies and other offices most nearly concerned with the administration of justice, we will briefly recapitulate the chief steps that led to the universal sovereignty of Rome. From the union of the two orders on the basis of an equality of rights in B.C. 367 dates the beginning of this world-wide supremacy. In B.C. 338 Latium was subdued; the Samnite wars already begun in B.C. 343, raged, with but two short intervals, till B.C. 290, when the superiority of the Roman arms was acknowledged; and the short struggle of Southern Italy under the leadership of Pyrrhus (B.C. 280-275) was soon followed by the submission of the whole of Italy to the dominion of Rome (B.C. 264). The position of Sicily at once led to the Punic wars. In the first struggle (B.C. 263-241), Rome stripped Carthage of Sicily and the Lipari Islands; in the second (B.C. 218-202) she broke the power of her rival, who kept the peace for half a century thereafter, and was finally ruined in the third war (B.C. 149-146). During the Punic wars, Rome had also turned her arms against enemies in other quarters. Cisalpine Gaul was reduced to a Roman province in B.C. 222, and the rebellious spirit of the inhabitants was completely quelled in B.C. 191. The alliance of Philip V. of Macedon with Hannibal (B.C. 215) suggested to the Romans the conquest of the Eastern world. The three Macedonian wars (B.C. 214-205, 200-197, 181-168) reduced Macedon and Greece to provinces of Rome. The Syrian war (B.C. 192-184) grew out of the early stages of the Macedonian wars; and contemporaneous with the eastern struggles were still more serious difficulties in Northern Italy and Spain. On the fall of Numantia in B.C. 133, Rome was supreme over all the lands of the Mediterranean coast, from the Pillars of Hercules to the monarchies of Asia Minor, Syria, and Egypt. Later she turned her attention to Transalpine Gaul, which was at length finally subdued by Cæsar (B.C. 58-50). The civil wars of the last half century of the republic were the assertion of personal power backed by

military force, which presently led to the downfall of the republic and the undisputed supremacy of Octavian (Augustus) (B.C. 31).

In B.C. 51 there were fifteen provinces, and in B.C. 31 there were twenty-four to divide between the emperor and the senate (or the people). About half were governed by proconsuls, and half by proprætors; the consuls and prætors being sent out with renewed *imperium*, after their year's service at home. The provinces were assigned by lot or by a common understanding among the consuls and among the prætors, or by the senate; the more disturbed or threatened territories being allotted to the consuls.

Extension of the Roman Citizenship.—The full Roman citizenship (*jus civitatis*) included certain public and private rights. The public rights were commonly expressed as *suffragium et honores*—the right of voting in the popular assemblies, and the right of being eligible to all public offices, civil, military, and sacred. To these may be added a third—the right of appeal from the magistrates to the assemblies[1] in all cases involving the *caput* (*jus provocationis*). The private rights were *conubium* and *commercium*. *Conubium*, the right of contracting a regular marriage, such that the children of it should be born into the privileges of the father, was the basis of the domestic or family law. *Commercium*, the right of making contracts, of acquiring, holding, and transferring property of all kinds, according to the law of Rome, was the basis of commercial intercourse. Citizens in the full enjoyment of all these rights were *cives optimo jure*; citizens in possession of the private rights alone were *cives non optimo jure*. In the earliest times the patricians alone were citizens in the fullest sense, and we have just seen how the plebeians, who possessed at first only the *commercium* and a limited *conubium*, at length, after a prolonged series of severe struggles, gained the rest of the rights, one after another, and placed themselves on an equal footing with the patricians.

In early times, all men outside the Roman state were enemies and barbarians; a free man that was not a Roman citizen was a foreigner or alien (*peregrinus*). By-and-by, however, the application was contracted, and *peregrini* were free aliens in some sort of connection with Rome. In the early days of the city, such persons may have been drawn to it by trade, or by other ties; or, at a later period, the Roman power may have been extended over the territory they were settled in, or it may have drawn into alliance the free states of which they were free subjects. Roman citizens also might lose their citizenship and fall into the condition of aliens. Under the republic, aliens had no part or lot in the rights of Roman citizens, political or civil, now enumerated. They were not even allowed to wear the national dress (*toga*), and they might be expelled from the city,—as indeed they were expelled in B.C. 127 and 66. For a long time they could not appear in a court of law in person, but could sue and defend only as represented by a Roman citizen, under whose protection they had placed themselves (*patronus*)

[1] The Twelve Tables (IX. 2) expressly provided that such trials should be held before the *comitia centuriata* alone. It is not easy, however, to believe that the plebeians would have long endured that a plebeian should not have the right of bringing his appeal before the assembly of the tribes. Compare Ramsay, *Roman Antiquities*, pp. 287-8.

—a quasi-revival of the clientship of old. Towards the end of the first Punic War, about B.C. 247, however, the increasing number of aliens and the enlarged amount of legal business led to the establishment of a special alien court under the *Prætor Peregrinus*,[1] for the settlement of suits between citizens and aliens and between aliens and aliens. Hence grew up the body of rules constituting the *jus gentium*, and defining the legal rights of aliens.

A middle position between the *civis* and the *peregrinus* was occupied by the *Latinus*. The kindred Romans and Latins had for long remained in close friendly relations. Towards the end of the regal period, Rome had stood at the head of the Latin confederation, and the Latin states probably possessed at least the *commercium*. During the century and a half's existence of the Latin League formed by Spurius Cassius in the early years of the republic (B.C. 493), many Latin municipal towns and colonies enjoyed the private rights of Roman citizenship. The disaffection that ended in the subjugation of Latium led to the various individual treatment of the conquered cities, which were received into the Roman alliance on such terms as their individual behaviour seemed to justify. In course of time no doubt the cities that had been more harshly dealt with would gradually recover the privileges they had lost. It may be stated broadly that the Latins possessed the *commercium*, but not the *conubium* (except by special grant). Probably at the date of the Social War the Latin privileges generally included the right of obtaining citizenship, on condition of one's having held a magistracy or post of honour in one's native town. At any rate, when the full citizenship was after that event extended to the whole of Italy, these privileges began to be extended to certain remoter Roman subjects that were not Roman citizens, under the name *jus Latii*, or *Latinitas*, or simply *Latium*.

In the very earliest times the number of patrician *cives* was increased by the accession of aliens, on whom the king, with the consent of the *comitia curiata*, conferred the citizenship either individually or as members of a community. The same principle was acted on during the republic, the citizenship being conferred by an express law upon individuals and communities that had deserved well of Rome. When personal superiority came to be in the ascendant, an express law was dispensed with, and Marius, Pompeius, Sulla, and Cæsar exercised a delegated or an assumed power to confer the citizenship at their discretion. Sometimes not the full citizenship, but only the private citizenship (*civitas sine suffragio*) was conferred, as in the case of Cære, in B.C. 390, and of Acerræ, in B.C. 332.

The Italy of the late republic was not a compact nation, but rather an aggregate of civic communities, without much uniformity of privileges or unity of feeling. The policy of Rome in respect to her Italian subjects has been summed up in the two words—isolation and self-government. She fostered the feeling of local patriotism, and conceded varying measures of home rule and privileges of citizenship, as well as imposed imperial burdens.

[1] Ramsay notes (after Becker) that the title *prætor peregrinus* first occurs in inscriptions of the reign of Trajan. In old laws the Alien Prætor is indicated by the expression *prætor qui inter peregrinos* (and *inter cives et peregrinos*) *jus dicit*, and the Urban Prætor is similarly spoken of as *prætor qui inter cives jus dicit*.

The colonies formed the most effective instrument to her hand. They constituted a friendly and commanding nucleus in the very heart of the strongest towns of the conquered states; they are described by Cicero and Livy as garrisons, fortifications, and watch-towers (*præsidia*, *propugnacula*, *speculæ*). Besides this, they diffused Roman ideas, and familiarised the people with the Roman language and institutions; they reared good soldiers for the Roman armies; and they relieved Rome from the severe pressure of a poor, excessive, and discontented population. The foundation charter of each prescribed the imperial burdens to be borne, and the contingent of troops to be furnished by it. The *Coloniæ Civium Romanorum* (including the *Coloniæ Maritimæ*) retained all the rights and privileges of Roman citizens, although their public rights were really in abeyance. The *Coloniæ Latinæ*, however, possessed only a partial private citizenship; they had *commercium*, but not *conubium* in the full sense, conveying to the children the rights of the father; as they consisted of citizens of Rome, as well as of Latin states, such Roman citizens as joined them lost their public rights and somewhat more. In all cases the government was a miniature of the government at Rome. The old inhabitants would be compelled to submit to the laws of the new settlers, and, if they did not drive out the colony, would gradually draw towards it in some sort of union. The municipal towns (*municipia*) of the olden time, down to the reduction of Latium, enjoyed, under a treaty of equal alliance, the private rights of Roman citizenship (with modified *conubium*) at Rome; the citizens of such towns might exercise these rights, and were liable to the corresponding obligations, and hence the name (*munia*, *capere*). After the subjugation of Latium, the foreign policy of the municipal towns was now merged in the supremacy of Rome, and the citizens either possessed the private citizenship alone (*municipia sine suffragio*), or, being enrolled in a Roman tribe, were able to exercise the full citizenship at Rome (*municipia cum suffragio*). In both cases the municipal towns were self-governed, and their imperial obligations were fixed by the terms of their treaties of alliance. It is probable that these commonly included a certain contingent of troops, with field pay and equipments. With the general conferment of the full citizenship after the Social War, the municipal towns all became *municipia cum suffragio*, and preserved but few marks of difference from colonies. The peculiar characteristic of the *Prefectures* (*præfecturæ*) was that they did not elect their own chief magistrate, who was annually sent out from Rome. His designation was *præfectus juri dicundo*. Subordinate to the colonies, municipal towns, and prefectures were the outlying market-towns and villages (*fora*, *conciliabula*). Before the Social War the citizens of all the Italian states in alliance with Rome that did not possess the full citizenship were called *Socii*, the chief of whom, the Latini of Latium and of the Latin Colonies, were usually named specifically in the general designation—*Socii et nomen Latinum*.

In B.C. 90, at the close of the Social War, the *lex Julia* gave the full citizenship to the Latini and the federate states (*Socii*). Next year, B.C. 89, the *lex Plautia Papiria* opened the citizenship to all such aliens as were citizens of the federate states. Thus the great mass of the Italians were admitted to the Roman franchise. The privileges of the Latins, who formed the chief element of the federate states, were then gradually extended to the

provinces. In B.C. 89 the *lex Pompeia*, which probably conferred the full citizenship on the Cispadani, gave *Latinitas* or *jus Latii* to all the towns of the Transpadani.

But a full citizen might lose his privileges, either wholly or in part. He might be sold into slavery for various offences against military discipline, or for wilfully avoiding registration in order to exempt himself from taxation. The provision of the Twelve Tables empowering a creditor to sell his debtor into slavery was abrogated by the *lex Pætelia* (B.C. 325 or 313); and for the enslavement of a thief caught in the act, also prescribed by the Twelve Tables, the Prætor substituted the penalty of fourfold restitution. A citizen taken prisoner by the enemy fell into the condition of a slave; his civil rights were in abeyance; but on his return home he recovered his rights by *postliminium* (or *jus postliminii*). A citizen that was admitted a member of any other state thereby divested himself of his Roman citizenship, and became invested with such privileges as his new state possessed in relation to Rome. We have just seen examples in the case of Roman citizens joining Latin colonies.

On the other hand, slaves might rise from the condition of mere pieces of property to the enjoyment of the franchise. In early times the slaves were few; but, as the Roman territory was extended, and prisoners were taken in war, they increased rapidly, and towards the close of the republic, they performed nearly all the agricultural work, filled nearly all the trades, and swarmed in the houses of the wealthy. The oppression of the slaves led to the rise of the agricultural labourers in Sicily in B.C. 135-132, and B.C. 103-99, and of the Gladiators in Italy in B.C. 73-71. Although a slave could not own property, yet if he had been allowed to hoard up his savings (*peculium*), he might at length purchase his freedom. The state itself sometimes rewarded slaves with freedom in respect of long or peculiarly important services; the most signal case was the manumission of 8000 slaves in B.C. 214 for distinguished bravery during their exceptional service in the army after the disaster at Cannæ.

When a slave had been manumitted in a legal form, he thereby became invested with the plebeian franchise. There seems, however, to have been much difficulty in satisfactorily disposing of the freedmen in tribes. Originally they were confined to the four city tribes, but in B.C. 312 they were distributed among all the tribes, an arrangement that was reversed in B.C. 304, and (for either this reversal had not been actually carried out, or it had been itself reversed) again in B.C. 220; in B.C. 169 they were enrolled in one of the city tribes (*tribus esquilina*), determined by lot; and finally, about B.C. 116, a law of Æmilius Scaurus restored them to the four city tribes, where they remained, in spite of further attempts at redistribution, till the end of the republic. It was long before the taint of blood ceased to bar the way of the freedman to social advancement. It took two generations of purification before a man of servile origin could face public opinion as a candidate for the plebeian tribuneship. Appius Claudius, who had distributed the freedmen among all the tribes in B.C. 312, was considered to have polluted the Senate by admitting the sons of freedmen in the same year of his censorship. In the time of the civil wars, the Senate was overrun with freedmen. The safe and profitable disposal of the voting power of freedmen was always a matter of the first consideration.

II. THE JUDICIAL OFFICERS.

1. *The Prætors and the Ædiles.*

The Prætor.—As the patricians were gradually compelled to share their power and privileges with the plebeians, they clung with desperate tenacity to the exclusive control of the administration of justice. The prætorship, as we have already seen, was created for the special purpose of reserving this cherished control when the rest of the consular functions were shared with the plebeians under one of the Licinian laws (B.C. 367), and it was the last stronghold of patrician exclusiveness to yield to the steady determination of the plebeians (B.C. 337).

For about a century and a quarter there was only one prætor. The increase of the Roman population, however, the expansion of judicial business, and the unavoidable recognition of aliens by the law, led to the appointment of a second prætor in B.C. 247. The original prætor now continued to administer justice between citizens and citizens alone; he was called the City Prætor (*Prætor Urbanus* or *Urbis*), and was said to hold the city province, lot, or *jurisdictio*. The new prætor administered justice between citizens and aliens, and between aliens and aliens; he was said to hold the alien province, lot, or *jurisdictio*, and (in late times, if not originally) was called the Alien or Foreign Prætor (*Prætor Peregrinus*). He, too, exercised his functions in the city; the provincial administration being provided for by the creation of two more prætors in B.C. 227 to go out as governors to Sicily and Sardinia, and of yet two more in B.C. 197 for the two divisions of Spain. Usually the two home prætors cast lots for their respective provinces, but sometimes the Senate distributed all the prætorian provinces at their discretion. The City prætorship was always considered the highest prize. When the alien prætor was sent out to lead an army, his judicial duties devolved upon the city prætor, who never took the field except in the most pressing emergencies. But about B.C. 144, shortly after the establishment of the *Quæstiones Perpetuæ*, all the prætors were detained at Rome, two of them as presidents of the civil courts, the rest as presidents in the criminal courts.

The prætors were annually elected by the *Comitia Centuriata*. They took rank next to the consuls, and indeed, from being elected under the same auspices, they were popularly styled colleagues of the consuls. They were the highest judicial magistrates. The city prætor ranked first, as supreme civil judge. In the absence of the consuls from the city, he was charged with all their functions, except that he could not name a dictator or preside at the consular or prætorian elections.

The Prætor's Edict.—All the principal home magistrates (consuls, prætors, ædiles, quæstors, censors) as well as the provincial governors and the pontiffs, were accustomed to publish edicts (*edicta*), or public notices, in reference to such remarkable events or important duties as required their official attention. An edict might be issued in reference to a single matter only, or it might be a statement of a new magistrate's general principles of administration. Such a general edict was prized as removing in a great measure the evils of uncertainty, and it became the custom for a magistrate, on entering office, to publish his official principles in this form. It was called an *edictum*

perpetuum, in contrast to temporary or occasional proclamations. Not only was it made known by oral announcement, but it was inscribed on white tablets and fixed up in the forum in such a position that everybody might read it with ease. The edicts published by the city and alien prætors, and by the curule ædiles, setting forth the rules they proposed to observe in granting or refusing legal remedies during their term of office, were called *edicta urbana*, as opposed to the *edicta provincialia* of the provincial governors and quæstors. Chief of all edicts were the edicts of the prætors. Naturally each successive prætor was content to adopt in the main the rules of his predecessor, and the portion of the preceding edict that he transferred to his own was called the *edictum tralatitium*. He was not legally bound to accept any such rules, but practically he had little choice in the matter; for the adoption by successive prætors of particular rules that supplied a felt want to the satisfaction of the public was an authoritative legalisation of them that could not be safely disturbed, and if a new rule had worked well even for no longer time than the past year, it could not be rejected without at least the appearance of deliberate or capricious unfairness. It was urged against Verres that he had arbitrarily altered the edict that he received from his predecessor in the prætorship. (Cic. *in Verr.* 1, 40–47.) With the growth of this feeling, the edict at length came to be handed down from year to year with but slight annual changes. The arbitrary modification of an *edictum perpetuum*, whether by addition or alteration, during a prætor's term of office, was also regarded with lively uneasiness and disfavour. Till about B.C. 67, however, there was no guarantee, except constitutional usage, that a prætor would adhere to his own proclamation, but in that year a *lex Cornelia* was passed declaring it illegal for a prætor to depart from his edict. The growth of this *edictum perpetuum* continued vigorously for more than a century after the establishment of the empire, notwithstanding that the triumph of the imperial system involved the destruction of the great elective magistracies of the republic. Under Hadrian, Salvius Julianus consolidated and arranged the Perpetual Edict, and that work (A.D. 131) may be taken to mark the end of prætorian legal reform. The *jus honorarium* included both the *jus prætorium*[1] and the *jus ædilicium*, and this name was given, because, says Justinian, those that bear high honours, namely the magistrates, have given their authority to this branch of the law.

Jus Gentium.—The *jus gentium* was not exactly co-extensive with the *jus honorarium*. Two distinct uses of the expression *jus gentium* are to be discriminated.

First, the Roman jurists define *jus gentium* as comprising the principles of right and wrong recognised in the laws of all peoples or bodies of men politically organised. Justinian, having separated public from private law, reproduces from Ulpian a threefold division of Roman private law into precepts of natural law (*jus naturale*), of the law common to all nations or gentile law (*jus gentium*), and of the civil law or law peculiar to the citizens

[1] Taking *jus prætorium* as the prætor's edict (of mixed civil and gentile law). Papinian's explanation limits it to the *jus* peculiar to the prætor, in contrast to the civil law: "Jus prætorium est quod prætores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam." (D., 1, 1, 7.)

of Rome (*jus civile*). Gaius makes a twofold division, in which natural law and gentile law are regarded as synonymous and opposed to civil law. Such a division, however, has but little foundation in the facts of Roman law, and possesses no scientific value; and its philosophical air and emptiness constitute its sole interest. It probably owes its start to the ethical maxim of the Stoics inculcating the duty of conforming to nature; and this insignificant and purely theoretical matter appears to be the only trace of Stoical influence (it cannot be called impression) on Roman law. This fanciful *jus gentium*, corresponding so closely to natural law,[1] is a late generalisation on the basis of the real and most important *jus gentium* now to be mentioned.

Second, the original *jus gentium* was the practical outcome of the necessity that pressed upon the Romans to provide rules of law for the settlement of disputes between Roman citizens and aliens, and between aliens and aliens. It was that portion of the Roman law that grew up, typically and chiefly, in the edict of the alien prætor. The civil law being applicable to citizens alone, the prætor and the arbitrators must necessarily decide causes between aliens and between citizens and aliens, in accordance with their notions of what was equitable and just (*æquum et bonum*), influenced of course by such usages and notions as commonly prevailed in dealings between aliens and between citizens and aliens. This body of equitable principles constituted the *jus gentium* as opposed generally to *jus civium*. While the edict of the alien prætor constituted it law for aliens, the edict of the city prætor imposed it as law upon Roman citizens. *Jus gentium*, accordingly, is not a collection of rules common to the law of all political societies of men, but a collection of rules governing the intercourse of Roman citizens with the members of all foreign nations reduced to subjection to Rome. Gradually precepts of the *jus gentium* were transferred to regulate the mutual intercourse of citizens, by two main agencies—the edict of the city prætor and the writings of the jurists. A third possible agency is suggested by Mr Poste: if any of the oral formularies of the earliest system of procedure (*legis actiones*) contained an instruction to the *judex* to govern himself by his views of equity and expediency (*æquum et bonum*), or in equivalent terms, such formularies may be regarded as a third source of gentile or natural law. Many rules of law were common to the civil and the gentile law, to Romans and to aliens alike; for example, many of the contracts used in every-day business—purchase and sale, letting and hiring, partnership, etc., and the so-called real contracts. Positive institutions peculiar to Roman citizens might not be thrown open to aliens, but corresponding alien institutions received legal recognition, as gentile marriage, bonitary possession, and gentile forms of contract.

"It is clear, from what has been said, that the Jus Gentium became a body of positive law among the Romans. But it must not be viewed as identical with Jus Honorarium, for the Edicta of the Prætor Urbanus contained many rules of strict Roman law. Nor must we view Jus Civile and Jus Gentium as opposed to one another, and Jus Civile again subdivided into

[1] Apart from Ulpian's application of Natural Law to facts antecedent to and outside of the relations of political society, the one great point of difference acknowledged by the Romans was in the matter of slavery. Slavery, though opposed to the Law of Nature, was an institution of the *jus gentium*. The Law of Nature seems to have availed but slowly to soften the rigour of the *jus gentium* in respect of the slave.

Jus Civile and Jus Honorarium. For the Provincialia Edicta contained both much of the Jus Gentium and much particular law ; and the edictum of the Prætor Peregrinus also. The *Jus Honorarium*, or the Edicta of the Prætors, were the organ by which the Roman law received its general principles ; and the chief part of these general principles are founded on the Jus Gentium. The opposition of Jus Civile and Jus Honorarium is strictly an opposition of form ; but to this form we must add the material opposition, which consisted in this, that the matter of the Edicta was derived from another principle than the Jus Civile ; it was derived from the *naturalis æquitas*, the characteristic of the Jus Gentium." (Long, *Ciceronis Orat.* ("Bibl. Classica" series), Vol. I. (*Verr. libri septem*), Excursus IV. (*Edicta Magistratuum*), p. 190.)

Condictio.—To the four forms of statute-process recognised in the Twelve Tables there was subsequently added a fifth called *condictio* (or notice). Gaius (iv. 19) tells us that it was created by the *lex Silia* (B.C. 244)[1] for the recovery of a determinate sum of money, and extended by the *lex Calpurnia* (B.C. 234)[1] to the recovery of every determinate thing. Sir H. S. Maine, however, holds to the opinion that it was only regulated, not created, by those laws. Gaius explains that in *condictio* the plaintiff gave notice to the defendant to appear before the prætor on the thirtieth day after the summons to choose an arbitrator ; but he adds that in his day there was no longer any propriety in the designation, for in such cases notice had ceased to be given. The essence of the process was that the parties entered into a *sponsio* and *restipulatio*—that is, they laid a wager whereby one-third of the sum (or of the value of the thing) in dispute went to the winner (and not, as in the *sacramentum*, to the state), along with the subject litigated. Jurists of the time of Gaius could not understand the necessity for a new process when the *sacramentum* and *judicis postulatio* would have compassed the end in view. Sir H. S. Maine points to the difference between a present arbitrator, as supposed in the *sacramentum*, and a future arbitrator (thirty days hence), with an immediate wager, as in the *condictio*. Mr Poste remarks that "at this period the *sacramentum* would be practically confined to real actions before the Centumviral Court ; *condictio* would be the appropriate personal action for recovering a certain sum or thing due upon a unilateral contract, real (*mutuum*), verbal (*stipulatio*), or literal (*expensilatio*) ; and *judicis postulatio* the appropriate personal action for recovering an uncertain sum due on a bilateral contract, and enforcing obligations to perform (*facere*) rather than to convey." (Poste's *Gaius*, iv. 18-20, Comm.) In any case the *condictio* is distinctly preferable to the *sacramentum*. It is simpler, and better adapted to the ends of civil procedure, for it begins at once with reciprocal wagers, and, by awarding the sums staked to the winner, it introduces *costs*.

Defects of Statute-Process.—The five *legis actiones*, however, were very limited in their application, exceedingly inconvenient, and most uncertain. They could not be applied by any one except a Roman citizen, so that the increasing numbers of aliens at Rome were entirely excluded from recourse

[1] Some critics carry the date as far back as the fifth century before Christ, shortly after the date of the Twelve Tables. See p. 62, middle.

to them. Besides, they were not suitable for every form of grievance in a state of society that had long outgrown them. They were intolerably vexatious in requiring the personal appearance of the parties and in not permitting them to employ an agent. They were dangerously uncertain, for litigants had to select the forms of procedure for themselves, and the slightest mistake ruined their whole case. The professional knowledge that would have introduced more certainty into the use of the forms, was, in the earliest times, carefully withheld from the people at large. It was not till B.C. 304 that the formularies of actions and the lawful court-days were published by Cneius Flavius, and a century more elapsed till the publication of the work of Sextus Ælius Pætus on the Twelve Tables. Old patricians that had filled high offices of state, and the first straggling jurisconsults, could give additional assistance to puzzled litigants. But all such aids to the sure selection of forms must have been limited to a narrow circle, and the advantages of them could hardly have reached the great body of the people. Gaius (iv. 30) records that the system of statute-process fell into discredit and desuetude owing to the excessive *subtilitas* of the jurists. Probably more stress might justly be laid on the merciless rigidity, the absolute want of elasticity in its forms, and the irremediable consequences of the slightest departure from any one of them. These last, at any rate, were its most serious defects. In both points the new system that had been growing up alongside of it ever since the institution of the prætorship made an immense advance. Whereas the statute-process began with the form, and was liable to be invalidated by error at every stage up to the *litis contestatio*, the formula was not settled till the issues had been sifted out by both parties, assisted by jurists, before the magistrate ; and then it was settled, not by the plaintiff, but by the magistrate himself ; and up to this point no fatal error could possibly creep in. Again, whereas the statute-process gave no remedy unless the plaintiff could find a form for the proper expression of his claim, the new system enabled the prætor to accommodate the formula to any ground of action, and to grant a new action suitable to the circumstances that had developed since the days of the Twelve Tables.

The Formulary System.—The origin of the written formula may not improbably be sought in the department of the Alien Prætor. The forms of the *legis actiones* being the peculiar heritage of Roman citizens, it fell to the Alien Prætor to devise some substitute in cases wherein aliens were parties. In doing so, he naturally preserved the essential features of the Roman system, introducing only such modifications as were either absolutely necessary or practically desirable. Thus, he did not undertake to hear and decide causes himself, but referred them to arbitrators—not the Roman *judices*, but the *recuperatores*. Again, as in the *legis actiones*, the Prætor elicited from the parties the question in controversy between them ; but instead of wrapping this up in the rigid forms of the *jus civile*, he was content to make out a plain written instruction to the arbitrators, informing them that, if they found the fact to be so-and-so, they should order the defendant to pay so-and-so. This was the essential character of the *formula in factum ;* it contained no positive assertion of any right in the plaintiff, but proceeded at once from a recital of the facts constituting the complaint, to give the arbitrators power to award damages.

By a very simple and ingenious variation of the *formula*, it was possible to admit an agent or attorney either for the plaintiff or the defendant. Thus, "If Dio has received in deposit a golden vase of Agerius, and refuses to give it up, let the *recuperatores* order Dio to pay to Negidius the value of the vase." By introducing the name of the attorney Negidius, Agerius was relieved from all trouble in connection with the proceedings.

In ascribing the origin of the written *formula* to the necessity of providing for aliens there is an element of conjecture, but the account cannot be far wrong. The next step is the introduction of *formulæ* in civil causes between citizens. This may have been one of the objects of the *lex Æbutia*. At all events, there can be little temerity in hazarding the assertion that *formulæ* were brought in for citizens first in the case of *actiones in personam*, and that a very considerable interval elapsed before they were allowed in *actiones in rem*. Whether this interval corresponds with the distance between the *lex Æbutia* and the *leges Juliæ* is a matter of conjecture. But there is no doubt that the first *formula* admitted in causes between citizens was a simplification of the *condictio*, which in turn may be viewed as a modification of the *sacramentum*. The cardinal difference between them was the omission of the reciprocal wagers that formed an indispensable preliminary to the *condictio*. The steps whereby the *formula* was adapted to actions for property can be traced with certainty, from the *sacramentum* to trial by *sponsio* or wager, and then to direct submission of the right of the plaintiff to the judgment of the *judex*.

The exact force of the *Lex Æbutia* and of the two *leges Juliæ* mentioned by Gaius,[1] is by no means clear. It has commonly been supposed from the statement of Gaius that they formally abolished the *legis actiones* (except in certain cases) and established the *formulæ* in their place. The excepted cases were—(1) cases of apprehended damage (*damni infecti*), and (2) causes intended to go before the centumviral court; but by the time of Gaius the *legis actio* had been practically discarded in the case of apprehended damage. There is a tendency now to understand that the *lex Æbutia* formally introduced the Formulary procedure, and simply left the statute-process to its chances of existence, which were continuously limited as time went on, and in the days of Gaius were restricted, legally to two classes of causes, and practically to one class. In any case those *leges* are the signs of the decline of the statute-process, and if not formally, yet practically they abrogated it. After the decay of the system of statute-process, however, the forms still survived for many a day, in the ceremonies of adoption, in the manumission of slaves, in the emancipation of sons, and in conveyance by *in jure cessio*. And it left traces of its influence on the prætorian system that grew and flourished by its side and finally superseded it.

The marked feature of the new system of procedure *in jure* lay in the forms containing the prætor's instructions to the *judex*. Such forms were designated *formulæ*. The *judex* was bound to adhere to his instructions, and thus it was a matter of the utmost importance that the right *formula*

[1] G., iv. 30-31. The *lex Æbutia* is usually assigned to about B.C. 170; but conjecture places it at various points between B.C. 300 and 100. The *leges Juliæ* are supposed to be *leges judiciariæ* of Cæsar or Augustus—perhaps B.C. 45 and 25.

should be given. The shaping of the *formula* was entirely in the hands of the magistrate, who was free to vary it in such ways as to secure what he considered the substantial justice of the case. Some *formulæ* were framed so as to state a fact (*in factum conceptæ*), on which the judgment was based, and they also specified either generally or with limitations the amount of the award ; others were framed so as to state a right of the plaintiff or a duty of the defendant (*in jus conceptæ*). There was no essential difference in procedure between an *actio* and an *interdictum;* the latter in this respect precisely imitated the former.

Operation of the Prætor's influence.—The action of the Prætor affected the law in three distinct ways.

First. The prætor denied to a person having a perfect legal right his proper remedy. The plaintiff's claim might be perfectly valid by the civil law, and yet to give effect to it might work injustice. In order to prevent this deplorable result, the prætor recognised a merely equitable defence (*exceptio*). If the defendant was able to advance and establish facts sufficient to show that injustice would flow from the enforcement of the plaintiff's claim, then the prætor would invest such a defence with the force of a legal protection against the plaintiff's claim. The strict letter of the old law, if not set aside, was prevented from carrying its unfairness into action. Some *exceptiones* the prætor set forth in his edict, others he granted to suit particular cases after inquiry. But, while some exceptions were based on the jurisdiction of the prætor, there were others created by statute or something equivalent to statute. (G. iv. 115-137.)

Second. The prætor gave old actions to persons having no legal right. In many cases, while basing his formula on an old rule of law, he extended its application in accordance with the newer necessities of the situation—a discretionary power of the utmost value, although of considerable danger in the hands of unskilful or dishonest magistrates. This extension of old actions to new cases Gaius describes as a Fiction. It was a rigid maxim of law, for example, that the prætor could not make an heir ; yet the prætor contrived, under the name of *bonorum possessio*, to give to a person all the rights and duties of an heir. For it often happened that a person with no title by the civil law was nevertheless the rightful heir on grounds of natural justice. In the actions brought by such a person the *formula* ran in this way : "If—were Aulus Agerius heir—Numerius Negidius ought to pay him xxx *sestertii :* let the *judex* condemn Numerius to pay him that amount." This form does not make the false averment that Aulus Agerius is heir ; it simply directs the *judex* to give the same sentence against Numerius as if Aulus Agerius were heir. It was perhaps less of a shock to put the matter in this way, than it would have been to say plainly and directly that Aulus Agerius ought to recover whether he was heir or not. It conveyed the impression that if Aulus were not heir according to strict law, nevertheless in justice he ought to be. Such an action seems rather a hypothetical than a fictitious action. It was said to be founded on utility (*actio utilis*). In some actions, indeed, the prætor took a more direct and bolder course ; for example, in the case of a sale of inheritance, the defendant was condemned to pay the buyer if it appeared that he owed money to the deceased.

Third. The prætor introduced entirely new actions. Of these much the

most important is the Interdict. When the prætor introduced a new right *in rem* the remedy he gave was called *interdictum*, and, in some cases, *decretum*. (G. iv. 138-170.) When he introduced new rights *in personam*, his remedy was called *actio*. The exception of the *actio Serviana*, which was brought to vindicate a right *in rem*, may be explained in various ways; but it is sufficient to remark that this action was not introduced until a period when the word *interdictum* was beginning to lose its exclusiveness. There appears to be no instance where a remedy for a right *in personam* is called *interdictum*. In the time of Justinian there was no substantial difference between interdicts and actions; Gaius indicates that the procedure was exactly similar in both cases; and we can hardly say more than that the distinction between *interdictum* and *actio* appears to have only a historical significance, testifying merely that certain rights *in rem* were created by the prætor.[1]

Besides cases of an executive character, such as proceedings for the execution of judgments or to enforce the rules of procedure, the prætor sat as judge to investigate and determine disputes between litigants. For example, if a minor under twenty-five had foolishly or imprudently entered into a bargain that resulted in serious loss to him, the prætor might personally hear the evidence and redress the disadvantage by making the bargain void (*restitutio in integrum*). And even persons over twenty-five might similarly be relieved from the consequences of fraud or force practised or exercised upon them. But such relief the prætor granted only when no other remedy by *actio* or *exceptio* was available. Under the empire this Extraordinary Procedure rapidly superseded the formulary system.

The Prætor's Jurisdictio and Imperium.—The power of the prætor was twofold: he possessed both *jurisdictio* and *imperium*. *Jurisdictio* expressed his unlimited power of administering the civil law in the ordinary course of procedure (*ordo judiciorum*). Under the forms of Statute-Process (*legis actiones*), it was summed up in three words—*do*, *dico*, *addico*—uttered by the

[1] Mr Poste (*Gaius*, iv. 138-170, Comm., page 622, 2d ed.) makes the distinction rest on the point of origin and the sanction. "Interdicts are characterised by Gaius as proceedings wherein the prætor '*principaliter* auctoritatem suam interponit.' *Principaliter* may simply refer to the chronological order of steps in legal proceedings; and then interdict procedure will be characterised by the fact that it opens with a command of the prætor (*interdictum*), whereas ordinary procedure opened with an act of the plaintiff (*in jus vocatio*) and the prætor's authority was not very signally manifested, at least in statute-process, till the stage of execution (*addictio, missio in possessionem*). But Bethmann-Hollweg, sect. 98, seems correct in giving a less insignificant meaning to the term which expresses the essential contrast of Interdict and Action, and interpreting the word *principaliter* as expressive of the pre-eminence, supremacy, or absolute power, of the prætor in the sphere where interdicts were employed. The contrast then will be between the *jurisdictio* of the prætor and his *imperium*." Elsewhere (page 624), however, Mr Poste admits that "this feature was not peculiar to interdicts; but if we suppose that interdicts were coeval with statute-process, and formed a matter of *cognitio extraordinaria*, and that, further, the other subjects of *cognitio extraordinaria* were then imperfectly developed, at such a period interdicts would form the most signal manifestation of magisterial *auctoritas*: and it is perhaps to a jurist of this period that the definition we have quoted is due."

prætor in disposing of the several stages of a case. That is to say, he gave permission to bring the cause into court (*dare actionem*), and he appointed an arbitrator (*dare judicem*); he stated the law and shaped its application for the investigation of the case before the arbitrator (*dicere jus*);[1] and he formally gave effect to the decision of the arbitrator by vesting through his judgment a title to property or to damages (*addicere bona* or *damna*). Under the formulary process, the oral statement of the law in the first person was superseded by a written document expressing the prætor's directions or decision in the imperative form. The other element of the prætor's power, the *imperium*, vested in him as part of the sovereign power (practically restricted) that he possessed in virtue of his magistracy. As associated with (D. 1, 21, 1), or as embracing (D. 2, 1, 3), the *jurisdictio*, it was called *imperium mixtum*, in contrast with *imperium merum*, the mere power of the sword, a criminal jurisdiction. On the *imperium* were based the legislative, as opposed to the merely administrative, functions of the prætor. "In *legis actio* the legislator and the litigants seem alone to occupy the scene. The prætor is only present as master of the ceremonies, and even as such can only utter sentences which the legislator has previously dictated. In the formulary system the prætor appears with much larger attributions; he seems to have stepped in front of the legislator and has taken much of the initiative from the suitors." (Poste, *Gaius*, iv. 138-170 Comm.) He appoints new actions (*actiones honorariæ*, or *prætoriæ*), no longer limiting himself to those appointed by statute. In such actions (as opposed to actions of the civil law, *actiones legitimæ*), "the prætor, except so far as he abstained with a demure deference from inserting in the formula the sacred term *Oportere*, certainly exercised the attributions of a legislator. A similar, though not identical, division was that into *judicia legitima* and *judicia imperio continentia* (binding by *imperium*); a division that, roughly speaking, corresponded to the functions of the prætor in imperial Rome, and his functions in the subject provinces. This last division, though important in its time, was more purely historic and accidental than the preceding; it has left a less permanent impress on Roman law, and its traces are nearly effaced from the compilation of Justinian." (Poste, *Gaius*, iv. 138-170, Comm.) Again, in the exercise of his *Cognitio Extraordinaria* (as opposed to statute-process and the formulary system, composing at different periods the ordinary course of procedure), the prætor personally made an investigation of the facts and issued a decree, which he could enforce by fine, distress, and imprisonment; thus assuming the functions of the *judex* and of the legislator as well. The *jurisdictio* might be delegated, but not the *imperium*.

The prætor stands in Roman law midway between the jurisconsults and the legislature. His right to alter the law was openly acknowledged, but it was not unlimited. He was surrounded by a firm, although invisible and somewhat elastic, band. He was checked by public opinion, and by the probability of having to answer for his conduct on demitting office. He may

[1] *Dicere jus* (cf. *juris-dictio*), according to Ulpian (D. 2, 1, 1), is the widest designation of the authority of the prætor, including not merely the compulsory reference to arbitration, but the appointment of tutors, etc.

be viewed as the keeper of the conscience of the Roman people, as the person that was to determine in what cases strict law was to give way to natural justice (*naturalis æquitas*). Even a wider authority than this was ascribed to him, for he was to entertain general considerations of utility (*publica utilitas*). A single example may suffice to show that the prætor's edict was confined within real, although indefinable, limits. The Twelve Tables gave the succession to a father to his children under his *potestas*; the children released from the *potestas* did not succeed. The prætor, however, did not scruple to admit emancipated children to succeed their fathers; but it was reserved for later legislation to provide that a child should succeed its mother.

The work of the prætor may be summed up under three heads. It was the prætor chiefly that admitted aliens within the pale of the Roman law. To him is mainly due the change whereby the formalism of the civil law was superseded by well-conceived rules giving effect to the real intentions of parties. Lastly, he took the first and most active share in transforming the law of intestate succession, so that, for the purpose of inheritance, the family was regarded as connected by the natural relation of blood instead of the artificial relation of *potestas*.

The Ædiles.—The two *Plebeian Ædiles* were first elected in B.C. 494 as assistants to the tribunes. They were charged with the special duty of keeping the tablets whereon were inscribed the laws passed by the popular assemblies and (after B.C. 446) the decrees passed by the senate. In course of time they had new duties laid upon them, and they gradually came to be regarded as independent magistrates. On the establishment of the prætorship in B.C. 367, the election of two *Curule Ædiles* was agreed upon between the patricians and the plebeians, the chief duty assigned to them being ostensibly the magnificent celebration of the *Ludi Romani*, in commemoration of the union of the two orders. The Curule Ædiles were to be patricians; next year, however, it was arranged that they should be patrician and plebeian in alternate years, and presently it was agreed that they should be elected from both orders indifferently. The first Curule Ædiles were elected in B.C. 365.

The jurisdiction of the ædiles seems to have been limited. Their duties are summed up by Cicero in three heads. First, they were *curatores urbis*, burgh magistrates, and commissioners of police and of public health. Second, they were *curatores annonæ*, inspectors of the markets, and commissioners for the storing up and distribution of the imports of grain. In B.C. 45 Julius Cæsar created two additional plebeian ædiles to look after the supply of corn (*Ædiles Cereales*). Third, the ædiles were *curatores ludorum solennium*, superintendents of the arrangements for the public games. To the plebeian ædiles also fell the duty of instituting prosecutions against (1) persons that occupied more than their legal extent of state land (*ager publicus*); (2) tenants of state pastures that pastured thereon more than the legal number of flocks and herds; and (3) money-lenders that exacted an illegal rate of interest—all such persons being regarded as offenders against interests that were peculiarly plebeian. The ædiles (according to some authorities, only the curule ædiles), on entering office, issued edicts or rules of administration (*jus ædilicium*), and they were empowered to inflict fines,—for example in

respect of nuisances, unwholesome provisions, light weights, avaricious hoarding of grain in time of scarcity. Their judicial powers seem to have been chiefly exercised in reference to sale, and that mostly of grain, slaves, and cattle.[1] The *jus ædilicium* was reckoned as part of the *jus honorarium*.

Provincial Magistrates.—In addition to his military duties, the Provincial *Governor*, whether proconsul or proprætor, exercised supreme jurisdiction in all causes, civil and criminal—like the prætor. He was guided and restricted by the particular law or laws constituting and regulating his province. Each province came to be divided into judicial districts (*juridici conventus*, *jurisdictiones*), and the governor went on circuit, holding an assize (*conventus*) in the principal town of each district at least once a-year. With the aid of a board of assessors (*consilium*), chosen from the qualified jurymen of the province in attendance (*conventus*), he decided appeals from local courts, as well as fresh cases of importance. All his civil *judices* were *recuperatores*. The governor might punish provincial offenders with imprisonment, flogging, or even death ; but Roman citizens, convicted on a criminal charge, always enjoyed the right of appeal to Rome.

The *Quæstor*, who always accompanied the provincial governor, and who was supposed to live in the closest intimacy and friendship with him, exercised the functions of curule ædile.

2. *The Arbitrators.*

Under the Republic, the Arbitrators were of four classes—*judex*, *arbiter*, *centumviri*, *recuperatores*. *Judex* was also used as a general term applicable to all the classes.

Judex.—The office of *judex* is of unknown origin. It certainly remounts to the Twelve Tables, of which certain extant provisions refer to both *judex* and *arbiter*. Besides, the old *legis actio* called *Judicis Postulatio* is decisive evidence of its antiquity.

In the early centuries of the republic, although in principle the litigants in civil suits were always free to choose their *judex*, yet in fact they were confined to the selection of senators. This limitation continued down to the times of the Gracchi.

Till B.C. 123 the *consilium*, or jury (*judices*), in criminal trials, before Special Commissions (*Quæstiones*) and Standing Commissions (*Quæstiones Perpetuæ*) alike, had been drawn exclusively from the senatorial body. In this year, however, the *lex Sempronia* was carried by C. Sempronius Gracchus —the first of a series of judiciary laws (*leges judiciariæ*), by which the friends and the foes of the senate from time to time endeavoured to fix the classes that should furnish the criminal jurors. This act stript the senatorial order of their exclusive judicial power, and enacted that the *judices* should be chosen from the Order of Knights (*Equites*, *Ordo Equester*)—a non-military class, now for the first time constituted a political body, and consisting simply of citizens (of non-senatorial families) possessed of a certain property qualification (*census equester*), namely, 400,000 sesterces. This reform was

[1] The duties and honours of curule ædile are set forth by Cicero (*in Verr.*, V. 14).

acknowledged by the popular party to be, on the whole, a vast improvement; although it had little effect on the trials for Restitution of mal-appropriations (*Repetunda*), the provincial governors being blind and deaf to the exactions of the tax-farmers (*publicani*), who, as members of the order of knights, would become their *judices* in the probable enough event of their being prosecuted for mal-administration. To the Senators, on the other hand, the results appeared very different, and during the next forty years they struggled steadily to regain and hold the exclusive privilege. Under the *lex Acilia repetundarum* (B.C. 122) the list of *judices* was annual, and was chosen from the knights. Under the *lex Servilia repetundarum* of Glaucia (about B.C. 111) the *judices* were still chosen from the knights. By the *lex Servilia* of Cæpio (consul, B.C. 106), the privilege of being *judices* was to be shared between the knights and the senators, or to be wholly transferred to the senators; but, if this law was ever really passed, it must have been presently repealed.[1] In B.C. 91 the *lex Livia* of M. Livius Drusus, tribune of the plebeians, opened the office equally to senators and knights; but it was repealed in the same year by the unanimous consent of parties. In B.C. 89 the *lex Plautia* required the election of fifteen jurors from each of the thirty-five tribes by the several tribes themselves, without prescribing a limitation to any particular classes. At last, in B.C. 81, the *lex Cornelia* of Sulla restored to the senators the exclusive privilege wrested from them by the *lex Sempronia*. Their triumph was but short-lived, however. In B.C. 70 the *lex Aurelia*, proposed by M. Aurelius Cotta, the City Prætor, under the sanction of Pompey, enacted that the *judices* should be chosen from three classes—the Senators, the Knights, and the Tribunes of the Treasury. In B.C. 55 the *lex Pompeia* limited the eligible Treasury Tribunes to the wealthiest of the class, and in B.C. 46 Cæsar's *lex Julia* rendered all Treasury Tribunes ineligible. For a short time Antony admitted even legionary soldiers, without regard to their property qualification. Augustus restored the three classes of the *lex Aurelia* and added a fourth class, called *ducenarii*—citizens whose census amounted to 200,000 sesterces, or only half the qualification of the knights. These were appointed to try causes of inferior importance. Finally, a fifth class was added by Caligula.

---

[1] The preceding three laws are mixed up in all orders and relations by different writers. The *lex Acilia* (the provisions of which have generally been referred to the *lex Servilia* of Glaucia) has been usually placed about B.C. 102, and after the *lex Servilia*. But Mommsen has conclusively shown that the provisions generally assigned to the *lex Servilia* belong to the *lex Acilia*, and that this *lex* was passed in B.C. 123-121 (Zumpt places it "several years after the death of Gracchus," "say B.C. 118"), while the *lex Servilia* of Glaucia was passed about B.C. 111. Zumpt states that the *lex Servilia* of Cæpio shared the privilege of being *judices* between the knights and the senators, and that it lasted for about a year, being repealed by the *lex Servilia* of Glaucia of B.C. 104, which restricted the privilege once more to the knights. This is substantially the position that Klenze accepted: that Q. Servilius, by a judiciary law, passed in his consulship, B.C. 106, transferred the *judicia* to the Senate, and that Glaucia reversed this arrangement by his *lex repetundarum*, which was thus subsequent to B.C. 106. But Mommsen has shown that this position is untenable (*Zeitschrift für Alterthumswiss.* 1843, p. 823). See Mommsen, *Corpus Inscriptionum Latinarum*, i. 49 follg.; Bruns, *Fontes Iur. Rom. Antiq.*, pp. 52 follg., with the references; Zumpt, *Criminalrecht d. Röm. Rep.*, ii. 2, 497, and ii. 1, 101-145.

The number of *judices* varied greatly at different periods. By the *lex Acilia Repetundarum* (B.C. 122) the Alien Prætor was commanded to choose yearly, for the purposes of the act, 450 *judices*, and to swear, when he announced their names in public, that he had exercised his best judgment in the choice. He was further required by the act to inscribe all their names (with the name of each *judex's* father and tribe and family), arranged according to tribes, in black letters on a white table; and then to set forth this list in a position where it could be conveniently read by passers-by. The *lex Livia* appointed 600 *judices;* the *lex Plautia*, 525; Cicero mentions 850; and under Augustus the number mounted to some 4000. Under the *lex Acilia* the accuser and the accused selected 100 *judices* from the 450 on the album (under certain restrictions, excluding chiefly relations and friends of either party, certain present and past officers of state, and others); and each party chose one-half of the *judices* offered by the other, so that 100 formed the tribunal. The numbers of the *lex Julia* and of the *lex Plautia* may have been similarly chosen for each particular *quæstio*, but at a later period the total number of *judices* was first chosen, and the jurors for the particular *quæstiones* were then selected from the general list. For each particular trial the *judices* finally selected did not remain at the number fixed by the *lex Acilia.* The *lex Pompeia de Vi* and *de Ambitu* prescribed the selection of 80 *judices* by lot from the available list, 30 of whom might be rejected by accuser and accused. In the trial of Clodius for the Bona Dea escapade, there were 56 *judices.* The Alien Prætor is charged with the selection for the particular *quæstio* under the *lex Acilia*, but the City Prætor also chose on oath in a precisely similar manner, and sometimes the *Quæsitor* chose by lot. The rule seems to have been that the presiding prætor selected an oath. The jurors placed on the *Album Judicum* were styled *Judices Selecti.* By the *lex Aurelia* they were arranged in three sections (*decuriæ judicum*) according to the classes they were drawn from; and the additional classes admitted by Augustus and Caligula formed two more sections, or *decuriæ.*

Yet not every person belonging to the various classes mentioned was entitled to the privilege of being a *judex.* The *lex Acilia* provided that the prætor should not choose any person that was or had been Tribune of the Plebeians, Quæstor, Triumvir Capitalis (superintendent of prisons), Military Tribune in one of the first four legions, Triumvir agris dandis assignandis (land commissioner); any person that was or had been a senator, any person that was *infamis*, any person that was under thirty or over sixty years of age, any person that did not reside either in Rome or within (a mile?) of the city, any person that was father, brother, or son of any of the above-mentioned magistrates, or of a senator, or of an ex-senator, or any one that was beyond seas. Augustus reduced the lower limit of age to twenty-five; the Digest mentions eighteen. There were also the usual natural exceptions—idiots, deaf and dumb persons, and persons under puberty; and the customary exceptions—women and slaves. The prætor had also the power of extending incapacity to other persons.

Whether the *judices* in civil cases were always, from B.C. 123 down to the time of Augustus, chosen from the same varying area as the criminal jurors, is not certainly known. There are some grounds for the opinion that the parties might select as civil *judex* a person not on the inscribed list.

Ortolan, on the other hand, maintains that civil as well as criminal *judices* must be taken from the inscribed list. It does not, at all events, seem likely that the area of selection of civil *judices* was more limited at any given time than the area of selection of criminal *judices;* and, if it hardly seems probable that in the earlier part of this period the areas of selection were conterminous, they were certainly conterminous in the time of Augustus, if not in the time of Julius Cæsar.

In all causes, both civil and criminal, it was a fundamental principle that both parties should agree to their *judex*. "No one," says Cicero (*pro Cluentio*, 43), "would our ancestors suffer to be a judge, I do not say of the dignity of a man, but not even of the smallest money matter, unless the opposing parties agreed upon him." The manner of choosing a criminal *judex* has already been referred to. In civil causes the usual course was for the plaintiff to offer the defendant a *judex* (*judicem ferre*); and if the two parties failed to agree, the selection seems to have been determined by lot. When the *judex* had been at last selected, the magistrate formally appointed him (*addicere judicem*). The person chosen was unpaid, and could not refuse to act. Certain excuses were admissible, but if an absent *judex* failed to furnish a satisfactory excuse, he was liable to punishment. As the office related to public law, a person under *potestas* could act. The persons excepted by nature and by custom, and the age of *judices*, have been already mentioned.

The civil *judex*, like the prætor himself, was not a trained lawyer. He has been compared with the modern jury, but this analogy is even more misleading than such analogies usually are. In English law there is no functionary that fills exactly the office of *judex*. His functions were in a sense unique. He alone, a single *judex*, a man unacquainted with law, sat without the help of any superior judge, and pronounced judgment in the cause. He might, indeed, seek or listen to the advice of jurisconsults or others, but he was entirely free to pronounce his own sentence. As we have just seen, the *judex* was selected from the higher classes of society; for centuries, from the order of senators alone. A civil cause was emphatically not a trial by one's equals; it was a trial by the order of nobility. The least inaccurate description of the position and function of a republican *judex* is this: he was an arbitrator, selected from the privileged order (or orders) exclusively, to whom a cause was referred by compulsion of law.

What, then, were the checks upon a reference apparently so vague and dangerous? In the first place, perhaps the most important check of all was the character of the *judices*. Whatever knowledge of law existed, and the largest share of experience of public business, would probably be found in the senatorial body. In the next place, there was a considerable latitude of choice. Surely among three hundred of the leading men of Rome two litigants could find one man in whose fairness and wisdom they might put confidence. Again, if a *judex* exceeded his authority under the reference, his judgment could be treated as absolutely null and void. And even if, not exceeding the limits of the reference, the judgment proceeded on an error of law, the defeated litigant might appeal to the prætor when execution on the judgment was demanded; and failing that, he might obtain the veto of another magistrate or of a Tribune of the Plebeians. Last of all, an action could be brought against a *judex* for misjudgment.

Arbiter.—In the ancient references to the institution of *judex*, the phrase "*judex* or *arbiter*" (*judex arbiterve*) frequently recurs. The *judex* and the *arbiter* had precisely the same functions, and quite possibly were chosen in precisely the same way from the same class. But what, if any, was the difference between them? In one passage (*pro Murena*, 12) Cicero ridicules the use of the two words by the jurisconsults as if it were a purely verbal distinction. Elsewhere,[1] however, he proceeds to mark a real distinction, according to which the arbitrator or referee was termed arbiter in those cases where the reference contained an element of equity, the action being for an indeterminate sum. But the basis for such a distinction is insufficient. The only difference that expressly appears is, that, whereas there never was but one *judex* in a cause, there might be several *arbitri*. The Twelve Tables mention the number three in cases of disputes regarding boundaries. Doubtless also *arbiter* was anciently used by preference when the referee had some degree of latitude, and was not tied down to give either a definite sum or nothing. Such would appear to have been the usage in the time of Cicero; but, when we come to Gaius, we find the word *judex* used indifferently in all cases.[2] There remains, however, a perplexing question. One of the *legis actiones*, concerning which, unfortunately, we know nothing but the name, was called *Judicis Postulatio;* but the examples that are

[1] Cicero, *pro* Q. Roscio Com., 4, 10; 4, 11. Cf. *Top.* 17; *de Off.* 3, 16-17 (66-70). It is a *judicium*, he says, when the simple question is whether the defendant owes a given sum of money; an *arbitrium*, when it is alleged that the defendant owes something and it remains for the referee to ascertain the exact amount. Hence, as he justly remarks, in a *judicium* the plaintiff gets either all he asks or nothing; in an *arbitrium*, the plaintiff may get less than he expects or more. In the latter case the referee is appointed with latitude, with no more precise instruction than to give whatever sum he thinks fair and just (*quantum æquius et melius, id dari*). The formula runs thus: *quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex bona fide.* It is clear that by the time of Gaius any exclusive use of *arbiter* for equitable (*bonæ fidei*) actions, if such ever existed, had quite disappeared; for Gaius (iv. 47, 63, etc.), speaking of *bonæ fidei* actions, uses the word *judex*. Cicero's analysis is undoubtedly superficial. He is evidently thinking only of contracts, and not even of all these. Thus, in an action on a delict, the demand of damages is necessarily indefinite, yet the action is not *bonæ fidei*. Again, in a stipulation to give an uncertain amount, or to do some act, the claim for damages must be indefinite, yet the action is *stricti juris*. Thus although all actions *bonæ fidei* may have an indefinite demand, it is clear that many actions where the demand is indefinite are not *bonæ fidei*. A passage from Seneca (*de Beneficiis*, 3, 7) is quoted by Savigny to confirm his argument that *bonæ fidei* actions were sent before an *arbiter*, while actions *stricti juris* were sent before a *judex;* but that passage seems to speak of an action *bonæ fidei* as being sent before either an *arbiter* or a *judex*, and it treats the latitude of the *arbiter* as a great evil. The result of the authorities, then, seems to be, that, although on the one hand there was an obvious and recognised distinction between actions where the demand was definite or liquidated, and actions where the demand was indefinite, and on the other hand between actions *stricti juris* and actions *bonæ fidei*, yet those distinctions are not conterminous, and it cannot be shown that to either or both were the distinct terms *judex* and *arbiter* specially appropriated.

[2] The *formula arbitraria* relates to a different state of facts.

given are all cases where, on Cicero's distinction, *arbiter* should be employed. How is it, then, that in a *judicis postulatio* an *arbiter* should always be appointed? It would seem that the terms, if not quite synonymous, varied but slightly. Perhaps *judex* suggested more strongly the compulsory authority of the referee, and *arbiter* indicated rather the unrestricted range of his powers.[1]

Centumviri.—The origin and the constitution of the centumviral court are involved in obscurity. Three main facts, however, seem to be established. First, it was a permanent tribunal; it was not constituted for the trial of a single cause. Again, while the court possessed continuous existence, the members were, in all probability, elected annually, in accordance with the universal rule of the republican tenure of offices. Further, while the *judices* were for centuries selected exclusively from the patricians, the centumviri were drawn from the tribes—probably elected by the assembly of the tribes—the plebeians being thus admitted to the exercise of judicial functions. All the probabilities favour a very ancient origin, but we have no definite authority for placing the existence of the court at an earlier date than about the middle of the third century before Christ. So closely was it identified with the ancient procedure that, even when the *legis actiones* were abolished in all other cases (save one), the oldest of them all, the *sacramentum*, was still retained in the proceedings before the prætor as an indispensable preliminary to a centumviral trial. (Gaius, IV. 31.) As Puchta insists, the *lex Æbutia* did not establish the centumviral court, but this court must have been in existence when the *lex Æbutia* was passed. At a later period we are informed that Octavius (Augustus) transferred to *decemviri*, from the ex-quæstors, the power of convoking and presiding over the centumviral court; and there has been much speculation as to the possible connection of these *decemviri* with the *judices decemviri* mentioned by Livy about the middle of the fifth century before Christ. (Liv. 3, 55.) The history of their functions is not known, but they were still present in court after the presidency was assumed by a prætor. Under the empire the centumvirs sat in the Basilica Julia, and a spear (*hasta*), the ancient symbol of Quiritarian ownership, was planted before the tribunal. Their functions come nearer to the modern jury system than the functions of the *judices*. The court was divided into four chambers, each of which sat separately, except in cases of some importance, when they were united—sometimes all together, sometimes in two sections, apparently; but regarding the relations of the four chambers various conjectures have been made.[2] The centumviral court decayed very slowly, maintaining a lingering existence down to the time of the Lower Empire.[3]

---

[1] Cf. Festus, *arbiter*: "*Arbiter* dicitur iudex, quod totius rei habeat arbitrium et facultatem."

[2] Plin. *Epist.*, 1, 18; 4, 24; 6, 33. Quint., *Inst. Orat.*, 12, 5, 6. Maynz, *Cours du Droit Romain*, i., 114 (*Introd.*, 36). The expressions *duplex judicium*, *duæ hastæ* (Quint., *Inst. Orat.*, 11, 1, 78; 5, 2, 1), and *quadruplex judicium* (Plin., *Epist.*, 4, 24; 6, 33) have suggested that in certain causes the court sat sometimes in two, sometimes in four sections, all hearing the cause together, but each section voting separately.

[3] Pomponius (*D.* 1, 2, 2, 29) refers to a period immediately following the institution of the alien prætorship (B.C. 247) the creation of *decemviri litibus judicandis* to

In what causes did the centumviral court possess an exclusive and special jurisdiction? It would seem that the parties were free to choose whether they would go before the centumviral court; but the question cannot be answered satisfactorily. We do not know whether there were any trials that could be held only before the centumvirs, or whether all causes could be referred with the consent of the parties to either centumvirs or *judices* indifferently. But when a cause was pending before the centumvirs,

---

preside in the centumviral court. This statement at once recalls the *judices decemviri* that were made sacrosanct in B.C. 449 (Liv. 3, 55). Niebuhr, referring specially to the *judices*, considers that the centumvirs are intended, and removes the creation of the court back to the time of King Servius; while Zumpt (*Ueber das Centumviralgericht*) reads *judices decemviri* together (as Puchta affirms must certainly be done) and refers the creation of the court to the Twelve Tables, five members being chosen from each of the twenty-one tribes. It is possible, of course, that Livy has projected those officers (*judices decemviri*) a very long distance into the past, and that they did not exist till a century or two later. The approximate date given by Pomponius corresponds closely with the statement of Festus, that, when the tribes were increased to thirty-five (B.C. 241), three members were elected from each tribe, so that the exact total number was 105. Again, Ortolan, Dean Liddell, and others, place the institution of the centumviral court about the period of the original establishment of the prætorship (not the alien prætorship) at a time when (Livy says) there were twenty-five tribes (B.C. 387-358), so that four members from each tribe would give the exact hundred. The number, however, was not exact in later times, whether originally exact or not; for Varro warns us to take the name *centumviri* roughly, and Pliny mentions in his time 180 members.

Puchta discusses the matter at some length (*Cursus*, i. 151; Bk. II. *Gesch. d. Röm. Rechts*, sect. 49; and *Cursus*, ii. 25-28: Bk. III. *Gesch. d. Röm. Civil-Processes*, sect. 153). He relies little on Pomponius, and not much more on Festus; and he thinks the view of Zumpt is but a degree less probable than the view of Niebuhr. Far more significant is the connection between the court and the ancient procedure, which definitely establishes its existence at a time when another system had not yet replaced, or even taken its position by the side of, the *legis actio*. Tracing the probable history of the centumviral court, Puchta believes it to have been a late offshoot from the evidently older office of the *decemviri litibus judicandis*. The decemvirs, he thinks, were created by King Servius, to take cognisance of causes involving the *caput* of citizens or the portion of their possessions taken into account in fixing their property qualification (that is to say, the property they held in quiritarian ownership)—matters of deep and immediate public interest, which, in so far as they existed (*caput* and *inheritances* only), had theretofore been dealt with by the pontiffs and the *comitia curiata*, whose attention was now confined to non-contentious cases of that kind (adrogation and wills). For this court the sign of the *hasta* (*signum quoddam justi dominii:* G. iv. 16) was set up, as the symbol of public duties. After a time the centumviral court was established, taking over from the decemviral court all the property causes, and leaving to it only the causes touching the *caput* (*Cic. pro Cæc.*, 33; *Orat. pro Domo*, 29). Finally the political significance of the *hasta*, which gave rise to the contrast of *judicium privatum* and *judicium centumvirale*, was lost sight of; after the *lex Æbutia* property cases of all sorts could come before *judices privati*, the *centumvirales causæ* themselves were conceived only from the point of view of private law, and the activity of the centumvirs became gradually limited to cases of inheritance.

there could not be carried before a *judex* any subordinate question capable of decision in the centumviral trial. Justinian in this way explains the rule that, pending a *petitio hereditatis*, no dispute involving the same question could be entered before a *judex*. For, says he, the greatness and authority of the centumviral tribunal did not suffer the question of inheritance to be decided by any less authority than themselves. (*C.* 3, 31, 12.)

From the circumstance that Cicero enumerates in great detail the kind of causes referred to the centumvirs, it may be inferred that some preference at least was shown for that tribunal. The list that he gives[1] includes causes that fall under four heads : (1) disputes as to Quiritarian ownership, including therein servitudes ; (2) wills ; (3) intestate succession (*agnatio, gentilitas*) ; (4) *tutela* and questions of status (as freedom, citizenship, etc.). These cover nearly the whole civil law, only three topics being omitted : contracts (except so far as *nexi* may relate to this subject), delicts, and questions of possession as contrasted with ownership. Besides, Cicero's list is professedly incomplete. Whether the centumviral court also possessed a certain criminal jurisdiction has been disputed. Towards the time of Gaius it seems to have sat only to try questions of inheritance.

Recuperatores.—While there could be only one *judex*, and there might be several *arbitri*, there were always several *recuperatores*,—at Rome, three or even five. The *recuperatores* need not be senators, nor need they be drawn from the *album judicum;* persons that happened to be in court, casual passers-by, or any citizens indiscriminately, might be taken for the purpose. They exercised the same functions as the *judex*, but, beyond the fact that they were employed in causes requiring speedy decision, we do not know to what particular classes of causes (if any) they were limited.

In the beginning *recuperatores* are supposed to have been employed only in causes wherein aliens were parties. Festus quotes the authority of the jurisconsult Ælius Gallus for the statement that *reciperatores* (recoverers) constituted the court or commission appointed under treaty between Rome and foreign kings, nations, and cities, for the decision of disputes between citizens of Rome and such other sovereign powers.[2] This agrees with the later circumstance that the provincial *judices* were designated, not *judices*, but *recuperatores*. Upon this basis has arisen the belief that the *recuperatores* were at first the arbitrators appointed for aliens,—a scratch court, in anticipation of the organisation developed under the alien prætor. In process of time the jurisdiction of the court would naturally be extended to Roman citizens, as it certainly did extend in the time of Cicero

III. PLACES AND TIMES OF JUDICIAL PROCEEDINGS.

In Rome the magistrates sat in the *Forum* or *Comitium*, on their curule chairs, the lower magistrates on lower seats (*subsellia*). In the provinces,

[1] Cicero, *de Orat.*, 1, 38 : . . . "in causis centumviralibus, in quibus usucapionum, tutelarum, gentilitatum, agnationum, alluvionum, circumluvionum, nexorum, mancipiorum, parietum, luminum, stillicidiorum, testamentorum ruptorum et ratorum, ceterarumque rerum innumerabilium jura versentur."

[2] Compare the *Plebiscitum* (*Lex Antonia*) *de Termessibus*, 4. Mommsen, *Corp. Inscr. Lat.*, I. 114 ; or Bruns, *Fontes Iur. Rom. Antiq.*, 85.

the president imitated the form at Rome, and sat in his court on a curule chair. Later on, the courts came to be held in the Basilicas, which afterwards formed the model of many Christian churches. (Paul, Sent. 4, 6, 2.) Causes also were heard in closed buildings, called *secretaria* or *auditoria*. The proceedings were, however, conducted with open doors (C. Th. 1, 16, 9); and the practice of setting up a screen before the judge was severely reprobated in a constitution of Constantine. (C. Th. 1, 16, 7.)

Anciently, the calendar was in the hands of the pontiffs and patricians, and great mystery surrounded the determination of the days on which it was lawful for the magistrates to sit; and it was a turning-point in the development of Roman Law, when (about B.C. 304) Cn. Flavius, a clerk of Appius Claudius Caecus, wrote out a calendar, and published the forms of legal procedure. Days on which it was lawful for the prætor to exercise his general powers were called *fasti*. Days on which he could not pronounce any of the words, "*Do*, *Dico*, *Addico*," were called *nefasti*. There were forty *dies fasti* and sixty *dies nefasti* in the year. The other portion of the year was partially open to legal proceedings. On *dies comitiales*—that is, days when the people could meet for legislative purposes or elections—the prætor could act if the popular assembly was not sitting. Of these days there were 190. On certain other days—*endotercisi* or *intercisi*—it was an impiety to perform any of the ceremonies of the *legis actiones* before the *rex sacrificulus* came down in the morning to sacrifice a victim, and in the evening of the same day; but the intermediate period might be devoted to legal business.

The proceedings before *judices* were not affected by the *dies nefasti*. The *judex* did not represent the Roman people—he was simply a private citizen appointed by authority to pronounce a decision in a private quarrel; and it was not necessary that he should be fettered by the rules that limited or hampered the transaction of state affairs. Here, again, is an indication of the broad difference between *jus* and *judicium*, between the interposition of the state and the conduct of merely private affairs. The *judex* might sit on *dies nefasti*, but he abstained from sitting on holidays (*feriae*). These were of two kinds—occasional and periodical. Occasional holidays (*repentinae feriae*) were fixed by the magistrates on account of some occasion of public rejoicing or sorrow. In later times these days were called *imperiales*. (C. 3, 12, 4.) Periodical (*solemnes*) holidays varied at different times. The last day of December and the 3d of January were public holidays. (D. 2, 12, 5; D. 50, 16, 233, 1.) The time of sowing and harvest also was kept free from litigation in periods varying according to the custom of the province. (D. 2, 12, 4.)

The distinction between the times lawful for the acts of the magistrate and the trial of causes before *judices* existed down to Marcus Aurelius. He allowed 230 days to litigation, whether before a *prætor* or a *judex*, hence called *dies juridici* or *dies judiciarii*. The rest of the year was open to litigation with the consent of the parties. (D. 2, 12, 1, 1; D. 2, 12, 6.) A constitution, of date A.D. 389, by Valentinian, Theodosius, and Arcadius, begins by stating that all the year is *dies juridici*, but a vacation of two months was allowed for harvest; also every Sunday, the usual holidays in January, the anniversary of the origin of Rome and Constantinople, a fortnight at Easter,

the anniversary of the birth of Christ, and the Epiphany, were kept free from legal business. (C. 3, 12, 7.) In A.D. 392 Easter was made a general holiday. (C. 3, 12, 8.)

IV. THE JURISCONSULTS.

Jurisconsulti, Jureconsulti, Jurisperiti, Jurisprudentes, etc.—Until the time of Diocletian, the administration of law was not confided to professional lawyers. It was regarded as a public office that each citizen might be called upon to undertake. The prætor was, generally speaking, more of a statesman than a jurist, a politician on his way to the consulship; not, as with us, a middle-aged lawyer retiring from active practice to exercise judicial functions. The *judex*, similarly, was a man of respectable social standing, and presumably of intelligence and probity, with more or less experience of the world; not necessarily a man of any legal knowledge. In process of time, however, there grew up in Rome a class of men that made it their business to know the law and to communicate their information to such as sought it. Hence a strange result. The men that knew the law had no direct participation in the administration of justice; the men that administered justice did not know law.

Pomponius states that the custody of the Twelve Tables, the knowledge of the forms of procedure, and the right of interpreting the law belonged in early times to the College of Pontiffs, who were then patrician officers. He further informs us that this exclusive knowledge of the practical working of the law was maintained for a century and a half after the publication of the Twelve Tables. The first person that publicly professed to give information on points of law is said to have been Tiberius Coruncanius, the first plebeian Pontifex Maximus, consul in B.C. 280. During the two following centuries, however, the task of answering questions of law seems to have fallen chiefly on aged patricians that had held high public office; but from about a century before Christ the existence of a class of professional jurisconsults may be dated. Any one that had confidence in his own knowledge gave legal advice to such persons as had confidence enough in him to become his clients. During the republic it was entirely voluntary for a magistrate to accept, or for any one to submit to him, advice on points of law. Nevertheless, the ignorance of the prætor and of the *judices* naturally made them welcome the assistance that it was in the power of the jurisconsults to offer. In the first instance, the authority of the opinions of individual jurisconsults varied with the public estimation of their answers and of their writings. But Augustus, with a view to increase the authority of juristic opinions (and to have effective control over the profession), established a privileged class of authorised jurisconsults, to whose decisions special weight should attach.

The earliest collection of Roman laws, the *Jus Papirianum* of the regal period, has already been referred to. It was not till B.C. 304 that the full knowledge of the law was wrested from the patricians. In that year Cneius Flavius, the son of a freedman, and by profession (not a jurist, but) a public scrivener and notary, who had been employed as agent by Appius Claudius in that statesman's attempt to increase the political influence of the freedmen, obtained possession both of the various forms proper for the different kinds of process and of the lawful times of legal proceedings, and published

the whole of the sacred information. Flavius's calendar and list of technical forms was known as *Jus Flavianum.* To Appius Claudius himself (censor, B.C. 307) is attributed a work *De Usurpationibus*, now lost. A century later, about B.C. 200, Sextus Ælius Pætus Catus (curule ædile, B.C. 200; consul, B.C. 198) wrote a work in three parts (hence called *Tripertita*) containing the Twelve Tables, the interpretation of the Twelve Tables, and the *legis actiones.* This was designated *Jus Ælianum.* The jurisconsults of the century following are now represented by only a few legal opinions and scraps of writings, or mere references to such. M. Porcius Cato—either the censor (B.C. 234-149), or his son Licinianus (died about B.C. 152), both of whom bore a high reputation—and M. Junius Brutus (about the middle of the second century B.C.) wrote commentaries on the civil law. Fabius Pictor, a younger contemporary of Cato, set forth the *Jus Pontificium;* M. Manilius (consul, B.C. 149) treated of Actions; C. Sempronius Tuditanus (consul, B.C. 129) dealt at some length with the subject of Magistrates; and M. Junius Gracchanus, who derived his cognomen from his friendship with the famous tribune of the plebeians, C. Sempronius Gracchus, wrote on Roman constitutional and social history. Such men as these may be considered to have prepared for and to have ushered in the golden age of legal study. Q. Mucius Scævola the pontifex (consul, B.C. 95; died, B.C. 82), whom Cicero, his pupil, declares to have been the most eloquent of jurists, and the most learned jurist among orators, is regarded as the first to have published a complete system of the civil law. This work was arranged in eighteen books. He is the most ancient lawyer whose writings have furnished extracts to the compilers of the Digest. Another pupil of his, C. Aquillius Gallus, Cicero's colleague in the prætorship (B.C. 66), and a jurist of much consideration, was the instructor of Servius Sulpicius. L. Cincius (of the age of Cicero) wrote on the Calendar, the *comitia*, the power of the consuls, the office of jurisconsult, and war (six books at least); and he compiled a glossary of ancient words. Servius Sulpicius Rufus (consul, B.C. 51), the pupil of Aquillius Gallus, and one of the best orators as well as one of the best jurists of the age, wrote a large number of legal works, including a commentary on the edicts of the prætors. He, too, handed on the torch to distinguished pupils, chief of whom were Aulus Ofilius and Alfenus Varus. The latter produced a very extensive and important book called *Digesta.* Ofilius, besides imitating his master in writing on the prætorian edicts, was the teacher both of Capito and of Labeo. And C. Trebatius Testa, a trusted adviser of Augustus, who composed nine or ten books *de Religionibus* and several *de Jure Civili*, was also the teacher of Labeo.[1]

Functions of Jurisconsult.—The functions of a jurisconsult are summed up by Cicero (*De Orat.*, I, 48; *pro Mur.*, 9) in four words—*respondere, cavere, agere, scribere.* He was said *respondere*, when he stated the opinion he had formed on the facts of the case as submitted to him. This he would deliver to the client (at a later period, sealed with his seal, indicating imperial authorisation), and the client would place it before the *judex* in his own

[1] For the fragments of the Republican jurisconsults, see Huschke's *Iurisprudentiæ Anteiustin. quæ supersunt*, pp. 1-44.

writing or with his own attestation.[1] *Cavere* is to point out all the steps necessary for the enforcement or protection of the client's rights, and particularly the legal forms to be observed. *Agere* is to appear before the magistrate or the *judex*, and there give counsel in support of the client's interests. *Scribere* is to draw up legal instruments generally; it may also be stretched to include the composition of treatises on law.

The Roman law-student picked up his knowledge of law chiefly in the chambers of a jurist. It was always considered honourable, Cicero tells us, to impart instruction in the civil law, and the chambers of eminent jurists were filled with pupils. Cicero himself frequented the auditorium first of Q. Mucius the augur and afterwards of his still more distinguished relative, Q. Mucius the pontifex. Servius Sulpicius was similarly trained by Lucilius and Aquillius. Three stages of legal education are denoted in the Digest by the words *instituere*, *audire*, *instruere*—to lay the foundation of professional knowledge, to listen to the eminent jurist delivering his views in consultation, and to build up and complete one's professional acquirements. An advanced pupil was called the jurist's *studiosus;* a term probably implying that the pupil, although still attending in the jurist's chambers, was capable of doing business on his own account. Mr Poste thinks that, under the empire, "probably every lawyer was called a *juris studiosus* until by imperial diploma he had received the *jus respondendi* which made him a *juris auctor*." (Poste, *Gaius*, p. 147, 2d ed.)

From the manner wherein the jurisconsults modified the law, it is extremely difficult to specify the changes that ought to be ascribed to them. It is probably to them, however, that is due the extension of *glans* (an acorn) to every kind of fruit, and *tignum* (timber) to every kind of building material. Their influence was also felt in forms of conveyancing. Of these the most generally useful was the fictitious suit (*in jure cessio*), which, although resorted to long before the existence of jurisconsults as a professional class, was doubtless largely extended by them. It was by their ingenuity, as Cicero complains, that women were enabled to nominate their own *tutores*. The great bulk of Roman law, and all that is most valuable in it, is due to the activity of the jurisconsults, down to the end of the second century of the Christian era: a glance at the Table of Statutes and Constitutions shows how small was the amount contributed by direct legislation.

V. THE CRIMINAL COURTS OF THE REPUBLIC.

The Comitia.—In theory the supreme jurisdiction in criminal cases always rested with the people in their assemblies; although in fact it began at an early date to be delegated to commissions. The cognisable offences were at no period formally set forth in the laws, but were chiefly determined and defined by custom, and by the public opinion of the time. The presiding magistrate was the prosecutor. He had previously given formal notice, at a public meeting, that he intended to summon the *comitia* on a particular

[1] D., 1, 2, 47. But jurists were also consulted on all sorts of business matters outside the sphere of litigation. Cicero specifies the marriage of a daughter, the purchase of an estate, and the cultivation of a field. (*De Orat.*, 3, 33.)

day for the impeachment of the accused (*diem dicere alicui*), who was thrown into prison till the day of trial, unless he found sureties for his due appearance. On the day of trial, the magistrate preferred the charge, and supported it by evidence (*anquisitio*); after which he laid before the *comitia* a bill embodying the penalties he proposed to inflict on the accused. This bill the *comitia* dealt with, accepted or rejected, in the usual manner. They might act in precise accordance with a clear provision of the law, or they might adapt a provision of some existing law to the more or less similar circumstances of the particular case, or they might ground their decision on some previous decisions in similar cases not embodied in any law; or they might be guided in their judgment merely by the general feeling of the time in regard to the particular offence. The criminal legislation of the period was by no means extensive.

Special Commissions (*Quæstiones*).—In the history of the kings there is mention of *Duumviri*, to whom Tullus Hostilius delegated the trial of Horatius; and to the same early period belong the *Quæstores Parricidii* for the trial of capital cases. Owing presumably to the difficulty of properly conducting complicated cases before a court so little fitted for exhaustive investigation and patient discrimination of evidence, and probably under the influence of the senate, there grew up, in the early Republic, a similar practice of delegating the judicial power of the *comitia* in particular criminal cases to one or two persons called *Quæsitores* or *Quæstores* (Investigators, or Triers). These were special commissioners, who sat as judges to investigate the facts of the particular cases referred to them. They were no doubt elected by the *comitia*, although the senate, in matters within its jurisdiction, also usually appointed a senator as a Quæstor. The Quæstor was always assisted by a jury or body of assessors (*consilium*). These were chosen exclusively from the senators, until the passing of the *lex Sempronia* (B.C. 123), after which the area of selection varied considerably (see page 45). The opinion of a majority of the jury decided the verdict of the court, which, whether in accordance with the opinion of the judge or otherwise, was final. The first special commission recorded under the Republic belongs to the year B.C. 413, on which occasion the *comitia tributa*, at the instance of the senate, and with the concurrence of the *comitia centuriata*, appointed the consuls as *Quæstores* to inquire into the murder of M. Postumius, a tribune of the soldiers with consular power.[1] The plan seems to have worked successfully; and it was an easy transition, first from a commission for a particular case to a commission for all cases of the same kind awaiting trial at the same time, and next to a permanent tribunal for the trial of all cases of a particular nature.

Standing Commissions (*Quæstiones Perpetuæ*).—The *Quæstiones Perpetuæ* were permanent or Standing Commissions[2] for the trial of particular classes of offences. The first of these courts was instituted by the

[1] "Senatusconsultum factum est ut de quæstione Postumianæ cædis tribuni primo quoque tempore ad plebem ferrent plebesque præficeret quæstioni quem vellet. A plebe consensu populi consulibus negotium mandatur." (Liv. iv. 51.)

[2] They were designated *perpetuæ* in opposition to the special commissions. *Perpetuæ*, as in the expression *edictum perpetuum*, means simply lasting through the year

lex Calpurnia, B.C. 149, for the trial of persons charged with malversation in the provinces (*repetundæ*).[1] The next was the court that took cognisance of bribery at elections (*ambitus*), which is supposed to have been created by the *lex Maria*, B.C. 119.[2] The impairment or degradation of the dignity of the Roman people, or of such persons as they invested with authority (*majestas*) does not appear as a crime in enactments earlier than the *lex Appuleia*, about B.C. 100.[3] There existed in B.C. 90 (although the date of institution is unknown) a court for cases of embezzlement of public property (*peculatus*).[4] More courts were created by *leges Corneliæ* of Sulla, B.C. 81: for *vis* (forcible obstruction of the administrative authorities or officers);[5] for *parricidium* (murder),[6] and *incendium* (arson),[7] by *lex Cornelia de sicariis et veneficiis;* and for *falsum* (forgery, including coinage of base money and bribed evidence).[8] These were the most important of the standing commissions. The legislation of Sulla confirmed and expanded the growing systematisation of the criminal law, and drew within the cognisance of these specialised tribunals very nearly the whole of the ordinary criminal business of the state. Each court was established by a law, which defined the crime and the punishment of persons that should fall under its jurisdiction, and regulated its constitution and procedure. The theoretical supremacy of the *comitia* remained; and the *comitia* continued directly to exercise their judicial power in all cases not provided for by a standing commission—for instance, in cases of *perduellio* (high treason), which were always tried

---

of office of the presiding magistrate, the principle of the tribunal alone being "perpetual," or established for an indefinite period.

[1] The laws *de repetundis* were: (1) *lex Calpurnia*, B.C. 149; (2) *lex Junia*, between 149 and 122, about 134; (3) *lex Acilia*, about 122; (4) *lex Servilia* of Glaucia, about 111; (5) *lex Cornelia* of Sulla, 81; (6) *lex Julia* of Cæsar, 59.

[2] The laws *de ambitu* were: (1) *lex Cornelia Baebia*, B.C. 181; (2) *lex Cornelia Fulvia*, 159; (3) *lex Maria*, 119; (4) *lex Fabia;* (5) *lex Acilia Calpurnia*, 67; (6) *lex Tullia*, 63; (7) *lex Licinia*, 55; (8) *lex Pompeia*, 52; (9) *lex Julia* of Augustus, 18. As early as B.C. 432 a plebiscitum had been passed forbidding candidates to wear a conspicuous dress: and the *lex Poetelia*, B.C. 358, discountenanced excessive zeal in canvassing.

[3] The laws *de majestate* were: (1) *lex Appuleia*, B.C. 102 or 100; (2) *lex Varia*, 92; (3) *lex Cornelia*, 81; (4) *lex Julia* of Cæsar, which was revived and oppressively extended under the empire.

[4] The law establishing this court remained valid till the *lex Julia* (of Cæsar or Augustus). The *lex Julia* included *sacrilegium* (stealing or injuring religious property) and the *crimen de pecuniis residuis*.

[5] The laws *de vi* were: (1) *lex Plautia*, B.C. 89; (2) *lex Cornelia*, 81, establishing the *Quæstio Perpetua de vi;* (3) *lex Lutatia*, 78, supplementary to *lex Plautia;* (4) *lex Pompeia*, 52 (temporary, with special reference to the murder of Clodius and the subsequent disturbances); (5) *lex Julia* (of Cæsar), 46, superseding previous laws. By the last, or by *leges Juliæ* of Augustus, *vis publica* and *vis privata* are pointedly distinguished.

[6] Somewhat modified by the *lex Pompeia de Parricidiis*, B.C. 55.

[7] When connected with a riot, *incendium* also fell under the *lex Pompeia de vi* and the *lex Julia de vi*.

[8] The penalty of all the Cornelian laws was exile (*aquæ et ignis interdictio*).

before the *comitia*, or before special commissioners, when not included under *majestas* or *vis*. The senate possessed no criminal jurisdiction over citizens, although it regularly tried state crimes committed by the allies, and had always assumed the unconstitutional right of initiative in cases of exceptional emergency. Unimportant crimes were dealt with by the magistrates possessing *imperium*, and punished by imprisonment, fine, or even flogging.

The presiding judge of the standing commissions was not elected directly by the *comitia;* he was either one of the prætors or a special *Judex Quæstionis*, and the prætor was nominated by the law creating the particular court. By the *lex Calpurnia*, for instance, and again by the *lex Acilia*, the presidency of the court *de repetundis* was naturally conferred on the alien prætor. But the great increase of civil business soon gave full occupation to both the alien and the city prætor, and the remaining four prætors, instead of proceeding to their several provinces on election, were detained for a year at home to preside in the criminal courts. Sulla increased the courts to eight or nine, and the prætors to eight, six of whom were now free to preside at criminal trials. They distributed the courts among them by lot. For each of the courts not provided with a praetor as president, a supplementary judge, called *judex quæstionis*, was appointed. Concerning the *judex quæstionis* little is known. He sat for the prætor, with equal authority, as president of a criminal commission. Unlike the prætor, he was required to take an oath on assuming office. How he was appointed, whether by the comitia or by the prætor, or by the special law of the court, is not known; neither can we tell whether he was appointed for some department of the work of the court, or for the particular occasion, or as a permanent deputy. Two commissions were not given to one person; and, while there were fewer spare prætors than there were criminal courts, the most obvious way of supplying presidents was to appoint a *judex quæstionis* for each judgeless commission. The necessity for the continuance of this appointment was finally obviated by the great increase of prætors under Julius Cæsar and Augustus. The presiding judge was charged solely with the administration of the provisions of the law governing his particular court. He had no voice in the decision, which was wholly a matter for the jury. But an unfair judge might indirectly sway the trial, by urging embarrassing technicalities, or by falsely reporting the verdict as shown by the state of the ballot.

The classes that the jury (*judices*) were drawn from, their qualifications for office, their number, and the successive judiciary laws relating to them, have been already fully set forth (page 44).

Under the *Quæstiones Perpetuæ* the procedure was pretty much the same in all the courts. The general course was this. The intending impeacher (it was now open to any citizen to prosecute) applied to the president of the court that took cognisance of the kind of charge to be brought, for leave to prefer an accusation (*postulatio*). If two or more persons made simultaneous application, a jury decided which of them should be the impeacher (*divinatio*). The impeacher then formally stated the name of the accused and the crime to be charged against him (*nominis* or *criminis delatio*). The accused was next cited before the prætor, and the charge was preferred against him in person (*citatio*); upon which he was interrogated for the purpose of eliciting admis-

sions, so as to narrow the issues to be tried (*interrogatio*); and a formal charge was thereupon drawn up (*inscriptio*) and signed by the impeacher and his supporters (*subscriptio*). The judge then formally registered the name of the accused (*nominis receptio*), and appointed a day for the trial, which, unless fixed by the special law regulating the *quæstio*, or varied by other special circumstances (such as difficulties in procuring the evidence), was generally the tenth day following. On the day of trial, the jury was chosen by ballot from the available list, unless the special law regulating the *quæstio* ordained otherwise; and, if any of them failed to appear when called, the judge had power to enforce their attendance or to punish their absence. If the impeacher did not appear, the accused was instantly discharged; but a fresh process might be instituted. If the accused did not appear, sentence was pronounced against him, late in the day, in terms of the special law of the court. Both impeacher and accused might conduct their own case, or obtain the assistance of counsel and friends.

On the conclusion of the evidence, the jury gave their verdict, at first openly, but after the *lex Cassia* (B.C. 137) by ballot. It might be expressed in any one of three forms—*Not Guilty* (*Absolvo*), *Guilty* (*Condemno*), and *Doubtful* (*Non Liquet*). Equal votes were construed favourably to the accused. In case of *Doubtful*, the judge said *Amplius* ("Further," "More fully"), and the cause was heard a second time, or oftener (*ampliatio*), until the jury were able either to acquit or to condemn. About B.C. 111, however, the *lex Servilia* of Glaucia discontinued *ampliatio* and introduced *comperendinatio*, or the deferring of the trial at the point of the verdict to the next day but one following.[1] There were now two stages in the trial. In the first stage (*actio prima*), both sides stated their case, examined the witnesses, and summed up the evidence; the proceedings were now suspended till the day after the morrow, when the second stage (*actio secunda*) came on, and both parties could bring forward fresh evidence and discuss the case over again. At the end of the second hearing, the jury must either acquit or condemn; they were not permitted to declare that they could not make up their minds (*Non Liquet*). The *lex Servilia* ruled the trials *de Repetundis* down to the time of Sulla. Zumpt maintains that, after the laws of Sulla, *comperendinatio* still remained in trials for all official crimes (*Amtsverbrechen*), while for all common crimes the *ampliatio* was introduced. By the *lex Aurelia* (B.C. 70), as he holds, *comperendinatio* was abolished, but *ampliatio* did not succeed to its place. A single *actio* was substituted—which, however, might last for several days—so that it was no longer competent to vote a fresh hearing, and it was necessary to pronounce a final judgment. (Zumpt, *Criminalrecht d. Röm. Rep.*, II. 2,

[1] Cicero (*in Verr.* II. 1, 9) says the *lex Acilia* permitted no *ampliatio* or other adjournment after all was ready for the verdict. He also ascribes the introduction of *comperendinatio* to the *lex Servilia* of Glaucia, before which he says *ampliatio* was permitted. But the *lex Acilia repetundarum* permitted *ampliatio* (Bruns, *Fontes Iur. Rom. Ant.*, p. 52); and Cicero's statement either applies to another *lex Acilia*, or is mistaken. A further alternative is—that the *lex repetundarum* given by Mommsen and Bruns as the *lex Acilia* is neither the *lex Servilia* nor the *lex Acilia*. Mommsen, however, rejects Cicero's statement as to the *lex Acilia*—"*ipsis Ciceronis verbis pessime lectis*"—and unravels the whole question. (*Corp. Inscr. Lat.* I. 55.)

127; 211; 214). The jury further estimated the penalty of the accused on condemnation (*litis æstimatio*), if pecuniary; and in this they were guided by the special law of the court, which prescribed perhaps double, treble, or quadruple the amount charged against the accused.

VI. REPUBLICAN SOURCES OF LAW.

During the Republic there were three direct and three indirect sources of law.

Formally and directly law emanated chiefly from the two popular assemblies, and to a certain small extent from the senate.

A *lex* (or *populi-scitum*), or statute, was an enactment passed by the *comitia centuriata*, on the proposal of a senatorial magistrate,—for instance, a consul or a prætor. From first to last *leges* were binding on the whole people, patricians and plebeians alike.

A *plebiscitum* was an enactment passed by the *comitia tributa*, on the proposal of a plebeian magistrate,—usually a tribune. At first *plebiscita* were binding on the plebeians alone. By the *lex Hortensia*, B.C. 287, however, it was finally settled that they should be binding on the whole people, patricians and plebeians alike. They were commonly designated *leges;* as *lex Canuleia*, *lex Aquilia.*

For the last half of the republican period these two independent legislative bodies worked side by side with surprising harmony and mutual forbearance. Perhaps this absence of serious discord was considerably due to the superior interest of each in different matters. The *comitia tributa* seems to have concerned itself chiefly with private law, while the *comitia centuriata* attended to matters of government and foreign relations. During the latter half of the Republican period the plebiscites became of increasing importance.

A *Senatusconsultum* was a resolution passed by the senate, and not vetoed by a tribune of the plebeians. The senate never possessed or claimed the right to make or to repeal a law. But in the early half of the Republic they appear to have insisted on revising and sanctioning all bills that were to be submitted to the *comitia;* and a law of B.C. 67 seems to have stopped their occasional assumption of the right to suspend temporarily, in favour of an individual, the operation of a law. Further, the senate, of its own authority, was in the habit of issuing administrative edicts that possessed the force of law in such matters as were not provided for by any existing law. (See Appendix II. to this section, p. 65.)

The three informal or indirect sources were—the Edicts of the magistrates, and especially of the prætors, long-continued and generally recognised customs, and the opinions delivered by the jurisconsults. The two last were commonly rendered effective through absorption in the prætorian edicts.

To the above-named sources of written law, Cicero adds previous decisions (*res judicatæ*) and equity (*æquitas*).

"The legislative power of the popular assembly and the absence of legislative power in the senate and the prætor were marked by a difference of style in the lex and plebiscite, edict and decree of the senate: while the lex

and plebiscite employed the imperative (*damnas esto, jus potestasque esto, etc.*) the resolutions of the senate scrupulously avoid the imperative, and are clothed in the forms *placere, censere, arbitrari*, etc., as if they were rather recommendations than commands; and the edicts and interdicts of the prætor are couched in the subjunctive (*Exhibeas, Restituas, etc.*), a milder form of imperative. Or to show that their force and operation is limited to his own tenure of office, they are expressed in the first person (*actionem dabo, ratum habebo, vim fieri veto*). When he has authority to command, he shows it by using the imperative, as in addressing litigants (*mittite ambo hominem, inite viam, redite*), or the judge (*condemnato, absolvito*)." (Poste, Gaius, I, 1-7 comm., p. 36 (2d ed.). After Ihering, *Geist des Röm. Rechts*, 47.)

APPENDIX I. TO THE FOREGOING SECTION.

REPUBLICAN LEGES.

The following is a conspectus of the most important *leges* (including *plebiscita* and a few *privilegia*) that have come down to us with particular titles from the period of the Republic. It may be noted that a *lex* generally took its title from the gentile name of its proposer, as *lex Hortensia*; sometimes from the two consuls or the magistrates, as *lex Acilia Calpurnia, lex Papia Poppæa*; sometimes from its object, as *lex Sempronia judiciaria* or *lex Cincia de donis et muneribus*:—

B.C.

508. *Leges Valeriæ*, securing annual magistracies and right of appeal.

? 492. *Lex Icilia*, forbidding tribune to be interrupted while speaking, or dispersal of assembly of tribes. B.C. 470 is also given.

486. *Lex Cassia, agraria.*

? 472. *Lex Pinaria*, giving *judex* (in sacramental procedure) on 30th day instead of at once. Voigt and Muirhead prefer B.C. 432; against Mommsen, Rudorff, Huschke.

471. *Lex Publilia*, permitting the tribes to elect the *tribuni plebis.*

456. *Lex Icilia*, assigning the Aventine to the plebs.

455. *Lex Aternia Tarpeia*, empowering magistrates to fine persons resisting their authority, and fixing maximum fine.

449. The Twelve Tables.

449. *Lex Duilia*, against leaving the people without tribunes, or creating magistrates *sine provocatione.*

449. *Leges Valeriæ-Horatiæ*, enacting that *plebiscita*, after confirmation of the *patres*, should bind the whole people; giving right of appeal; and guaranteeing inviolability of tribunes, ædiles, etc. (plebeian magistrates).

448. *Lex Trebonia*, election of tribunes.

445. *Lex Canuleia*, conceding *conubium* of patricians and plebeians.

434. *Lex Æmilia*, censors to hold office for a year and a half only.

430. *Lex Julia Papiria*, fixing money values in fines instead of sheep and cattle values.

? 390. *Lex Apuleia*, sureties. So Rudorff and Huschke. Also referred to 230 (Voigt), and 102 (Appleton, Poste, Sandars).

? 383. *Lex Publilia, de sponsu.* (Less probably, 399.)

B.C.

367. *Leges Liciniæ*, election of consuls, one to be a plebeian ; *ager publicus ;* interest paid on loans to be considered as so much in repayment of principal ; decemvirs (half of them plebeians) to keep Sibylline books.

358. *Lex Pœtelia*, against too zealous canvassing ; first *lex de ambitu.*

357. *Lex Manlia*, imposing tax of five per cent. on value of manumitted slave.

352. *Lex Marcia*, against usury.

342. *Lex Licinia*, re-enacted ; both consuls may be plebeians.

341. *Lex Genucia*, forbidding usury.

339. *Leges Publiliæ, patrum auctoritas* unnecessary to validity of *plebiscita ; patrum auctoritas* to be given before voting in comitia centuriata ; one of the two censors to be a plebeian.

332. *Lex Papiria*, granting *civitas sine suffragio* to the Accerani.

325 or 313. *Lex Pœtelia, de nexis.*

300. *Lex Ogulnia*, plebeians admitted as pontiffs and augurs.

300. *Lex Valeria*, right of appeal.

287. *Lex Hortensia*, resolutions of tribes to bind all citizens, directly.

? 287. *Lex Aquilia*, introducing *actio damni injuriæ.*

? 287. *Lex Mœnia, patrum auctoritas* unnecessary to election of magistrates.

? 244. *Lex Silia*, de ponderibus. So Haubold and Rudorff. Bruns (42) thinks the grounds uncertain.

? 244. *Lex Silia*, introducing (as Gaius says ; or regulating, as Sir H. S. Maine thinks) *condictio*, for cases of *certa pecunia.* So Huschke. Ihering places it in first half of the fifth century U.C. (B.C. 350-300) ; Voigt, B.C. 443-425. (Cf. Muirhead, p. 277, note to *Gaius*, iv. 19.)

? 234. *Lex Calpurnia*, extending *condictio* to cases of *omnis certa res.*

? 243-124. *Lex Papiria, de sacramentis.* (Bruns, 43.)

232 or 228. *Lex Flaminia, agraria.*

215. *Lex Oppia*, sumptuary.

204. *Lex Cincia, de donis et muneribus.* (Bruns, 43.)

198. *Lex Atinia*, prohibiting usucapion of *res furtivæ.* (Cf. Bruns, 43.)

193. *Lex Sempronia, de fenore.* making the law of money lent the same for Socii and Latini as for Roman citizens.

192 or 180. *Lex Baebia*, ordaining that four and six prætors should be elected alternately ; not observed.

Before 186. *Lex Atilia*, authorising city prætor and majority of plebeian tribunes to appoint tutor, at Rome.

254-184. *Lex Plœtoria*, in favour of minors. Referred to by Plautus (B.C. 254-184).

? 183. *Lex Furia, testamentaria*, limiting amount of legacies.

181. *Lex Orchia*, sumptuary.

181. *Lex Cornelia Baebia, de ambitu.*

179. *Lex Annalis* or *Villia*, fixing minimum age of candidates for the higher magistracies.

? 173. *Lex Cicereia*, sureties. (Gaius, iii. 123.)

? 170. *Lex Æbutia*, introducing the Formulary Procedure. Date very uncertain ; conjecture ranges from middle of fifth to middle of seventh century U.C. (B.C. 300-100.) Muirhead prefers about B.C. 247 (p. 283, *Gaius*, iv. 30, note). Poste, about 170.

169. *Lex Voconia*, imposing disabilities on women as to succession, and limiting amount of legacies. (Cf. Muirhead, p. 153 ; *Gaius*, ii. 226 note.)

161. *Lex Fannia*, sumptuary.

B.C.

159. *Lex Cornelia Fulvia, de ambitu.*
149. *Lex Calpurnia, repetundarum.*
143. *Lex Didia,* sumptuary.
139. *Lex Gabinia, jubellaria,* introducing ballot in election of magistrates.
137. *Lex Cassia, tabellaria,* introducing ballot in *judicia populi* (except for *perduellio:* cf. *Lex Cœlia,* B.C. 107).
? 134. (149-122.) *Lex Junia, repetundarum.*
133. *Lex Sempronia, agraria.*
131. *Lex Papiria, tabellaria,* introducing ballot in enactment and repeal of laws.
? 130. *Lex Atinia,* giving senatorial rank to tribune.
126. *Lex Junia, de peregrinis,* banishing aliens from the city.
123. *Lex Sempronia, de capite civium Romanorum,* enacting that the people alone should decide on the *caput* of a citizen.
123. *Lex Sempronia, judiciaria.*
123. *Lex Sempronia, ne quis judicio circumveniretur.*
123. *Lex Sempronia, de provinciis consularibus* (repealed by Cæsar).
122. *Lex Fannia,* banishing Latini and Italici from the city.
? 122. *Lex Acilia, repetundarum.* Mommsen seems to have shown that it must be placed 123-121; Zumpt prefers a few years later, say 118.
119. *Lex Maria, de ambitu,* supposed to have established the *Quæstio Perpetua.*
119. *Lex Thoria, agraria,* as to land tax (*vectigal*). (Cf. Bruns, *Lex Agraria,* 67.)
119-67. *Lex Fabia, de ambitu.*
? 111. *Lex Servilia, repetundarum,* of Glaucia.
107. *Lex Cælia, tabellaria,* introducing ballot in cases of *perduellio* (supplementing *lex Cassia,* B.C. 137).
106. *Lex Servilia, judiciaria,* of Cæpio. If ever passed, was very soon swept away.
104. *Lex Cassia,* compelling demission of senatorship in certain cases.
104. *Lex Marcia, agraria.*
? 103. *Lex Licinia,* sumptuary.
102 or 100. *Lex Appuleia, majestatis.*
100. *Lex Appuleia, agraria.*
95. *Lex Licinia Mucia, de civibus regundis,* scrutinising title to citizenship.
? 95. *Lex Furia, de sponsu.* (Gaius, iii. 121; iv. 22.) Usual date, 95. But Rudorff gives B.C. 345; Huschke, beginning of fifth century U.C. (about B.C. 350 or later); Voigt, 218; Bruns, second half of sixth century (B.C. 204-154), holding that it must have been later than *lex Cincia* (204); Appleton, 100 or 99. See Muirhead, p. 221, *Gaius,* iii. 121, note.
91. *Lex Livia, judiciaria.*
90. *Lex Julia,* as to the Tribes; and giving citizenship to Latini and Socii.
89. *Lex Plautia Papiria,* as to the Tribes; and giving citizenship to aliens being citizens of federate states.
89. *Lex Pompeia,* giving citizenship to Cispadani, and Latinitas to Transpadani.
89. *Lex Plautia, judiciaria.*
89. *Lex Plautia, de vi.*
88. *Lex Sulpicia,* as to the Tribes, and new citizens.

B.C.

81. *Lex Cornelia, de falsis*, also called *testamentaria*. Under favourable construction of this law (*beneficio legis Corneliæ*, Paul., *Sent.* iii. 4A, 8) comes provision as to wills of citizens dying in captivity. Sandars ad J., ii. 12, 5. Cf. Ulp. xxiii. 5. Others refer this provision to a *Lex Cornelia de captivis*, B.C. 67.
81. *Lex Cornelia, judiciaria*.
81. *Lex Cornelia, repetundarum*.
81. *Lex Cornelia, de XX. quæstoribus*. (Bruns, *Fontes*, 82.)
81 (83-80). *Lex Cornelia, de sicariis et veneficiis*. (Bruns, *Fontes*, 85.)
81. *Lex Cornelia, de sponsoribus*. So Huschke and Poste. Voigt, B.C. 327.
81. *Lex Cornelia*, sumptuary.
80. *Lex Cornelia, tribunitia*, diminishing the power of the tribunes.
Before 80. *Lex Remnia*, branding for calumny. (Cic. *pro Rosc. Amer.*, 19, 20.)
78. *Lex Æmilia*, sumptuary.
78. *Lex Lutatia, de vi*.
71. *Lex Antonia, de Termessibus*. (Bruns, 85.)
70. *Lex Pompeia, tribunitia*, restoring the powers of the tribunes taken away by Sulla, B.C. 80.
70. *Lex Aurelia, judiciaria*.
67. *Lex Acilia Calpurnia, de ambitu*.
67. *Lex Cornelia, de captivis*. See *Lex Cornelia de falsis*, B.C. 81.
67. *Lex Cornelia:* prætor must abide by his edict.
65. *Lex Papia*, banishing from the city persons not domiciled in Italy.
63. *Lex Tullia, de ambitu*.
62. *Lex Cæcilia, de vectigalibus*, untaxing lands and harbours in Italy.
60. *Lex Flavia, agraria*.
59. *Lex Julia, agraria*.
59. *Lex Julia, repetundarum*.
58. *Lex Clodia*, attacking censorship.
55. *Lex Licinia, de ambitu*.
55. *Lex Pompeia, judiciaria*.
55. *Lex Pompeia, de parricidiis*.
54. *Lex Cœcilia, de censoribus*, repealing *lex Clodia*, B.C. 58.
52. *Lex Pompeia, de ambitu*.
52. *Lex Pompeia, de vi*.
49-42. *Lex Rubria, de Gallia Cisalpina*. (Bruns, 91.)
47. *Lex Julia* (*de fenore* or) *de pecuniis mutuis* or *creditis*.
46. *Lex Julia, judiciaria*. Supposed to be one of the *leges Juliæ* (Gaius, iv. 30), restricting *legis actiones*. Cf. *lex Julia judiciaria*, B.C. 25.
? 46. *Lex Julia, de vi*. May belong to Cæsar or Augustus. (Bruns, 104.)
45. *Lex Julia, municipalis*. (Bruns, 95.)
44. *Lex Ursonitana s. Coloniæ Juliæ Genetivæ*. Cæsar's charter to Latin colony at Urso, near Seville. See references collected in Muirhead, p. 9, *Gaius*, i. 22, note, and Bruns, *Fontes*, 110 following.
? . *Lex Julia*, sumptuary.
? . *Lex Julia, de annona*. May belong to Cæsar or to Augustus.
40. *Lex Falcidia*, reserving one-fourth of inheritance to testamentary heir. (Bruns, 103.)
39. *Lex Quinctia, de aquæductibus*. (Bruns, 105.)
34. *Lex Scribonia*, prohibiting usucapion of servitudes.

Of quite uncertain date are the following:—

Lex Creperia (so Studemund, Gaius, iv. 95), fixing *sponsio* in centumviral causes at 125 sesterces. Huschke takes the reference to be to the *lex Julia Papiria*, B.C. 430. See Muirhead, p. 316, *Gaius*, iv. 95, note 4.

Lex Minicia (so Studemund, formerly *Mensia*, Gaius, i. 78-79. Cf. Ulp., v. 8), as to status of children of parents of different condition.

Lex Vallia (so Studemund, formerly *Valeria*, Gaius, iv. 25), amending procedure by *manus injectio*. Later than *lex Furia*, which may safely be thrown back a century beyond the usual date.

APPENDIX II. TO THE FOREGOING SECTION.

SENATUSCONSULTA.

Examples of *senatusconsulta* under the Republic may be seen in Bruns, *Fontes*, pp. 145-151: *sc. de Bacchanalibus* (B.C. 186); *sc. de Philosophis et Rhetoribus* (B.C. 161); *sc. de Tiburtibus* (seventh century U.C.); and *sc. de Asclepiade Clazomenio sociisque* (B.C. 78).

A specimen of a *senatus auctoritas* (B.C. 51) is given in Bruns, 154.

CHAPTER IV.

FROM AUGUSTUS TO JUSTINIAN (B.C. 31—A.D. 565).

I. PUBLIC EVENTS AND IMPERIAL ENACTMENTS.

The Political Transition.—From the day of the battle of Actium (B.C. 31) the Roman world lay at the feet of Octavian (Augustus). Warned by the fate of his uncle, the victor, while securing his personal supremacy, conciliated the people by an ostentatiously assiduous regard for the forms of popular government. Gradually but surely he gathered into his own hand all the important powers exercised by the republican magistrates, at the same time permitting the senate practically to supersede the *comitia* as representative of the people. In the convulsive strife of personal ambitions the senate had strengthened their authority, and it suited the professed humility of Octavian's policy to accept at their hands the honours of the state. In B.C. 29 they conferred on him the title of *Imperator*, implying the possession of supreme power; in B.C. 28, the title of *Princeps Senatus;* in B.C. 27, *Augustus;* in B.C. 23, tribunician power and proconsular authority; in B.C. 19, consular power; and in B.C. 12, the title of Pontifex Maximus. In B.C. 27, the provinces were divided, as we shall see further, between the emperor and the people (or the senate), but the command of the troops secured all substantial power to the emperor. Thus the whole power of the Roman empire was laid, with every show of constitutional procedure, in the hollow of the emperor's hand. Magistrates with republican titles, indeed, still continued

to be elected and to exercise their functions, but their real power was transferred piecemeal to new imperial magistrates, and they were all overshadowed by the active predominance of the emperor.

A like fate attended the *comitia*. For many years the *comitia curiata* continued to pass *leges curiatæ* in confirmation of adoptions. It was gradually superseded, however, by the senate, whose consent was considered sufficient; and at length Diocletian enacted (A.D. 286) that the permission of the emperor, published in the court of the prætor or of the president of a province, should have the force of the ancient law. The *comitia centuriata* and *tributa*, again, apparently ceased after Pharsalia (B.C. 48) to be consulted on war and peace, and under Augustus they lost all jurisdiction, theoretical as well as actual, in criminal trials. They were still summoned to consider bills; but this power also was gradually superseded by the constitutions of the emperor and the resolutions of the senate passed with his approbation, and died out just before the end of the first century after Christ. As late as the second century, they were still assembled for the election of magistrates; but they had long ceased to possess an atom of real authority, for Augustus, following the example of Julius Cæsar, recommended (*commendo vobis*) the consuls and one-half of the candidates for each of the other magistracies, and under Tiberius all the magistrates not recommended by the emperor were put forward by the senate. By the end of the third century they had ceased to be summoned even to go through the form of sanctioning the choice of the emperor and the senate.

Augustus (B.C. 31—A.D. 14).—The political situation under Augustus has just been explained. The changes in the law effected by him referred mainly to three matters. (1) The *lex Julia de Maritandis Ordinibus*, rejected by the *comitia tributa* in B.C. 28, and not passed till B.C. 18, or even (as others think) A.D. 4, was supplemented by the *lex Papia et Poppæa* in A.D. 9. Apart from the separate titles, these laws were also spoken of as the *leges* (or *lex*) *Julia et Papia*, or *novæ leges*, or simply *leges*. The scope of these enactments, the most extensive after the Twelve Tables, was intended to be wide enough to touch every source of the abounding moral depravity, which was ruinously thinning the ranks of legitimate citizens. "Not only marriage," says Ortolan, "but everything even remotely connected with it—betrothal, divorce, dower, gifts between husband and wife, concubinage, inheritance and the period allowed for entrance upon it, legacies and their devolution, *dies cedens*, the capacity or the incapacity of beneficiaries to receive—in fine, the rights, privileges, or particular dispensations granted under divers special circumstances to fathers or to mothers who had children, or who had a specified number." (Ortolan, *History of Roman Law* (Prichard and Nasmith), sec. 70, par. 370, p. 309.) These marriage and paternity laws were diligently commented on by the jurists, as appears from the fragments of various treatises *ad legem Papiam* preserved in the Digest. They suffered very gradual extinction at the hands of Caracalla, Constantine, and Justinian. (2) *Fideicommissa* and codicils, embodying informally the last wishes of testators, were more liberally considered and protected on equitable grounds. For such cases two special prætors (*fideicommissarii*) were appointed under Claudius, one of whom was suppressed under Titus. (3) By the *lex Ælia Sentia* (A.D. 4) and the *lex Fufia Caninia* (A.D. 8), severe

restrictions were placed on the enfranchisement of slaves. The freedmen were felt to be too numerous.

In the reign of Augustus, seven centuries and a-half after the foundation of Rome, Jesus Christ was born at Bethlehem, in Judæa. The influence of Christ's teaching on the Roman law will be considered presently.

Tiberius (A.D. 14-37).—The mantle of assumed moderation and humility fell from Augustus on the shoulders of Tiberius. Under him, however, the popular election of magistrates was transferred to the senate, which was further occupied in busily pronouncing sentence of death for the elastic crime of treason. The chief enactment of the reign was the *lex Junia [Norbana]* (A.D. 19), modifying the position and rights of freedmen.

Hadrian (A.D. 117-138). — Beyond the *prætores fideicommissarii* of Claudius (A.D. 41-54) and Titus (A.D. 79-81), there is nothing to remark on the times from Tiberius to Hadrian, except the violent supremacy of the army and the tragical fate of successive emperors. Under Hadrian a new order of things seems to arise ; or perhaps, to some extent, it is now that the storms clear away, discovering the existence of numerous changes hitherto unperceived. Italy is divided into four provinces, administered from Rome under consular governors, who, at a later period, were succeeded by *correctores* or *præsides*. The *auditorium*, a section of the *consistorium*, of the emperor, is constituted a separate council. The prætorian prefects have added civil to military jurisdiction. The means of appeal are more carefully organised, from inferior magistrates to superior, and at last to the emperor. The Perpetual Edict is finally arranged and authorised. The opinions of the jurists are for the first time, on condition of being unanimous, recognised as written law. Constitutions of the emperors, although none are definitely ascribed to an earlier date, have probably been issued for a century previously.

Antoninus Pius (A.D. 138-161) engaged at the public expense teachers of philosophy to conduct classes both at Rome and in the provinces. He alleviated the lot of the slave, by making cruel treatment a ground of compulsory sale.

Antoninus Caracalla (A.D. 211-217).—On the assassination of Commodus (A.D. 193), an outburst of military violence, during which the empire was actually sold by auction to the highest bidder, was succeeded by the reign of Septimius Severus (A.D. 193-211), a pupil and admirer of Papinian, and then by that of Caracalla, the great jurist's murderer. Caracalla extended the rights of citizenship to every subject of the Roman empire ; an act that did not affect the laws of enfranchisement, or interfere with the judicial condemnation of citizens to loss of rights of citizenship. He also modified the *leges Julia et Papia*, doubling (increasing from one twentieth to one-tenth) the duty on enfranchisement, inheritance, legacies, and *donationes mortis causa*, and sweeping the *caduca* of *coelibes* and *orbi* into the *fiscus*.

Diocletian (A.D. 284-305). — From the time of Alexander Severus (A.D. 222-235), the study of jurisprudence declined, and almost died out, not to be revived with any brilliancy till the rise of Tribonian in the time of Justinian, three centuries later. For the next fifty years, down to Diocletian, the political history is simply a bloody chronicle of the making, unmaking,

and murdering of emperors. In the meantime the Christian religion was silently and rapidly permeating the empire, undermining the formal institutions of the pagan worship, strengthening the practical application of the equitable conception of law, and steadily making its way under the encouragement of severe persecutions—one of the most severe occurring under Diocletian (A.D. 303). The attitude of the tribes pressing on the northern frontiers was seriously menacing the integrity of the empire. By every incursion they gained some advantage; they either carried off considerable booty, or retired with bribes from the treasury of a weak emperor. They were temporarily borne back by Diocletian, who braced up the discipline of the Roman legions, and directed them with energy. In 286 he assumed Maximian as a colleague, created him Augustus, and entrusted him with the defence of the western empire; and in 292, in order to cope more successfully with the increasing dangers, the emperors chose as lieutenants and presumptive successors Constantius and Galerius, and proclaimed them Cæsars. Diocletian now ruled the east, from Nicomedia; Maximian ruled Italy and Africa, from Milan; Constantius ruled Britain, Gaul, and Spain, from Trèves; and Galerius ruled Illyricum and the line of the Danube, from Sirmium. By a constitution of A.D. 294 Diocletian abolished the Formulary System, and established the extraordinary as the ordinary procedure.

Constantine (A.D. 306 or 313-337).—Diocletian had laid down the purple in 305, to pass the remaining eight years of his life in quiet retirement. In 307 six emperors were contending for the supremacy; in 312 Constantine became master of the West, and next year Licinius became sole emperor of the East. In 314 the two rivals fought for the mastery, and Licinius bought peace by the cession of Illyricum, Pannonia, and Greece, to Constantine. After some nine years, war again broke out between them, and Constantine crushed Licinius, and soon afterwards put him to death (A.D. 324). Constantine was now sole emperor. In 330 he established Byzantium as the capital of the empire, renamed it Constantinople, and conferred upon it the privileges of Rome.

To Christians Constantine had extended protection while he was Cæsar in Gaul, and still more after the victory that made him master of the West (312). In 314 Licinius had published an edict at Milan for the same purpose. In 325 Constantine, now sole emperor, formally embraced Christianity and proclaimed it as the religion of the empire. In the same year he attended the first general council at Nicæa, when the views of Arius were condemned. The whole of the ancient sacred law, with all the public law dependent on it, was swept away. The Christian bishops ranked with the highest dignitaries, presided in courts of their own, and wielded great influence in the state. Religious corporations were permitted to hold property; and now the heretics, and not the Christians, suffered from legal disabilities. The influences of Christian principle and sentiment, indirect as well as direct, worked powerfully. The exercise of the *patria potestas* was restricted and softened, in regard both to the person and to the property of *filiifamiliæ*; and, in particular, the incapacities of *coelibes* and *orbi*, imposed by the *leges Julia et Papia*, were almost wholly removed (A.D. 320).

Constantius (A.D. 337-361).—The persecutions of non-Christians, which

sullied the reign of Constantine, were carried on still more hotly under Constantius, who closed the pagan temples, and punished pagan rites with death and confiscation. Under Julian (A.D. 361-3) Christianity was temporarily discouraged, but presently recovered its commanding authority. Towards the end of his reign (A.D. 360) Constantius introduced the office of *præfectus urbi* from Rome. The suppression of the formulary system was followed up in A.D. 339 by Constantine II., who abolished the necessity of symbolic formulæ in testamentary documents, and in 342 by Constantius, who took away the special significance of all technical and sacred forms of law whatsoever (*juris formulæ*), so that the plain intention of the parties should not be defeated through any neglect of formal expression.

Theodosius II. (A.D. 408-450).—Before his death in 395, Theodosius I. divided the empire into two separate sovereignties of the East and the West, and gave them to his sons Arcadius and Honorius. The reign of Theodosius II., son of Arcadius, is memorable for the compilation of the Theodosian Code (429-438), as well as for the Law of Citations (426), a new rule on the authority of the juristic writings, and for the establishment of a school of philosophy and law at Constantinople. Probably these legal labours were due less to the emperor than to his prætorian prefect and chief law adviser, Antiochus. To somewhere about the beginning of the fifth century also, probably belong three important, though fragmentary, works—the Vatican Fragments, a Comparison of the Mosaic and the Roman Laws, and the *Consultatio veteris cujusdam jureconsulti* (pp. 87-88).

Fall of the Western Empire.—The northern tribes pressing downwards at length overwhelmed the Empire of the West. In 410 the Goths under Alaric, after several years of fierce fighting, battered down the walls of Rome. Gaul was conquered and divided into three kingdoms : the Franks (north), 410 ; the Burgundians (east), 414 ; the Visigoths (south), 419. In 453, Attila, king of the Huns, retired from before Rome, on temporary conditions ; and in 455, Genseric, king of the Vandals, came from the conquest of Roman Spain and Africa, and sacked Rome for forty days. For twenty years more, the emperors were set up and plucked down by the invading chiefs, and then the Empire of the West came to an ignominious end (476). Odoacer proclaimed himself king of Italy, and divided the territory among his soldiers ; but he in turn was overthrown by Theodoric, king of the Ostrogoths (493), who ruled Italy from Ravenna with enlightened and beneficent sway for another generation (till 526). The Ostrogothic kingdom was finally destroyed by Narses, the general of Justinian, in A.D. 553. In the beginning of the sixth century certain of the barbarian kings published codes of law for their Roman subjects—*lex Romana Visigothorum*, *lex Romana Burgundionum*, *Edictum Theodorici* (pp. 88-89).

Justinian (A.D. 527-565).—Religious persecutions and the contentions of orthodoxy and heterodoxy, the military achievements of the great Belisarius, and of Narses, and, above all, the consolidation of the law, signalised the reign of Justinian. Following the counsel of Tribonian, no doubt, Justinian ordered the compilation of the Code, the Digest, and the Institutes, and published his subsequent Novels. The alterations of the old law writings are excused by the practical object in view. The modifications in the law tend in a liberal direction. The last strict shackles of the artificial civil law were

freely loosened or completely knocked off, and the law was informed with a more simple, business-like, and equitable spirit.

II. MAGISTRATES OF THE EMPIRE.

1. *Republican Magistrates under the Empire.*

The Consuls.—For some three centuries the ordinary magistracies of the republic continued to exist under the empire, and many of them are still heard of at a much later period. But they were the mere shadows of their former selves. The consulship was assumed or bestowed by the emperors just as they thought fit. Instead of a pair of consuls for every twelve months, there was ordinarily a new pair every two months, so as to afford the emperor sufficient opportunities of gratifying persons he wished to favour. Owing to the overshadowing power of the emperor, and their short period of office, they were of no political account whatever. Still they presided in the senate and the *comitia*. Occasionally they acted as judges in civil suits; and from Claudius to M. Aurelius they exercised special jurisdiction in cases relating to minors. The consulship, though wholly stripped of power, was considered for six centuries as the most exalted and most honourable of dignities; for the prudent emperors had invested it with extraordinary pomp and splendour.

The Plebeian Tribunes.—The Tribuneship of the Plebeians existed into the fifth century, but it retained no more power than the consulship, and, in the eyes of the public, no honour whatever. The tribunes were generally chosen by the senate by lot from the list of ex-quæstors under forty years of age. During the first century they still summoned the senate and presided at its meetings. They exerted their right of intercession, but with careful regard to the emperor's pleasure. From Augustus to Alexander Severus, they divided, with the prætors and the ædiles, the general superintendence of the fourteen regions of the city, the really important duties being in the hands of heads of special departments. And down to the time of Nero they exercised extensive jurisdiction in civil suits. The office was also established by Constantine at Constantinople.

The Prætors.—The Prætors varied from twelve to eighteen, and their functions were greatly transformed. They were turned into ædiles, their criminal and civil jurisdiction being transferred to the senate and the City Prefect. Later on, certain special matters were re-committed to them. Claudius appointed (A.D. 41) two prætors, one of whom Titus abolished (A.D. 79), to decide questions relating to trust-estates (*prætor de fideicommissis*). Nerva appointed a prætor for causes between private persons and the *fiscus*. Antoninus appointed a *prætor* or *judex tutelaris* for the affairs of minors. The alien prætor disappeared on Caracalla's extension of the full citizenship to the limits of the empire; the city prætor existed, in name at least, as long as the Empire of the West; and both he and the *prætor tutelaris* entered on a new sphere of existence at Constantinople.

The Ædiles.—The Ædiles, Plebeian, Curule, and Cereal, remained till the time of Alexander Severus, but their functions were reduced to insignificance.

The Censor—Præfectus Morum.—The office of Censor died out in the first years of the empire (B.C. 22), although several of the emperors assumed the title. The functions were partly undertaken by the emperor, who regulated public morals (*præfectus morum*) and selected the senators, and were partly distributed among other officers.

The provincial officials will be more conveniently mentioned below (pp. 72-73).

2. *New Magistrates under the Empire.*

In the crippled state of the old magistracies, some new magistrates were necessary for the conduct of the business of the empire. These were absolutely the creatures of the emperor—nominated directly by him, holding office during his pleasure, and uniformly acting, with servile watchfulness, in accordance with his wishes. Before naming them, however, we will state the relation of the emperor himself to the administration of justice.

The Emperor.—The emperor was the fountain of justice as well as of law. He was the supreme judge. He exercised his powers principally in two ways : either he sat as judge on appeals, or he gave opinions at the instance of a subordinate judge or of a party to a cause (*epistulæ, rescripta*). Justinian abolished the old practice of reference from a judge, and required the judge in every instance to give a final decision, allowing an aggrieved party to upset the judgment only by a regular appeal.

The Council of the Emperor (*Sacrum Auditorium vel Consistorium*) grew out of the half-year councils (*concilia semestria*) established by Augustus, in which (among other things) projects to be laid before the senate were discussed, and judicial investigations prosecuted. It was variously constituted, according to the caprice of the emperor. Tiberius chose, in addition to his friends and associates, twenty leading citizens ; Hadrian added the prætors, and certain distinguished senators and knights ; Alexander Severus summoned the men most competent to handle the matter under discussion. In the time of Hadrian, the *Auditorium* was the separate part of the council that assisted when legal questions were under consideration. Under Diocletian the *Consistorium* received a fixed organisation. It was composed of the higher officials attached to the imperial palace ; and in addition to assisting the emperor in administration and legislation, it also acted as a final court of appeal. It descended as an institution to the Lower Empire.

The City Prefect (*Præfectus Urbi*).—The city prefecture of the empire, a transformed republican office, was permanently established by Augustus in B.C. 25. The chief duty was to maintain public tranquillity and good order, in support of which the City Prefect held the command of the city militia or national guards (*cohortes urbanæ*). Other functions were rapidly added ; and gradually the City Prefect became the supreme criminal and civil judge, absorbing the chief duties of the republican prætors and ædiles.

His *civil* jurisdiction extended 100 miles beyond the walls of Rome. In certain cases he assumed a special original jurisdiction ; as in complaints by slaves of the cruelty of their masters, in disputes as to their respective duties between freedmen and patrons, in suits by and against bankers, and in certain interdicts.

His *criminal* jurisdiction seems to have extended throughout Italy. When a crime was disclosed in civil proceedings before other magistrates, the City Prefect received the culprit for trial and punishment. He could sentence to simple banishment from the city, or to deportation or relegation, or to the mines.

In the exercise of his *appellate* jurisdiction, he sat, with a board of assessors (*consilium*), to hear appeals from the inferior courts in all parts of the empire. There was, at last, no appeal from his sentence, except to the emperor.

By the direction of the emperor, however, cases would at times be transferred from his court and submitted to the special consideration of the senate. These would include all the more serious criminal charges affecting the government, the emperor, senators or their families, or governors of provinces.

The Prætorian Prefect (*Præfectus Prætorio*).—The *præfectus prætorio*, the general of the imperial life guards, soon became the second, and even at times the first, power in the state, owing to the armed force he commanded. Under Augustus there were two, under Tiberius one, and, at later periods, occasionally three or four prefects. Their power, at first purely military, naturally extended; under Hadrian they had begun to exercise civil authority, and under Commodus their hand was in every department of government; particularly they drew to themselves a large civil and criminal jurisdiction, and in fact filled the highest judicial office. The great jurists, Papinian, Paul, and Ulpian, were prætorian prefects. Their military jurisdiction was abolished by Constantine the Great.

At first, appeals lay from the prætorian prefects, but at last they were made a court of final appeal within their jurisdiction. Appeals lay to them from the presidents of provinces. They exercised a superintendence and control over inferior judges, could remove them for inefficiency or ill-health, and, subject to the approval of the emperor, punish them for abuse of their powers.

The Provincial Governors.—When Augustus assumed supreme power, he took under his direct and sole control twelve of the dependent provinces, including the newer and less settled ones on the frontiers (*provinciæ imperatoriæ* or *Cæsaris*). These were governed by imperial lieutenants (*legati Cæsaris* or *Augusti; præsides*), at the head of a strong military force. Twelve provinces were left under the administration of the senate, including such as were long-settled and peaceful (*provinciæ senatoriæ* or *populi*). These were governed, as under the republic, by past-consuls or past-prætors, who were now all styled *proconsules* (sometimes also *præsides*). At first there existed certain trifling distinctions between the two classes. Generally the proconsuls enjoyed higher consideration and dignity, their insignia being six *fasces* as against the five *fasces* of the lieutenants. They could also fine up to six ounces of gold, the lieutenants only up to two. But by the time of Justinian these distinctions had gradually become obliterated.

The jurisdiction of the President was most extensive, including all the causes, civil and criminal, that were heard at Rome by different judges. Nor was he tied down by Roman precedents, but could decide according to his own ideas of right. Exchequer cases, however, although included in his

wide commission, he usually left to the Finance Minister (*procurator Cæsaris*). The criminal powers of the President extended to the punishment of the mines, but not to deportation to an island, without the special authorisation of the emperor. He was not bound to hear every cause himself, but might follow the practice adopted by the greater magistrates in Rome.

The jurisdiction of the President in civil causes extended only to persons domiciled in his province ; but he possessed full authority to deal with all criminals within his bounds. He could not act outside his province, except in regard to the voluntary jurisdiction, which he could exercise as soon as he left Rome. It was his duty to wait in his province, even after the expiration of his term, until his successor actually arrived ; and he could not divest himself of his authority by resignation.

The commission of the Presidents charged them not to be unduly familiar with their subjects. Other restrictions were imposed on them for the protection of the inhabitants : they might not marry a woman belonging to their province, nor buy land, except when their ancestral property was sold by the Exchequer.

The rearrangement of the provinces under Constantine is referred to below (page 74).

Provincial Finance Ministers.—The Provincial Governor was attended by a Finance Minister, the Proconsul by a *Quæstor*, the Imperial Lieutenant by a *Procurator Cæsaris*. At first, his functions were purely administrative, but in course of time he naturally drew to himself a jurisdiction over causes in which the Exchequer was a party. Ultimately the Procurator had acknowledged jurisdiction over all Exchequer causes, with power to decide all subsidiary questions,—even some questions of status, as whether a person were a slave or a freedman ; but if the question were whether a person were freeborn, it must be referred to the Court of the President. The Procurator had no power either to banish or to fine.

Assessors to Magistrates.—The provincial as well as the home magistrates, being quite as much executive as judicial officers, were often chosen more for their business capacity than for their knowledge of law. It therefore became customary to give them the assistance of paid jurisconsults (*adsessores*). Before the office acquired its importance and permanent character, *adsessores* were required to give up practice only in the court where they assisted ; but Justinian required them to elect between their profession of advocacy and their employment as *adsessores*. He enacted also that no one should sit as assessor to more than one magistrate. The assessor could not hear causes in the absence of the magistrate, for it was necessary that the official documents should bear the magistrate's signature.

Judices Pedanei.—In the famous constitution of Diocletian enacting (A.D. 294) that the extraordinary procedure should henceforth be the ordinary procedure, it is incidentally mentioned that the presidents of provinces had been in the habit of assigning to *judices pedanei* causes that they were unable to hear personally. The precise duties of these *judices pedanei* are uncertain. After the abolition of the ordinary procedure, however, they acted as petty judges, in causes of small amount. Diocletian restricted their employment to those occasions when the president was prevented from giving a personal hearing, either through the pressure of his public duties or the excessive

number of causes. Julian also permitted the president to appoint them for causes of minor importance, and Zeno assigned a certain number to each prefecture. Justinian altered this, for the Constantinople prefecture at least, and nominated certain advocates of high professional standing, requiring them to sit continuously, and giving them jurisdiction in all civil causes up to 300 *solidi*. Their jurisdiction, however, was not compulsory ; the parties might submit their cause to an arbitrator by preference, provided they rejected a *judex pedaneus* before the beginning of the trial.

Magistracies introduced by Constantine.—The establishment of a new capital and the influence of Christianity under Constantine led to considerable modifications in the administration. The *Bishops* (*episcopi*) were the highest dignitaries. They naturally undertook duties of humanity and charity in protection and aid of the poor, of captives, and of children ; they sat on the councils for the nomination of tutors and curators, and they enfranchised slaves in the churches. They could act temporarily for absent magistrates, and the emperor himself frequently obtained their advice. The peaceable nature of Christianity fostered the ancient resort to arbitration ; and Constantine established an episcopal jurisdiction (*episcopalis audientia*) over certain classes and matters of religion and the church, which was largely taken advantage of also in other matters by the voluntary confidence of litigants.

Constantine divided the empire into four prætorian prefectures—the East, Illyria, Italy, and Gaul. These he subdivided into 13 (5, 2, 3, 3) dioceses, under Vicars (*vicarii*) ; and these again into 117 (48, 11, 29, 29) provinces, under proconsuls or rectors.

The Defensores Civitatum.—The *Defensores Civitatum* were municipal magistrates, of whom we hear first in constitutions of Valens, Valentinian, and Theodosius (about A.D. 379). They were elected by the leading citizens of their respective towns, for five years, and they were not at liberty to resign their post. With certain police duties and the special care of the poor, they also exercised jurisdiction in cases involving not more than 50 *solidi*. By the time of Justinian, the office had devolved on humble subordinates of the magistrates.

III. CRIMINAL LAW UNDER THE EMPIRE.

The criminal jurisdiction of the City Prefect, the Prætorian Prefect, and the Provincial Governors has been alluded to in the preceding section.

In the time of Justinian crimes were divided into three classes, according to the manner of prosecution—*Publica Judicia*, *Extraordinaria Crimina*, and *Privata Delicta*. (Stephen, *Hist. of the Crim. Law in England*, I. 12 follg.)

Publica Judicia.—These were the representatives of the old *Quæstiones Perpetuæ*, and took cognisance of crimes forbidden by the following laws, under defined penalties, capital (death or exile) or not :—Lex Julia Majestatis, Lex Julia de Adulteriis Coercendis, Lex Julia de Vi Publica, Lex Julia de Vi Privata, Lex Cornelia de Sicariis et Veneficiis, Lex Pompeia de Parricidiis, Lex Cornelia de Falsis, Lex Julia Repetundarum, Lex Julia de Annona,

Lex Julia Peculatus et de Sacrilegiis et de Residuis, Lex Julia Ambitus, Lex Fabia de Plagiariis. (*D.* 48, 4-15.)

Extraordinaria Crimina (*D.* 47).—"These were offences for which no special *Quæstio*, no specific punishment, were provided. The punishment was (within limits) at the discretion of the judge, and the injured party might prosecute, though he was considered in doing so to protect rather the public interest than his own."

Privata Delicta.—"These were offences for which a special action was set apart involving a definite result for the injured party; such, *e.g.*, as the *actio furti* or *actio injuriarum*."

"The classification is a little like a classification of English crimes, as being either (1) Treason or Felony; (2) Misdemeanours at common law; or (3) Torts; and there is something of a resemblance between the way in which, in the course of ages, the *Publica Judicia* and the *Extraordinaria Crimina* came to be formed into a single class of offences, as to all of which the punishment was more or less discretionary, and the gradual legislative removal in our own country of nearly every substantial distinction between felony and misdemeanour." (Stephen, *loc. cit.*)

IV. SOURCES OF LAW UNDER THE EMPIRE.

Gaius enumerates six sources of Roman law: statutes, plebiscites, decrees of the senate, edicts of the magistrates, constitutions of the emperors, and opinions of the jurists. The suggestions of custom would from time to time receive incorporation in one or other of those forms.

Lex, Plebiscitum, Senatusconsultum.—The *comitia* continued to pass *leges*, or rather *plebiscita*, with some little show of real power, under the first two emperors; the last recorded *lex* belongs to the reign of Nerva (A.D. 96-98). In imitation of the ancient forms, the emperor would lay the bill before the senate, in an *oratio* or an *epistula*, after which it would receive the *auctoritas* of the senate, and be proposed to the tribes. The reference to the tribes, however, rapidly fell into disuse as being inconvenient, and the ceremony became shortened to a mere proposition of the bill to the senate. The senate itself even came to be spoken of as *comitia*, and the *senatusconsulta* as *leges*; and the very naming of the decrees of the senate was modelled on the principle of the republican laws and plebiscites. Gradually the senate put forth more and more enactments on points of civil law, with unquestioned validity, and before the time of Antoninus Pius such decrees were frankly recognised as possessing full legal force. This continued till the reign of Septimius Severus (A.D. 206), after which, although the right of the senate theoretically remained, the exercise of it is doubtful. As *senatusconsulta* had superseded *leges* at the end of the first century, so, just after the close of the second century, they were in turn superseded by the imperial constitutions, which at last became the sole source of law.

Edicta Magistratuum.[1]—The publication of the *edictum perpetuum*, compiled by Salvius Julianus under Hadrian, did not put an end to the issuing of edicts: at any rate, the words of Gaius would lead us to suppose

[1] For examples of *edicta*, see Bruns, *Fontes*, 165 follg.

that in his time they continued to be regularly issued. The magistrates, however, would be bound to adopt its provisions, adding only such new forms and rules as might be necessary in new circumstances.

The Constitutions of the Emperor.[1]—The emperor's legal right to make law (*jus constituere*) was derived from the special statute (*lex regia, lex imperii,* or *de imperio*) investing him with all the powers of the people. This statute was a survival of the olden *lex curiata* regulating the investiture of the kings; at the beginning of each reign it was prepared by the senate and passed by the representatives of the thirty wards (*curiæ*). The *constitutiones* embrace all the emperor's acts of law-making in whatever form—legislative, judicial, or interpretative. They were (1) Edicts (*edicta*), general ordinances issued by him in his capacity of magistrate; (2) Decrees (*decreta*), judicial decisions pronounced either on final appeal or in the exercise of his summary jurisdiction; and (3) *Epistulæ*, or *rescripta*, written replies to the inquiries of judges or of private persons on particular points. To these may be added (4) *mandata*, orders to the imperial officers in the provinces. The earliest constitution directly mentioned by Justinian belongs to the time of Hadrian; but Augustus and his immediate successors issued constitutions in all kinds, veiling them, however, under names familiarly associated with the sovereignty of the people.

The Opinions of the Jurisconsults (*Responsa Prudentum*).—In order to increase the authority of the answers of the jurisconsults, and hardly without the idea of securing a certain professional allegiance to himself, Augustus enacted that there should be conferred on (some of) them the right of giving responses under imperial authorisation (*jus publice respondendi*). It would seem, however, that this enactment lay in abeyance till the next reign: for Pomponius mentions that the first to receive the imperial authority was Massurius Sabinus, the pupil of Capito. The jurists thus favoured above the rest were called *juris auctores;* their *auctoritas*, derived from the emperor, being embodied in their opinions delivered on single points or cases, and naturally perpetuated in collections of these, more or less supplemented and digested, into legal treatises. An extraordinary impetus was thus given to the production of legal literature, and to the activity that followed during the first two centuries of the Christian era we owe the rich store of juridical reasoning that constitutes the permanent value of the mature Roman Law.

The assistance given to the magistrates by the jurisconsults was equally needed and required by the emperors themselves. In the preparation of constitutions or of legislative measures, and even in other matters of difficulty, the emperors resorted to the advice of the best jurists of the day. These were important members in the *concilia semestria* of Augustus and the later Council of the emperor. Alexander Severus never sanctioned a constitution without consulting a score of jurists, in addition to other advisers.

It is not easy to suppose, even with Savigny and Puchta, that the answers of the privileged jurisconsults originally possessed the force of law. For the answers always might, and often did, conflict; and, in fact, the accumulation

[1] For examples of these, see Bruns, *Fontes*, 189 follg.

of such inconsistent authoritative opinions on a number of points of law presently divided the jurisconsults into two rival schools, to the great perplexity of the judges. The first great rivals were C. Ateius Capito and M. Antistius Labeo, who flourished under Augustus. Capito was a born aristocrat, and an assiduous courtier, who attained the consulship (A.D. 5 : died A.D. 22). Labeo was a son of the people, a staunch republican, scornful of political and courtly promotion, and distinguished for profound learning and intellectual acuteness. Capito is said to have been conservative of the traditions of the law ; Labeo is said to have boldly applied his scientific training and independent tendencies to strike out more liberal views and originate nicer discriminations. The followers of Capito and Labeo confirmed the general divergencies of juridical opinion. These seem, however, to have been on matters of detail, not of principle ;[1] and probably personal and political, no less than juridical, antagonism influenced the formation of the two parties. The rival schools, now fully recognised, were styled Sabinians or Cassians, and Proculians or Pegasians, after disciples of the founders. Leading successors of Capito were—Massurius Sabinus, G. Cassius Longinus (consul A.D. 30), Cælius Sabinus, Priscus Javolenus, and Salvius Julianus (of the *edictum perpetuum*) ; also Sextus Pomponius, who flourished under Antoninus Pius, and whose short and incomplete sketch of the History of Roman Law included in the Digest, furnishes our best information on this subject ; Sex. Cæcilius Africanus, famous for his obscure style ; and Gaius. Leading successors of Labeo were—Nerva (father), Proculus, Nerva (son), Pegasus, Juventius Celsus (father), Celsus (son), and Neratius Priscus. The opposition continued for about two centuries, and may be regarded as having taken end in the unique predominance of Papinian.

From M. Aurelius to Caracalla five jurists stand out in pre-eminent greatness—Gaius, Papinian, Ulpian, Paul, and Modestinus.

Gaius (the rest of his name is lost) lived in the middle quarters of the second century, under Hadrian, Antoninus Pius, and M. Aurelius. He tells us that he was a Sabinian, and affords our chief information regarding the characteristic differences of the two schools. Whatever reputation he may have enjoyed during life, we shall presently see (pages 79, 84) in what estimation he was afterwards held. He is known to us mainly by his *Institutiones* (see page 84). Besides this work he wrote numerous treatises—on the Twelve Tables, on the Three Edicts (Urban, Ædilician, and Provincial) ; on the *lex Papia Poppæa ;* on the writings of Q. Mucius Scævola ; and on the *senatusconsulta Orphitianum* and *Tertullianum*, as well as *Regulæ*, and seven books of *Res Cotidianæ*, which were also called *Aureæ*, so highly were they valued for their practical character. Some 535 extracts from his writings are contained in the Digest.

Æmilius Papinianus, the most celebrated of all the Roman jurists, flourished under M. Aurelius and Septimius Severus. He was the teacher and friend of Severus, whom he probably accompanied to Britain (York),

[1] The particular points are enumerated in the Index, under *Sabinians*. See Gaius I. 196 ; II. 15, 37, 79, 123, 195, 200, 217-223, 231, 244 ; III. 87, 98, 103, 133, 140, 141, 167, 178 ; IV. 78, 79, 114, 163. On the whole subject, see Dirksen, *Die Schulen d. Röm. Juristen* (in his *Beitraege z. Kunde d. Röm. Rechts*).

and who made him prætorian prefect or supreme judge. He was put to death by Caracalla, because (it is alleged) he declined to vindicate to the senate the murder of Geta. Papinian wrote thirty-seven books of *Quæstiones*, nineteen of *Responsa*, two of *Definitiones*, and works *De Adulteriis*, besides others. Some 596 extracts from his writings are contained in the Digest.

Domitius Ulpianus derived his origin from Tyre. Like Paul, he was a pupil of Papinian, and his colleague in the emperor's council. Banished by Elagabalus, he was recalled by Alexander Severus, who made him his chief adviser, and raised him to the post of prætorian prefect. Perhaps this was an unpopular act, for Ulpian was presently murdered by the soldiers, under the eyes of the emperor (A.D. 228). Besides annotating Papinian (see page 79), Ulpian composed numerous works, including two especially important treatises, *Ad Edictum* and *Libri ad Sabinum*. An epitome of his *Liber Singularis Regularum* (also improperly called *Fragmenta*) is extant in a MS. in the Vatican Library. His writings furnish about one-third of the Digest (the largest contribution of any single jurist), consisting of 2462 extracts, many of which are of considerable length.

Julius Paulus, a native of Padua, was also a pupil and colleague of Papinian, exiled by Elagabalus, recalled by Alexander Severus, and appointed prætorian prefect (A.D. 222). He survived Ulpian. Paul was an extremely prolific writer, more than seventy of his works being named in the Digest. The most celebrated was *Ad Edictum*, in eighty books. He too annotated Papinian (see page 79). An epitome of his *Sententiæ Receptæ*, in five books, is preserved in the *Breviarium Alaricianum;* and his writings furnish about one-sixth of the Digest, consisting of 2083 extracts.

Herennius Modestinus was a pupil of Papinian and of Ulpian. He was a member of the council of Alexander Severus, and flourished till about the middle of the third century. He wrote, among other works, certain books of *Excusationes*. He is now represented solely by 345 excerpts in the Digest.

Modestinus may be regarded as the last of the jurists. For half a century, from Alexander Severus to Constantine, the supremacy of military violence, setting up and plucking down a rapid succession of emperors, fatally checked the active development of jurisprudence. The labours of the jurisconsults of the first two centuries have been classed by Ortolan in four divisions of subjects: (1) commentaries on the edicts of the prætors or of the proconsuls (*ad Edictum*, *ad Edictum provinciale*); (2) treatises on the functions of the magistrates (*de officio præfecti urbi*, *proconsulis*, *etc.*); (3) extensive works on the whole body of the law (*Digesta*, *Pandectæ*); (4) abridgments or elementary lessons (*Institutiones*, *Regulæ*, *Sententiæ*).

It was Hadrian that first invested the opinions of the authorised jurists, when unanimous, with the force of law. When, however, they were not unanimous, the judge still bore the responsibility of deciding between them. Constantine (A.D. 321) maintained the unsatisfactory rule of Hadrian; but, with the professed desire of cutting short the endless contests between the jurists, and in jealousy for the clear reputation of Papinian, he invalidated the notes of Ulpian and Paul (and, in another constitution, the notes of Marcian) on the works of Papinian. The discredit thus cast on the notes seems to have extended in the popular mind to all the works of Ulpian and Paul, and to

have been particularly felt in regard to Paul's works, which were more widely influential in the West; and accordingly Constantine (A.D. 327) removed the supposed stigma, by recognising as authoritative the independent works of Paul, and especially his *Sententiæ*.

In this situation the legal authority of the jurists remained for just a century to come. Then, in B.C. 426, in the time of Valentinian III., was published a constitution drawn up under Theodosius II., which gave a final mechanical relief to the perplexity of the judges. This was the Law of Citations. It confirmed with legal authority all the writings of the five great jurists—Gaius, Papinian, Ulpian, Paul, and Modestinus—and all passages quoted by them from other jurists, provided the correctness of such quotations should be verified by comparison of manuscripts. The notes of Ulpian and Paul on Papinian were excepted; the invalidation of these pronounced by Constantine being expressly re-enacted. A majority of these authorities on any point was to determine the law; in case of equality of numbers, the opinion favoured by Papinian was to prevail; and if Papinian were silent, then the judge was reduced to the old necessity of making his own decision between the conflicting authorities.

Another century later, Justinian broke down the preponderant authority of the celebrated jurists, whether as individual names or as a majority. In his instructions to the compilers of the Digest (A.D. 533) he directs them to select, purely on grounds of intrinsic merit, what they consider best, from the writings of all the authorised jurists (including the notes of Ulpian, Paul, and Marcian on Papinian, hitherto proscribed). To each sentence placed in the Digest he gave the force of law; and he prohibited all further publication of commentaries or treatises on the subject, with a decisive finality sanctioned with the punishment of the author as guilty of forgery, and the destruction of his works. But the recommendations of Justinian were not in all points strictly adhered to.

Schools of Law.—The method of tuition by combined lecturing and practical demonstration was now supplemented with the study of legal works. Labeo, we are told, read with advanced students already in practice (*studiosi*) for six months of the year in town, thereafter retiring to the country for other six months' study and original work. Sabinus, in like manner, was attended by another class called *auditores*. Ulpian still speaks of Modestinus as *studiosus meus*. By this time, however, private teachers had arisen—*juris civilis professores* Ulpian calls them—who imparted preparatory instruction in law. At a later period public schools were established. One probably existed at Rome in the end of the fourth century. In A.D. 425 Theodosius II. established one for the study of rhetoric, philosophy, and jurisprudence at Constantinople; prohibiting the professors from giving private instruction, and all other teachers from giving public instruction. In the time of Justinian we hear of another recognised public school of law at Berytus. On the promulgation of the Digest (A.D. 533) Justinian addressed a constitution to the eight professors of law,[1] remarking on the ineffective

[1] Probably two for the Constantinople school and two for the Berytus school; and four as the temporary substitutes of these during their occupation on Justinian's com-

practice of the schools in the past, and prescribing a reformed course to be followed in the future.

Hitherto the law course had occupied four years, and the professors had confined themselves to six works, which were largely unsuitable, and to some extent not readily accessible to all the students. The first year students (*Dupondii*, students of the double *as*) devoted themselves to the Institutes of Gaius, and parts of four special books—on *res uxoria*, tutelage, wills, and legacies. The order of the Perpetual Edict was not followed. The second year students (*Edictales*) read selections from the first part of the law as arranged in the Edict—a preposterous order of study, Justinian declares—with portions of the law either *De Judiciis* or *De Rebus*. Much of the *De Judiciis* was obsolete, and latterly *De Rebus* had been dropped as inaccessible or unfit. The third year men (*Papinianistæ*) completed the study of *De Judiciis* and *De Rebus*, and entered upon parts of eight of the nineteen books of Papinian's *Responsa*. The fourth year students (λύται, *Lytæ*, Licentiates) revised the subjects of the whole course, with miscellaneous study of the *Responsa* of Paul.

This miserably deficient system Justinian superseded by the following course. The first year (now called *Justinianani novi*) read Justinian's Institutes and the first four books of the Digest. The second year (*Edictales*) study the matter of the Edict in so far as represented either in the seven books *De Judiciis* (Digest, 5 to 11) or in the eight books *De Rebus* (D., 12-19), read continuously; also four other books out of fourteen on special subjects, namely, one of the three on dower (D., 23-25), one of the two on tutelage and curatorship (D., 26, 27), one of the two on wills (D., 28, 29), and one of the seven on legacies and trusts (D., 30-36). The third year (*Papinianistæ*) complete the *De Judiciis* and *De Rebus* (reading the subject not chosen the year before); with three courses of special subjects—namely, pledges and mortgages (D., 20), interest (D., 22), and the edict of the ædiles, the *actio redhibitoria*, evictions, and *stipulationes duplæ* (D. 21). They also read and recite portions of Papinian. The fourth year (*Lytæ*) read frequently the ten books on special subjects reserved from the second year. This takes them over the first five parts of the Digest (36 books), and fits them to study afterwards in private the sixth and seventh parts. The fifth year (*Prolytæ*) study the Constitutions in the Code.

Justinian further denounces and prohibits under penalties the instruction said to be given by ignorant men in Alexandria, Cæsarea, and other cities. This indicates at least the wide prevalence of an active desire to study the law.

At the same time, the school at Rome was flourishing under the fostering care of Theodoric and his minister Cassiodorus. And, on the reconquest of Italy (A.D. 554), Justinian confirmed the professors in all their privileges, and introduced at Rome his improved method of legal instruction.

pilations. The school at Rome, being in the hands of the Ostrogoths, was not under the control of the emperor at this time. Seven are addressed as of the very high rank of *Illustres*, one as *vir disertissimus*.

APPENDIX TO THE FOREGOING SECTION.

LEGES AND SENATUSCONSULTA OF THE EMPIRE.

The following is a conspectus of the principal *leges* (*plebiscita*) and *senatusconsulta* that have come down to us with particular titles or definite authorship from the empire. Observe the ending—*ianum* in the title of the senatusconsults :—

UNDER AUGUSTUS.

B.C.

About 32 or 31. *Lex Julia et Titia*, extension of *lex Atilia* (before B.C. 186), authorising provincial magistrates to appoint tutors.

? 25. *Lex Julia, judiciaria*, supposed to be one of the *leges Juliæ* (Gaius, 4, 30) following up the *lex Æbutia* and further restricting *legis actiones*. Cf. *lex Julia judiciaria*, B.C. 46.

? *Lex Julia, de bonorum cessione.* (Gaius, 3, 78.)

? *Lex Julia*, sumptuary.

18. *Lex Julia, de adulteriis.* (Bruns, 105.)

18. *Lex Julia, de ambitu.*

17. *Senatusconsultum, de ludis sæcularibus.* (Bruns, 152.)

11. *Sc. de aquæductibus.* (Bruns, 153.)

? 11. *Sc. Maximo et Tuberone coss. factum*, ordaining that the wife of the *Flamen Dialis* should be *in manu* only in so far as concerned the *sacra*. Huschke calls this sc. the *lex Asinia Antistia*, and dates it A.D. 23. See Muirhead, p. 54, Gaius, 1, 136, note.

10. *Sc. Silanianum.* (Paul, *Sent.*, 3, 5.)

8. *Sc. de mense Augusto*, changing the name from *Sextilis* to *Augustus*. (Bruns, 154.)

? *Sc. de Collegiis.* (Bruns, 154.)

A.D.

? 4. *Lex Julia, de maritandis ordinibus.* B.C. 18 is also given as the date.

4. *Lex Ælia Sentia*, on manumission.

6. *Lex Julia, de vicesima hereditatum*, imposing duty of 5 per cent. on testamentary successions and bequests.

? 8. *Lex Fufia Caninia*, restricting testamentary manumission.

9. *Lex Julia et Papia Poppæa*, revised edition of *Lex Julia de maritandis ordinibus*. Other names : *Lex Julia, Lex Julia caducaria, Lex Papia, Lex Papia Poppæa.* (Bruns, 107.)

UNDER TIBERIUS.

16. *Sc. Libonianum*, rendering null all that a man, when writing out another's testament, inserted in his own favour.

? 19. *Lex Junia* [*Norbana*], on slaves informally manumitted.

? 24. *Lex Visellia*, giving citizenship to Latins after serving six years in the night watch. Mommsen places it earlier.

? 27. *Lex Junia Vellaea* (so Studemund ; formerly *Velleia*), on testamentary institution and disherison. Usual date, 46. Muirhead, p. 436 (additions and corrections to p. 120, sect. 134, note 1), inclines to an earlier date. Bruns, 27. (See *Fontes*, p. 108.) Tigerström and Sandars, 10.

? 34. *Sc. Persicianum* (or *Pernicianum*), rendering men and women that had not married before 60 and 50 respectively, permanently liable to the penalties of celibacy. Ulp. 16, 3 (cf. Muirhead's note).

UNDER CALIGULA.

A.D.
37-41. *Lex Mamilia Roscia Peducea Alliena Fabia*, colonial. Bruns (109) follows Rudorff in giving this date. Mommsen assigns the *lex* to the time of Jul. Cæsar.

UNDER CLAUDIUS.

41-46. *Sc. de ædificiis non diruendis.* (Bruns, 158.)
41-47. *Sc. Osterianum.* (Bruns, 155.)
42. *Sc. Largianum*, succession to property of Latini.
46. *Sc. de ludis saecularibus.* (Bruns, 152.)
46. *Sc. Velleianum.* (Bruns, 155.)
47. *Lex Claudia* (probably a Sc.), abolishing agnatic tutelage of women. (Gaius, 1, 157.)
48. *Sc. Claudianum* (*oratio Claudii*) *de jure honorum Gallis dando.* (Bruns, 156.)
52. *Sc. Claudianum*, on cohabitation of freewomen and slaves, etc.
? *Sc. Macedonianum*, against lending money to children under power of their father. Tacitus (*Ann.* 11, 13) places it under Claudius; Suetonius (*Vesp.* 11), under Vespasian. Sandars (Just., *Inst.*, p. 456, note to 4, 7, 7) suggests that "perhaps it was only renewed in the latter reign." Lipsius (ad Tac. *Ann.* 11, 13) regards the law under Vespasian as the law of Claudius renewed in more severe terms (*asperius*). (Bruns, 160, dates it 69-79.)
? *Sc. Claudianum*, ordaining, in modification of *Sc. Persicianum*, that a man over 60 marrying a woman under 50 should be regarded as having married before 60.

UNDER NERO.

56. *Sc. de ædificiis non diruendis.* (Bruns, 159.)
56. *Sc. Trebellianum*, on *fideicommissa.*
58. *Sc. Neronianum*, validation of legacies invalid through particular form of bequest. Huschke dates 58; Poste, 64.
61. *Sc. Calvitianum* (or *Calvisianum*), ordaining that marriage of woman over 50 with man over 60 should not qualify for taking inheritance, legacy, or dowry. (Ulp. 16, 4.)
61. *Lex Petronia*, or *Sc. Turpillianum*, punishing *tergiversatio.*

UNDER VESPASIAN.

70. *Lex de Imperio Vespasiani.* (Bruns, 128.)
70-79. *Sc. Pegasianum*, on *fideicommissa.*
? *Sc. Pegaso et Pusione coss. factum*, extending the benefits of the Aelia-Sentian marriage and *causae probatio* to Latini manumitted when over 30.

UNDER DOMITIAN.

81-84. Lex Malacitana, Lex Salpensana } Domitian's charters to the *municipia* of Malaga and Salpensa (in Southern Spain). (Bruns, 130 follg.)

UNDER NERVA.

96-98. *Lex Nervæ Agraria*, the latest known *lex.*

UNDER TRAJAN.

A.D.
103. *Sc. Rubrianum*, giving remedy in regard to bequest of liberty on trust. (Bruns, 161.)

? *Sc. Dasumianum* (similar object). Of the time of Trajan, or not later than Antoninus Pius.

UNDER HADRIAN.

? *Sc. Apronianum*?—allowing freedmen of municipalities to leave their inheritance to the municipalities. Ulp. 22, 5.

127. *Sc. Juncianum.* (Bruns, 161.)

129. *Sc. Juventianum.* (Bruns, 161.)

? *Sc. Plancianum* (1), on *fideicommissa.* Referred to, Ulp. 25, 17.

? *Sc. Plancianum* (2), *de agnoscendis liberis.* Dig. 25, 3. Paul., *Sent.*, 2, 24.

? *Sc. Tertullianum*, granting to a mother a right of succession to her children.

? *Sc Vitrasianum*, extending the remedy of sc. Rubrianum and Dasumianum.

[Muirhead (p. 588) has collected the references in Gaius and Ulpian to *senatusconsulta* attributed to Hadrian (*Hadriano auctore*), but not otherwise specifically designated. (1) G. i. 30, 77, 80, 81, 92; U. iii. 3. (2) G. i. 47. (3) G. i. 115*a*; ii. 112. (4) G. ii. 57. (5) G. ii. 143. (6) G. ii. 285, 287 (cf. J., 2, 20, 25); this may be the same as the Sc. Plancianum in Ulp. 25, 17. (7) G. iii. 73. (8) U. xxiv. 28.]

UNDER ANTONINUS PIUS.

138. *Sc. de nundinis saltus Beguensis.* (Bruns, 162.)

138-160. *Sc. de Cyzicenis.* (Bruns, 163.)

UNDER M. AURELIUS.

178. *Sc. Orphitianum*, granting to children a right of succession to their mother. (Bruns, 164.)

? *Sc. Sabinianum*, obliging a man that had adopted one of three brothers living under their father's *potestas*, to leave him one-fourth of his property. Theoph., J. 3, 1, 14.

[Muirhead (p. 589) has collected the references to the *senatusconsulta* of unknown name and authorship in Gaius and Ulpian. (1) G. i. 67-71; ii. 142. (2) One or more amending the law of tutory of women, G. i. 173, 174, 176, 177, 180; U. xi. 20-23. (3) G. i. 182. (4) G. 2, 276. (5) U. iii. 1. (6) U. iii. 5. (7) U. 22, 5. (8) One or more authorising certain deities to be instituted as heirs, U. 22, 6. (9) U. 24, 27.]

V. COMPILATIONS OF LAW UNDER THE EMPIRE.

The Perpetual Edict.

The *edictum perpetuum*, compiled by Salvius Julianus under Hadrian, seems to have been a systematic arrangement of the substance of the law set forth in the edicts of the various magistrates possessing the *jus edicendi.* Only some scattered fragments of it remain, in the Digest. A reconstruction has been attempted by Haubold. (Cf. Bruns, *Fontes*, 165 follg.)

Apparently, similar arrangements had been made by preceding prætors. Pomponius mentions that Aulus Ofilius was the first to publish a careful collection of the prætorian edicts.

The Institutes of Gaius.

It was very usual for distinguished jurists, especially of the half-century preceding Alexander Severus, to compile elementary treatises for the use of students. Ulpian's *Regulæ* and Paul's *Sententiæ* have already been mentioned, and we learn from the Digest that Papirius Justus, Callistratus (in three books), Paul (two books), Marcian (sixteen), and Florentinus (twelve), as well as Gaius, published *Institutiones.* Justinian's *Institutiones* or *Elementa,* belongs to a later date, and superseded them all. Of the earlier treatises, Gaius alone, the first and greatest, is extant.

Till the present century, Gaius was known only through some quotations from the Institutes, and an abridgment of the Institutes inserted in the *Lex Romana Visigothorum* (A.D. 506). In 1816 Niebuhr discovered the *Institutiones,* without either title or author's name, on a palimpsest of a date anterior to Justinian, in the library of the Chapter at Verona. The complete MS. consisted of 127 leaves, three of which are still wanting. Under Gaius, on about one-half (61) of the leaves had originally been inscribed some work on theology ; and finally, the leaves had been scraped on one side and washed on the other and arranged anyhow, in order to receive, above all, a third inscription—the letters of St Jerome.[1] The task of decipherment was thus anything but easy. The leaf containing iv. 134-144, had been seen by Maffei in 1732, and published by him in his *Historia Teologica* in 1740, and it had been republished by Haubold in the very year of Niebuhr's discovery ; but hitherto there had been no clue to the author. The *Institutiones* set forth in four books, and under the three divisions of Persons, Things, and Actions, the law of the age of Antoninus Pius and M. Aurelius, with numerous historical references to earlier times. This work was long the leading text-book of Roman Law, and was adopted as the chief model in framing Justinian's Institutes. The existence of both works affords a valuable means of ascertaining the changes in Roman Law within the three centuries and a half separating Gaius and Justinian. When the *Lex Romana Visigothorum* was drawn up (A.D. 506), the fourth book (on Actions), and several other parts, were omitted as obsolete.

The Purpose of the Institutes of Gaius.—As Puchta remarks, the Institutes of Gaius is the earliest book, so far as we know, that communicated first instruction under this title. (*Just. Inst., Proœm.* 6.) His further view that the plan and arrangement of the work is original, and not a mere imitation of previous systems, must be considered in the light of Rudorff's qualifying statements. (Puchta, *Cursus,* I, 401 ; Bk. II. *Gesch. d. Röm. Rechts,* sect. 99,

[1] Studemund, *Gaii Inst. Comm. IV.* page 5 : "In his 127 foliis ter scripta sunt 60, 62-68, 71, 73-80, 113-117, 119, 120, 122-125 ; item folia recta 80 et 126 ; item folium uersum 72 ; item denique folii 81u uersus 1-13, et folii 118u uersus 14, 15, 22, 23, 24." The rest of the leaves are twice written, except the first (1) and the last (127). The Gaius (of the fifth century) is overwritten with the epistles of St Jerome (of the eighth century).

with Rudorff's note.) Without dwelling on Böcking's remonstrance with such modern writers as maintain that the Institutes were intended to be a system of the whole Roman civil law, we may quote, as the common view, his assertion that "both the Gaius and the Justinian profess to be works introductory to the study of Roman private law (G., 1, 8, J., 1, 1, 2), *ut sint totius legitimæ scientiæ prima elementa*, setting forth the fundamental principles of the Roman civil law—persons, things, actions." (Böcking, *Röm. Privatrecht, Einl.* sect. 11.) Huschke also assumes that the work was intended to be an institutional[1] and systematic treatise, and explains repetitions by a theory that it was published in parts, the earlier parts having issued from Gaius's hands, so that he was compelled to insert additions and corrections in the later portions, if at all. Recently, however, Messrs Abdy and Walker have argued that, although the Institutes of Justinian was intended as a preliminary text-book for students, the Institutes of Gaius was not; and they claim to account more satisfactorily than Huschke does for the repetitions. Their theory is that "Gaius's work is in every respect a book of practice." "What Gaius really had in view was, not the publication of a systematic treatise on private law, but the enunciation, in the shape of oral lectures, of matter that would be serviceable to those who were studying with a view to practice. The work itself was not directly prepared for publication, but was a republication in a collected form of lectures (the outline of which perhaps had been originally in writing and the filling-up by word of mouth), when the cordial reception of the same by a limited class had suggested their being put into a shape which would benefit a wider circle of students." In support of this view they analyse the contents of Gaius, for the purpose of showing the very particular attention he has bestowed on the burning questions in legal practice at the time he wrote. The theory, however, seems to require much revision and elaboration.[2]

The Three Oldest Codes.

The Gregorian and Hermogenian Codes.—Already in the second century, certain collections of imperial constitutions had been made: there are preserved in the Digest fragments of rescripts of M. Aurelius and Verus that had been crudely summarised by Papirius Justus; and several volumes of imperial decisions and letters or propositions addressed to the senate had been published by Paul in the time of Septimius Severus and Caracalla. The collections made by the jurisconsults, Gregorian and Hermogenian, were private compilations, without legislative authority, containing the chief imperial rescripts of the second century, divided into books and titles according to subject, and arranged under these in order of date. Of the

[1] "Nec dubito Gaium ipsum hæc rudimenta eo consilio scripsisse, ut 'in stationibus ius publice docentium' (Gell., 13, 13) ab iis potius quam, ut hactenus factitatum, ab edicti prima parte iuris studium auspicaretur, quod pariter ei ineptum uideri debebat, ac nobis uideretur, si quis ab ordine quodam iudiciario explicando ante Institutiones uel Pandectas acceptas initium facere uellet." (Huschke, *Iurisp. Anteiust.* 92.)

[2] Abdy and Walker, *Gaius and Ulpian* (1st ed.), pref., ix-xiii. They claim the independent support of Dr Dernburg, in his *Die Institutionen des Gaius* (Halle, 1869).

Gregorian code there remain only seventy constitutions, embracing the century from Septimius Severus to Diocletian and Maximian (A.D. 196-304). It was probably drawn up between the latter reign and the reign of Constantine; certainly not earlier than A.D. 295. Of the Hermogenian code there remain scarcely thirty-two constitutions, embracing only seventeen years (one in A.D. 287, and the rest in 293-304), under Diocletian and Maximian, and Diocletian and Constantius. Bu seven more constitutions of Valens and Valentinian (A.D. 364-5) are found in the *Consultatio Veteris Cujusdam Jureconsulti*, headed *Ex Corpore Hermogeniani* (Huschke, *Iurisp. Anteiust.*, pp. 743-5); and, if there is not a mistake in the heading, these would seem most probably to have been appended at a later period. If so, the original compilation of the Hermogenian code would date about the same time as the Gregorian or somewhat later. If these later constitutions originally belonged to it, then the date is brought down to the end of the fourth century.[1] In A.D. 429 Theodosius ordained that the Theodosian code should be modelled after these two codes; and they probably supplied to the Justinian code the constitutions prior to Constantine. Our information regarding them comes from later collections that reproduce passages from them.[2]

No further work of Gregorian is known. But in the Digest there occur more than ninety fragments of a *Juris Epitome*, arranged in the order of the *Edictum Perpetuum*, in six books, by a Hermogenianus—whether the compiler of the code or not, we cannot tell.

The Theodosian Code.—A century later, the study of the civil law appears to have been impeded, and in fact rendered hopeless, by the confusing accumulation of imperial constitutions. To remedy this misfortune, Theodosius II., in A.D. 429, appointed a commission of ten members, which in A.D. 435 he reconstituted and increased to sixteen members, to collect and arrange the imperial constitutions dating from the beginning of the reign of Constantine. The president of both commissions was Antiochus, a past-consul and past-prætorian prefect. The new code was to continue the compilations of Gregorian and Hermogenian, and to be framed on the model of these. In A.D. 438 the completed work received the imperial sanction, and was published simultaneously by Theodosius in the East and by Valentinian III. in the West; and on the first day of the following January, it became the sole source of law for the Empire.

The Theodosian code is arranged on the traditional plan of the Perpetual Edict. It consists of sixteen books divided into titles according to the matter, and the constitutions (ranging from A.D. 312 to 438) are placed in chronological order under the titles, being broken up into parts where necessary for the proper classification of the subjects. The original texts, it is to be noted, probably underwent some verbal alterations at the hands of the second commission, which was directed to remove superfluous and to add necessary words, to change ambiguous expressions, and to amend

---

[1] Probably before A.D. 398. (Scheurl, *Lehrbuch der Institutionen*, 26.)

[2] Chiefly and almost exclusively from *Lex Rom. Visigothorum*, *Mos. et Rom. Leg. Collatio*, *Consultatio Vet. Cuj. Jureconsulti*, *Lex Rom. Burgundionum*, and the *Vatican Fragments*.

incongruities of statement.[1] The *jus privatum* occupies the first five books, with certain parts of later books (8, 12-19; 11, 30-39); this is followed by the law relating to the constitution and administration (bks. 6-8), criminal law (9), public revenue and matters of procedure (10-11), towns and corporations (12-14), public works and games (15), and ecclesiastical affairs (16). The first six books are defective, the rest are complete. The great importance of the code lies in the large number of constitutions it contains and the immense influence it exerted throughout the Roman world. Especially notable are the provisions of the last book on the subject of religion.

Projected New Code of Theodosius.—The Gregorian, Hermogenian, and Theodosian codes were to form a historical series, embracing in a certain methodical disposition the whole of the extant constitutions of the emperors up to A.D. 438, with occasional *interpretationes* inserted after paragraphs that seemed to require explanation, or an indication of their practical application. Theodosius further projected (A.D. 429) a new code, to comprise selections from these three codes and also from the treatises and answers of the jurisconsults, omitting all abrogated and disused enactments, and showing the exact state of the law at the time of publication. This work was to be entered upon after the completion of the code. But it was never executed.

Subsequent Novellæ.—In order to avoid disturbing the code by new constitutions (*novellæ*), it was agreed that none of these should possess the force of law until published both in the East and in the West. This practice was followed for some time, but it soon fell into disuse. As none of the *novellæ* of the West are found in Justinian's code, it is concluded that the *novellæ* of the West had not been recognised in the East.

Three Undated Fragments.

Fragmenta Vaticana.—In 1823 a librarian of the Vatican discovered and published certain fragments of Roman law, which were reproduced in 1828 at Berlin under the title of *Fragmenta Vaticana*. To judge from the gaps in the numbering of the sections, there would seem to be less than one-fifth of the whole collection extant. It is not certain, however, that it formed a complete work; it has more the appearance of an extensive and miscellaneous compilation of materials. The matters treated of include the law of sale, *excusatio*, agents (*cognitores* and *procuratores*), usufruct, *res uxoria* and dowry, and donations and the *lex Cincia*; and on the last half of these points it furnishes fresh details. Both the character of the jurists quoted, and the definite references to individuals give importance to the extracts. The fragments quoted *verbatim* are chiefly referred to Paul, less often to Ulpian, and still more rarely to Papinian; there is one extract from Celsus, one from Julian, and one from Marcellus; and frequent quotations from the other leading classical jurists of the empire, from Labeo to Pomponius and Scævola, in passages that look like notes. The imperial constitutions quoted date from M. Aurelius to Valentinian I. (A.D. 163-372). The Gregorian and

[1] Cod. Theod. 1, 1, 6, 1: "Quod ut, brevitate constrictum, claritate luceat, aggressuris hoc opus et demendi supervacanea [verba], et adiiciendi necessaria, et mutandi ambigua, et emendandi incongrua tribuimus potestatem."

Hermogenian codes are both quoted, the former five times. It has been inferred from the absence of mention of the Theodosian code that these fragments belong to an anterior date ; but all that we seem entitled to hold is that they are later than the Hermogenian code. Puchta and Vangerow place the date between 372 and 438 ; while Mommsen places it about 320, regarding the more recent constitutions as later additions.[1]

Mosaicarum et Romanarum Legum Collatio.—A work containing "A Comparison of the Mosaic and Roman Laws" was published at Paris in 1573. Passages are quoted from the Mosaic Law, and after each of these, without any further indication of intended comparison, are placed passages on the same matter drawn from the writings of the great Roman jurists or from the imperial constitutions. There are thirty-three passages from Paul, twenty-two from Ulpian, eight from Papinian, two from Modestinus, and one from Gaius ; eight from the Gregorian code, and five from the Hermogenian—how many (if any) from the Theodosian is not certain. A quotation from a constitution of A.D. 390 places the collection at a later date. The name *Rufinus*, believed to be read on the MS., is supposed to indicate the author ; and it has been referred to Rufinus, a prætorian prefect of Theodosius I., who died in A.D. 395, and to Rufinus, a fellow-pupil of St Jerome, founder of the Mount of Olives Convent, and one of the fathers of the Church, who died in A.D. 410. Huschke dates the compilation a few years before the end of the fourth century ; Vangerow, probably about the end of the fourth or the beginning of the fifth century.[2] Other critics place it several centuries later. It has also been called *Lex Dei.* It has been very useful in reconstructing the works quoted from, especially Paul's *Sententiæ*, Ulpian's *Regulæ*, and the Gregorian and Hermogenian codes.

Consultatio Veteris Cujusdam Jureconsulti.—In 1577 Cujas published a compilation consisting of the statement of legal questions followed by their solution on the principle of the Law of Citations, each quotation being referred with precision to its author, and the matter being digested into chapters. The author being unknown, Cujas announced the work as a *Consultatio* of some old jurist of the Lower Empire. It contains twenty-one passages from Paul's *Sententiæ*, sixteen from the Gregorian code, twenty from the Hermogenian, and eight from the Theodosian. It has proved an important help towards the right interpretation of the texts. As to the date, it can only be said to be later than the Theodosian code. Rudorff places it in the first half of the fifth century, while Huschke places it decidedly at the end of the fifth century.

Three Roman Codes promulgated by German Kings.

As the northern tribes swarmed southwards, and closed in upon Rome, they respected the Roman law in the territories they overran, and adopted the principle of judging every offender according to the laws of the nation

[1] Puchta, *Cursus*, 1,577 (Bk. II. *Gesch. d. R. R.*, sect. 135). Vangerow, *Lehrbuch d. Pandekten*, 1, 6 (*Einl.* sect. 2). Cf. Huschke, *Iurisp. Anteiust.*, pp. 616-20. Mommsen, *ed. mai.*, p. 403 follg. ; *ed. min.*, *præf.*, xiv. follg.

[2] Huschke, *Iurisp. Anteiust.*, pp. 547-9. Vangerow, *Pandekten*, 1, 6 (*Einl.* sect. 2).

that he personally belonged to. After a time, some of the conquering kings formally promulgated, alongside of their own Germanic laws, certain bodies of Roman law, binding on all Romans within their kingdoms.

Lex Romana Visigothorum, or Breviarium Alarici.—The Roman law promulgated among the Visigoths in Gaul was drawn up, by order of Alaric II., and under the superintendence of Gojaric, count of the palace, probably by a commission largely if not wholly composed of Roman jurists; and it was decreed at Aire in Gascony, A.D. 506, with the assent of the ecclesiastics, nobles, and provincial electors representing the people. The extant copy is one addressed to a certain count, Timotheus, and officially subscribed by Anianus, the secretary, by order of the king. No law or juristic opinion outside this compilation was permitted to be quoted in a court of law. The work contains—(1) constitutions (*leges*) extracted from the Theodosian code, and a series of *Novellæ* from Theodosius to Libius Severus (A.D.438-461); and (2) extracts, on the principle of the Law of Citations, from a few eminent jurists—namely, the Institutes of Gaius abridged (with omission of the fourth book and several other portions as obsolete), Paul's *Sententiæ* (five books), the Gregorian code (thirteen articles), the Hermogenian code (two articles), and Papinian's *Responsa* (two lines from the first book). With the exception of Gaius, the texts are accompanied by a very useful running commentary (*interpretatio*) in the Latin of the day. The compilation has been named *Breviarium Alaricianum* (or *Alarici*), or *Aniani*; also, in the middle ages, *Lex Theodosiana*, *Corpus Theodosianum*, *Liber Legum*, *Lex Romana*. It has preserved fragments of Roman law not otherwise known to us. It was more widely obeyed and more enduring than any of the similar bodies of law. The *Codex Legis Visigothorum*, published in Spain a century and a half later, was quite a different collection.

Lex Romana Burgundionum.—The *Lex Romana* of the Burgundians—also called, by a curious mistake of Cujas[1] (who first published it in 1566) *Responsa Papiani* (for *Papiniani*)—was announced in the second preface of the *Lex Gondobada*, so called from King Gundebald, and published under his son Sigismund, in A.D. 517. It embraces only forty-seven articles, which are arranged after the *Lex Gondobada*, and consist mostly of texts adopted from the Breviary of Alaric, with a few chosen directly from Roman writings. On the absorption of the Burgundian Kingdom by the Franks, seventeen years later (A.D. 534), it disappeared before the Breviary of Alaric and the code of Theodosius.

Edictum Theodorici.—Under the auspices of Theodoric, Cassiodorus and Boethius drew up an edict intended to be binding on Goths and Romans alike. It contained scarcely any reference to private law, for it aimed mainly at the maintenance of the Western Empire and the romanisation of the Goths. Savigny dates it A.D. 500; others, after 506. It remained in operation about half a century, being superseded by the Code of Justinian, A.D. 554.

[1] In the MS. used by Cujas, this law immediately follows the Breviary of Alaric, which ends (see above) with two lines from Papinian. The words *Responsa Papiani* (contraction for *Papiniani*), which indicate the source of those two lines, and end the Breviary, were inadvertently supposed by Cujas to be the title of the next collection. Cujas corrected his mistake in the edition of 1586.

The Legislation of Justinian.

At the distance of a century after the legislation of Theodosius, followed the legislation of Justinian. How urgent was the need for revision and reorganisation is pointed out by Ortolan : " the *plebiscita* of ancient Rome, the *senatusconsulta*, the edicts of the prætors, the numerous books of the authorised jurists, the codes of Gregorian, of Hermogenian, of Theodosius, the constitutions of all the emperors who had come after him, texts accumulated, confused and contradictory, formed altogether a real legislative chaos." For a century back, ever since the Theodosian code was published, imperial constitutions had been heaped up confusedly one upon another. The writings of the jurists had increased but little—for, since the classical days of Alexander Severus, we hear of no original works, except three books by Charisius (on the office of prætorian prefect, on civil offices, and on witnesses), quoted to some extent in the Digest, and the Epitome of the Law by Hermogenian, already alluded to ; but the Law of Citations still cumbrously and mechanically determined every question.

Codex Vetus.—The Old Code (*Codex Vetus*) was published on April 7, 529, and came into force six weeks later. On February 13 of the preceding year Justinian had appointed a commission of ten jurists, presided over by John, ex-quæstor of the palace, ex-consul, and patrician, and including Tribonian, the statesman and jurist, and Theophilus, professor of law at Constantinople, to consolidate into a single code the Gregorian, Hermogenian, and Theodosian codes, and the novels of the emperors subsequent to A.D. 438. They were instructed, "suppressing preambles, repetitions, contradictory and disused clauses, to collect and classify the laws under proper titles, adding, cutting down, modifying, compressing, if need be, several constitutions into a single enactment, so as to render the sense more clear, and yet preserve in each title the chronological order, so that this order may be noted by position in the code as well as by date."[1] The work was divided into twelve books. Constitutions not embraced in it, with the exception of those connected with certain interests specifically designated, were forbidden to be quoted in court ; and the absence of a date to any constitution (a defect that, under the Theodosian code, rendered a constitution devoid of authority) was supplied by the date of the code itself.

Quinquaginta Decisiones.—Justinian next turned to the writings of the jurists, and, on the suggestion of Tribonian, settled definitively, in a series of fifty constitutions, the controverted points that had proved so embarrassing under the Law of Citations. These "Fifty Decisions" were published at intervals during the next four years ; the most of them in A.D. 529-530. They have not survived in complete form ; but, apart from their influence on the composition of the Digest and of the Institutes, they were no doubt for the most part incorporated in the second edition of the Code.

The Digest, or Pandects.—The designations *Digesta* and *Pandectæ* were used indifferently for comprehensive law treatises or collections, the former implying a certain methodical arrangement. In former times, according to

[1] *De novo Codice faciendo*—first constitution at the head of the Code. (Ortolan, *History of Roman Law* (Prichard & Nasmith), sect. 105, par. 539, p. 444.)

Justinian, Digests had been compiled by Alfenus Varus (in forty books), by Celsus (thirty-nine), by Julian (ninety), by Marcellus (thirty), by Cervidius Scævola (forty); and Pandects by Ulpian (ten books), and by Modestinus (twelve). In A.D. 530 Justinian addressed to Tribonian a constitution, instructing him to undertake a thorough revision of the civil law, by collecting into a single code the whole of the useful matter of the juristic writings. Tribonian and his associates were to select freely from the writings of the authorised jurists, at their discretion; giving no preference to any one over another, except on pure grounds of merit of particular opinions. They were to eliminate and to correct, to cut out repetitions and obsolete law, to harmonise contradictions, and to avoid inserting matter already contained in the code of the constitutions. The work was to be in fifty books, divided into titles in the order either of the code or of the Perpetual Edict, as they should think fit. No future commentaries were to be permitted.

With the assistance of sixteen jurists, Tribonian completed the compilation in three years, A.D. 533. The hasty work was inevitably imperfect, the instructions of Justinian being in many points little attended to. Contradictions and repetitions still remained, aggravated by mutilation and alteration of the original texts of the jurists (thirty-nine). "Whether to efface the traces of abrogated institutions," says Ortolan, "whether to substitute new solutions for those formerly given, or to reconcile the different fragments, or to secure greater lucidity, or for the sake of brevity, or for other reasons, the writers of the Digest made ample use of the licence they had received to change and correct the quotations, and some jurists never broached that which the Digest causes them to say." Still, in spite of all this, the value of the work, whether to the subjects of the empire or to later students, is not to be exaggerated. It was published on December 16, and came into force on December 30, 533. As usual, the quotation of any juristic opinion not contained in it, and the publication of commentaries on it, were prohibited under penalties.

From an examination of the grouping, and of the sequence of the fragments under each article, Blume, a German jurist, was led to the belief that the extracts fall into three distinct series, which correspond generally with the first three years of prescribed legal study, and may have been prepared by separate sections of the commission, including respectively the professors of such years and subjects. The first series Blume calls the Series of Sabinus, consisting of extracts from commentaries on the writings of Sabinus, with a large number of other extracts for the most part drawn from numerous institutional and other elementary writings. The second is the Series of the Edict, consisting of extracts from commentaries on the Edict, with many other, more or less closely allied, passages. The third is the Series of Papinian, prominent in which are the Questions, Answers, and Definitions of Papinian, with extracts from similar works of several other other jurists.

The Institutes.—The *Institutiones* (or *Instituta*, or *Elementa*), an elementary treatise for students, was announced as in contemplation, in the constitution decreeing the compilation of the Digest. It seems to have been taken in hand by Tribonian, assisted by Theophilus and Dorotheus, the senior law professors at Constantinople and Berytus. It was to be based on

the existing elementary works of the jurists, and, in fact, it follows very closely the Institutes of Gaius, the most celebrated of them all. Obsolete law is omitted, and more recent law is inserted. Extracts and explanations are mixed up in a consecutive exposition, and the sources of the fragments are not indicated. The work is in four books. It was published by a special constitution investing it with the force of law, on November 22, and probably came into force, with the Digest, on December 30, 533.

The New Edition of the Code (*Codex repetitæ prælectionis*).—In a constitution dated December 17, 534, Justinian informed the Senate of Constantinople that he had commissioned Tribonian, Dorotheus, and three eminent lawyers of the city, to prepare a second edition of the Code, incorporating under the proper heads the Fifty Decisions, and a large number of constitutions subsequent to the first edition, and "suppressing without scruple whatever appears to be superfluous, abrogated provisions, repetitions, and contradictions." The New Code came into operation on Deccember 29, 534. This is the edition now extant. It is the first edition, however, that the Institutes refer to; and hence, from the changes introduced into the second edition, the references are sometimes at fault. The most ancient constitution formally ascribed to an emperor belongs to the reign of Hadrian. From this it has been rashly inferred that none of the constitutions were of older date.

The Novels (*Novellæ Constitutiones*).—Justinian reigned for thirty years longer (till A.D. 565), and continued to issue new constitutions modifying the Digest, the Institutes, and the Code. These were published in Greek, for the use of the multitude; and some of them also in Latin, for use in the West. There remain 152 in all: 30 relating to ecclesiastical affairs, 58 to the administration of the public or criminal law, and 64 to private law. The Novels were intended to form a collection in continuation of the previous compilations, but it does not appear that any such official arrangement was ever made. They come to us from four sources. (1.) We have fragmentary extracts bearing on ecclesiastical law, quoted under corresponding canons in a work on Canon Law (Νομοκανών) by John of Antioch, a learned priest, whom Justinian created Patriarch of Constantinople in A.D. 564. (2.) *Juliani Novellarum Epitome*, a Latin abridgment of 125 of the novels, published about A.D. 570 by Julian, a professor of law at Constantinople, most probably as an elementary treatise. This work was extensively used in Italy and Gaul. (3.) A Latin collection, of unknown origin, containing 134 novels, with Latin translation of such as were promulgated in Greek, widely circulated in Italy under the title of *Authenticæ*, or *Liber* or *Corpus Authenticarum*, or simply *Authenticum*—whether in contrast to the abridgment of Julian, or in accordance with the tradition that those were the very novels promulgated by Justinian in Italy. The last reason was the origin of another title of the collection—*Versio Vulgata*. (4.) A Greek collection, also of unknown origin, containing 168 documents (152 novels and 3 edicts of Justinian, with some novels of his two immediate successors and 2 edicts of prætorian prefects), probably in the original form. The last two collections are not arranged, and dates are largely wanting or incomplete. It may be added that there is extant at Paris a MS. containing in Greek an index or catalogue of the novels. Very few of the novels seem to have appeared after the

death of Tribonian, A.D. 543. The novels were published in Italy, by order of Justinian, A.D. 554.

Corpus Juris.—*Corpus Juris*, or *Corpus Juris Civilis* (as opposed to *Corpus Juris Canonici*), denotes the whole body of law embraced in the Digest, the Institutes, the Code, and the Novels. The term originated with the glossators.

It is to Tribonian that the merits and defects of Justinian's great work must be chiefly ascribed.

CHAPTER V.

THE GRÆCO-ROMAN OR BYZANTINE LAW[1] (A.D. 565-1453).

JUSTINIAN'S Code in the East.—In 1453, about nine centuries after Justinian, Constantinople was taken by the Turks, and the Empire of the East was overthrown. During some five centuries, or more than half the existence of the Eastern Empire after Justinian, the law nominally remained as settled by Justinian's legislation, modified indeed by subsequent novels of the emperors; but about the end of the eleventh century the Justinian code fell into abeyance without special abrogation. The great causes of its decay were—the change of language from Latin to Greek, the accumulation of fresh law and of commentaries and the authorised readjustment of the whole, and the overpowering influence of the ecclesiastical or canon law.

The Greek Jurists of the Half-Century after Justinian (*Antiqui*), A.D. 576-625.—During the fifty years following the death of Justinian, there appeared in Greek not only literal and epitomised translations, and summaries of contents, which Justinian had expressly permitted, but also, and even in his own lifetime, commentaries or interpretations, which he had expressly prohibited as "rather perversions." The Greek jurists that performed this work of translation and interpretation were mostly professors of law—the school of Justinian and their immediate successors. They have been called the *Antiqui*. Only three or four of their works are still extant in MS., the rest being known to us from fragments cited in the imperial compilations of the ninth century (chiefly in the *Basilica*), or in later writings. To each of the four sections of Justinian's work their studies were directed. The *Institutes* was reproduced by Theophilus in a Greek paraphrase, which has come down to us in various MSS.; and it formed the subject of two commentaries, by Dorotheus and by Stephanus (also a professor of law at Berytus, A.D. 555), now known only from quotations. *The Digest* gave rise to numerous commentaries—by Theophilus, Dorotheus, Isodorus, Stephanus, "Anonymous" (conjectured to be Julian, who wrote the

[1] See generally Zachariæ von Lingenthal, *Historiæ Iuris Græco-Romani delineatio*, and *Gesch. d. Gr.-Röm. Rechts.* Mortreuil. *Hist. du Droit Byzantin.*

Epitome Novellarum), Cyrill, Theodorus of Hermopolis, Gobidas (or Cubidius), and Anastasius—also known only from quotations. *The Code* was translated and largely commented on. There are references to a translation into Greek, with a concise commentary, by Anatolius; a more extensive commentary, by Isodorus; a translation, with a still larger commentary, by Thalelaeus; two abridgments, by Stephanus and by Theodorus of Hermopolis; and a new commentary by Phocas. *The Novels* appeared in three abridgments, by "Anonymous," by Athanasius, and by Theodorus of Hermopolis, which have reached us in MSS. nearly complete, except that the first appears only in fragments and in quotations. There were also the four works previously enumerated (page 92). Two commentaries on the novels, by Philoxenus and by Symbatius, are referred to in quotations. And, finally, there may be mentioned three monographs on special subjects.

Manuals or Codes of the Byzantine Emperors (*Ecloga, Prochiron, Epanagoge, Basilica*), A.D. 740-911.—A long period of neglect and languishment succeeded. The labours of the jurists on Justinian's code having apparently ceased, the next subject of legal activity was the imperial constitutions; but not till a long century later. Meantime (A.D. 717) the public school of law at Constantinople was closed, not to be opened for a century and a half to come (A.D. 866). At length, from about the middle of the eighth to the beginning of the tenth century (740-911), there appeared at intervals, under imperial authority, a series of three works on the constitutions. Those professed, indeed, to be derived from Justinian's compilations, but actually they were founded on Greek translations, abridgments, and commentaries, with which Justinian's texts were overlaid, and by which they were in the long run superseded.

1. In A.D. 740 a work called ἐκλογὴ τῶν νόμων, or *Ecloga Legum* (A Selection of the Laws), or the Isaurian Law, was published under the sanction of Leo III. the Isaurian and his son Constantine Copronymus, joint emperors (720-741). It was prepared by a commission of three jurists —Nicetas the quæstor, another Nicetas, and Marinus. It consists of a preface and eighteen titles; and the various extant MSS. contain various appendices, which are chiefly formed of extracts from the jurists of the sixth century; but the most complete appendix (in MS. of the middle of the ninth century) contains also extracts from the Rhodian maritime laws, from certain military laws, and from the Georgian or rural laws. The *Ecloga* was a poor production, and gradually fell into partial disuse, being at length abrogated, after the lapse of nearly a century and a half, partially by the *Prochiron*, and absolutely by the *Epanagoge*.

2. About A.D. 878 (870-879), a manual called ὁ πρόχειρος νόμος, Πρόχειρον νομικὸν, or *Prochiron*, also known as the constitution of Basil, or the constitution of the three emperors, was published under the sanction of Basil the Macedonian and his sons Constantine and Leo the Philosopher. It survives in various MSS., and consists of a preamble followed by forty titles, under which are grouped fragments from Greek abridgments and commentaries of Justinian and from the *Ecloga*, and recent amendments of the law from imperial constitutions. In the preamble the *Ecloga* is contemptuously discredited as a jumble rather than a selection of laws, and it is abrogated as far as necessary at the time (ὅσον ὤφειλεν).

A few years later (884-6), a revised edition of this work, called Ἐπαναγωγὴ τοῦ νόμου, or *Epanagoge Legis*, was published under the sanction of Basil and his sons Leo and Alexander (joint emperors, 879-886). This was intended as a sort of introduction to a general revision of the ancient laws —an undertaking that had been announced in the preamble to the *Prochiron*, and of which several volumes had already been published. In the preamble, the ignominious abrogation of the *Ecloga* is recorded ; and the bitter terms employed have been attributed to the religious opposition between the houses of Basil and Leo.

"The *Prochiron* and the *Epanagoge* became, both in Byzantine jurisprudence and practice, till the end of the Eastern empire, the constant resource and chief authority of the lawyer ; but the most important portion of this legislation is the *Basilicæ*." (Ortolan, *History of Roman Law*, 593.)

3. The *Basilica* or *Basilicæ* (τὰ βασιλικὰ νόμιμα, or αἱ βασιλικαὶ διατάξεις, "the imperial laws or constitutions ;" almost certainly without any reference to the name of the emperor Basil), originally known as the Revision of the Ancient Laws (ἡ ἀνακάθαρσις τῶν παλαιῶν νόμων, or *Repurgatio veterum legum*, or *Basilica repetitæ prælectionis*), was the completed work just referred to as announced in the preamble to the *Prochiron*, and begun under Basil. It was probably published under Leo and his brother Alexander and his son Constantine Porphyrogenitus (A.D. 906-911). Originally the work was disposed in six volumes, divided into sixty books, which were subdivided into titles. No complete MS. of the whole work remains, but a very able re-construction was attempted by Professor C. W. E. Heimbach, of Jena (1833-70), from MSS. of various periods and of complementary contents—an undertaking that has been characterised as one of the most important literary works of the nineteenth century. The object of the compilers (whose names and numbers are unknown) was to prepare a Greek version of Justinian's legislation, revised, systematised, and supplemented by subsequent constitutions. The original text was little used ; the extracts were drawn from the translations, abridgments, and commentaries of the sixth century jurists, with the text of such novels as had been promulgated in Greek and in the *Prochiron*. Many of the laws of the Digest are omitted, and many laws and extracts from ancient jurists not contained in the Digest are inserted. The fourfold disposition of the law into Institutes, Digest, Code, and Novels, was regarded as a serious embarrassment, which the compilers proposed to remove by effecting an amalgamation of the four works. Further, the text (except where the *Institutes* is cited) is accompanied with a profusion of annotations, or *scholia*, including interpretations, examples, developments, and sometimes conflicting decisions upon the text. A marked distinction is observed in these : some are passages from the sixth century jurists, and were therefore called παλαιὰ, or *antiqua ;* others are due to later jurists, and have been termed *scholia* proper. The *Basilica*, it must be carefully noted, was not promulgated as a fresh and final source of law superseding all previous sources, as was the case with the legislation of Justinian ; for the legislation of Justinian was still acknowledged as the ultimate source of the law, not being overruled, but only accommodated to the wants of the time by the revision in the *Basilica*. In fact, however, the *Basilica*, being in the Greek language, and being authorised by imperial

sanction, thrust the original works of Justinian into the background, although it did not formally take their place until late in the eleventh century.

The Later Greek Jurists of the Empire (A.D. 911-1453).—The publication of the elementary works, the *Prochiron* and the *Epanagoge*, and of the code of the *Basilica*, naturally prompted a fresh series of juristic commentaries, abridgments, and revisions. The ecclesiastical law was also studied with equal ardour.

1. To the *scholia* on the *Basilica*, reference has just been made. The main text (κεφάλαια, or *capitula*) continued unaltered; the *scholia antiqua*, whether added originally or soon after publication, were constantly reproduced, and later *scholia* were crowded on the margin of each jurist's MS., adding to, suppressing, amending, or otherwise modifying previous annotations or the doctrines of the text, all through the remainder of the Empire. Five of these later jurists are known to us by name —John (Nomophylax) and Calocyrus Sextus (about the middle of the eleventh century), Constantine of Nicæa (later), and Gregory Doxapater and Hagiotheodorites (of the twelfth century).

Several abridgments of the *Basilica* were prepared for practical use. An ἐκλογὴ βασιλικῶν (*Synopsis Basilicorum*), composed about 997, and furnished later with successive additions, survived in considerable respect, for some four centuries, till the close of the empire. Another concise and systematic abridgment was made in the second half of the eleventh century (1072) by Michael Attaliates, under the title of Πόνημα νομικὸν (*Opusculum de jure*). The two preceding works were also abridged and alphabetically arranged, under the title of Μικρὸν κατὰ στοιχεῖον, or *Synopsis minor*, in the second quarter of the thirteenth century.

2. The manuals of Basil also suggested the compilation of similar works, or themselves underwent revision. (1.) The Ἐπιτομὴ τῶν νόμων, or *Epitome Legum*, in fifty titles, founded partly on Justinian, partly on the *Epanagoge* or the *Prochiron*, was compiled in A.D. 920; and an enlarged or revised edition, in the order of the *Prochiron*, was published towards the end of the reign of Constantinus (945-959), under the title of *Epitome ad Prochiron mutata*. (2.) The *Epanagoge aucta*, a revision and enlargement of the *Epanagoge*, belongs to the last quarter of the tenth or the first quarter of the eleventh century. (3.) The *Ecloga ad Prochiron mutata* also, a compilation from the *Ecloga* of Leo, the *Prochiron*, and the *Epitome*, with additions from other sources, dates about the middle of the eleventh century, in the reign of Constantinus Monomachus (1042-54). (4.) The *Prochiron auctum*, a revised and greatly enlarged edition of the *Prochiron*, appeared about 1300.

3. Four other works, two of the eleventh and two of the fourteenth century, may be mentioned as largely based on the foregoing. (1) The Πεῖρα (*Experientia Romani*), a compilation, under 75 titles, of cases (with their decisions) drawn from the *Sententiæ* and other writings of Eustathius Romanus (A.D. 960-1000), belongs to the reign of Constantinus Monomachus (1042-54). (2) The *Synopsis Legum* of Michael Constantinus Psellus (A.D. 1020-1105) was couched in unpoetic verse, and dedicated to his pupil, the Emperor Michael Ducas (1070). (3) After an interval of some two centuries and a half, in 1335, the monk Matthæus Blastares published a Manual of Civil and Canon Law, which enjoyed great reputation during the century following. (4) And ten

years later, 1345, Constantine Harmenopulos, judge at Thessalonica, issued his *Hexabiblos* (Πρόχειρον τῶν νόμων τὸ λεγόμενον ἡ Ἑξάβιβλος) or *Promptuarium* —a lucid and methodical exposition in six books, under 80 titles, adapted to the jurisprudence of the age, the matter being drawn from the *Prochiron*, the *Synopsis Basilicorum major* and the *Synopsis minor*, the Πεῖρα, and (to some extent) the *Ecloga* of Leo. This work became famous throughout the East, commanded the respect of the Greeks under the Turkish domination, and even found its way into the West.

4. The *Novellæ* of the post-Justinian Emperors of the East dealt more with religious and political affairs than with private civil law.

5. At the same time the ecclesiastical law was closely allied with the civil law, and many of the jurists were as good canonists as civilians—for instance Psellus the younger, Doxapater, and Blastares. The great compilations contrasting the civil and the canon laws were called *Nomocanons;* and of course these were abridged by some jurists, and recast into systematic treatises (*syntagmata*) by others. The *Nomocanon* of John of Antioch has already been mentioned (page 92); it was revised and enlarged by Photius, and published under Basil in 883. The most celebrated of the later canonists were John Zonaras, who wrote in the twelfth century, and Theodorus Balsamon, who died early in the thirteenth century.

Fall of the Empire of the East, A.D. 1453.—On the overthrow of the Eastern Empire, the Koran superseded the Græco-Roman law as the law of the dominant people. Still the codes and manuals of the Byzantine emperors remained the law of the vanquished Greeks; even after the modifications of four centuries, they entered as the chief basis into the codes promulgated in Greece only half a century ago (1834), and they have been recognised as traditional law and custom in all subsequent attempts to formulate a complete system of law for the Greek nation.

The Later Study of Byzantine Law in the West.—The fall of Constantinople and the supremacy of the Turks led to a westward migration of learned men, carrying with them relics of Byzantine art, literature, and law. Copies of the works on Græco-Roman law, in parchment rolls or volumes, were deposited in many of the great cities of the West, especially in Italy. The Greek paraphrase of Justinian's *Institutes*, by Theophilus, was published at Basle in 1534; the *Hexabiblos* or *Promptuarium* of Harmenopulos, at Paris, in 1540; the *Synopsis Basilicorum*, in 1575; the *Basilica*, in 1667; the various collection of both canon and civil law texts, in 1573 and 1596; the canon and the *Nomocanons*, from 1661. Those sixteenth and seventeenth century editions commonly included a Latin translation. The active study of the Græco-Roman law declined during the last century, and passed from France into Germany in the early years of the present century. Ever since then the palm has been retained by the Germans, who have examined every MS. and issued the best editions; but the generous rivalry of France has been represented by several brilliant names.

CHAPTER VI.

THE JUSTINIAN LAW IN THE WEST.

THE Law of Justinian in Italy.—The Edict of Theodoric had ruled in Italy for only a short half century, when the victories of Belisarius and Narses opened the way for the extension of Justinian's legislation to the schools and courts of Rome and of Italy, by a pragmatic sanction dated 554. From this time forward the Byzantine power maintained a footing in Italy for about three centuries. Very soon, however, it began to suffer curtailment. In 568 (fourteen years later), the Lombards descended and seized a large slice of imperial territory; in 726 (172 years later), Rome threw off Byzantine supremacy; in 752 (198 years later), the Exarchate of Ravenna, the Pentapolis, and Istria, were conquered by the Lombards; in 774 (220 years later), Charlemagne founded the Pontifical States and the Frankish kingdom of Italy on conquests won from the Lombards; and about the middle of the ninth century (about 300 years later), the Byzantine power was extinguished in Italy by the independence of Pisa, Naples, and the southern shores of the peninsula. During those three centuries the Justinian law remained all but unaltered, especially as regards the civil law. Under pressure of the wars, Odofredus (died 1265) tells us, the school of Rome was transferred to Ravenna, whence the books of the law (that is, probably, the official MSS.) were carried to Bologna. Bologna ceased to be ruled from Constantinople in 728. Pisa and Amalfi, both also interesting for their possession of Justinian MSS., remained under imperial rule more than a century longer, after which their rivalry continued till the final overthrow of Amalfi in 1137. And through all these changes the Roman law continuously flourished in Italy.

Greater than a shifting territorial supremacy were the influence and the authority of the Church in supporting and fostering the Justinian legislation. For the Popes and the pontifical courts ranked the Roman civil law only a little lower than the canon law, and consistently upheld its authority; their influence penetrating far beyond the borders of the States of the Church, wherever an ecclesiastic found his way.

Yet more general was the influence of the principle of the personality of the laws. The conquering nations maintained their own laws; the Roman subjects of the empire and the clergy obeyed the Justinian law; the Romans of the territories subjugated by the northern invaders obeyed, as we have seen, chiefly Roman laws sanctioned by the invading kings. The principle was long adhered to. In the ninth century Lothar I. ordered that the whole of the population of Rome should be interrogated as to what law they individually desired to live under, so that they should be judged by that law of their choice, and by no other law.

Thus the Roman law, either ante-Justinianian or Justinianian, lived on through all vicissitudes of territorial conquest; "and, even in the obscurity and during the development of the feudal system, it was perpetuated, if not as a science, at least in practice, leaving the proofs of its authority in the

decisions, in the acts, in the formulæ of those times, and in the letters and writings of learned men." (Ortolan, *History of Roman Law*, 122.)

The Law of Justinian in Gaul.—As in Italy, so in Gaul the Roman law, whether ante-Justinianian or Justinianian, was preserved through ecclesiastical influence and the principle of the personality of the laws. We have already spoken of the Roman law of the Visigoths (or Breviary of Alaric) and of the Burgundians, and of the superior quality and vitality of the former collection. The epitome of the *Novellæ*, by Julian, which formed the basis of the Breviary, was also known in Gaul in the ninth century, probably through the relations of the clergy with their Italian brethren; and the two works were often copied together in the MSS. of the age. The works of Hincmar, Archbishop of Rheims, too, dating about the middle of the ninth century (845), indicate acquaintance with the Gregorian, Hermogenian, and Theodosian codes, and with the Comparison of the Mosaic and the Roman laws. But it is in the writings of Ivo (1035-1115), Bishop of Chartres, that we first light upon traces of the Institutes, Digest, and Code of Justinian; and in his *Pannormia* and *Decretum*, compilations of canonical texts, are found numerous fragments drawn from these sources. Ivo was a fellow-pupil of the Italian Anselm (afterwards Archbishop of Canterbury) in the Benedictine Abbey of Bec, in Normandy, under Lanfranc (who had previously won a reputation at his native Pavia as a teacher of the civil law); and this experience, as well as subsequent travel to Italy, would point to the probable origin of his familiarity with Justinian's works. For there were several Italian collections of the eleventh century, to one or other of which all Justinian's compilations furnished quotations, and Ivo was prepared to seek for, and would be sure to provide himself with, the best and newest literature on the subject.

With the progressive fusion of races would coincide a progressive fusion of laws and customs, and the principle of deciding a person's laws according to his origin or his choice would tend to fall into abeyance. At the same time the Justinian law and the canon law flourished side by side, and were gradually absorbing or overshadowing the Germanic laws and usages of the dominant people.

The Bologna School and the Glossators (A.D. 1100-1260).—As late as the first half of the eleventh century the study of the works of Justinian was kept up in the school at Ravenna, as we gather from the writings of St Damian (988-1072), Bishop of Ostia; in the tenth and early part of the eleventh century, the Lombardian law was the main study of Pavia, which Lanfranc left for Bec in 1042; and in 1075 Pepo delivered a public course of law at Bologna, where Irnerius, the first of the Glossators, was presently about to found the famous school of law, and to communicate to the study of jurisprudence such an impulse as has justly been termed a Revival.

The Glossators were jurists that inscribed on the MSS. of the Justinian laws interlinear and marginal notes explaining difficult words and passages. The practice was by no means new, but it had never been carried out to such an extent or with such ability; for the glossators commented at length on the whole of Justinian's books, and their glosses were received as authoritative over the whole of Europe. The extended glosses of a single jurist often formed a connected commentary on a portion of the *Corpus Juris*.

Closely allied in character with the glosses were the *summæ*, or summaries preliminary to exegetical lectures on particular portions of the *Corpus Juris*: *casus*, or cases constructed to exemplify or illustrate difficult points; and *brocarda*, or rules of law drawn from the texts, with parallel passages containing apparent difficulties, and with the attempts at explanation. The glossators also gave oral instruction, and wrote special treatises, chiefly on actions and procedure.

The glossators flourished for about a century and a half, from the beginning of the twelfth century to the time of Accursius, who died in 1260. Irnerius, the founder of the school, is known to us only as chief of the Bologna doctors (*lucerna juris*) in 1115, and as occupying a high post in the service of the Emperor Henry V. in 1116-18. After him may be mentioned four famous Bologna doctors, who all died about the end of the third quarter of the twelfth century: Bulgarus (died 1166), Martinus Gosia (died shortly before), Jacobus (died 1178), Ugo (died 1166-71). Placentinus (1120-92), named from Placentia his birth-place, founded the first French school of law at Montpellier in 1180, and introduced the writings and the method of the glossators. Vacarius, a Lombard, who was taken from Bologna to England in 1144 by Theobald, Archbishop of Canterbury, founded a school of law at Oxford, and introduced the writings of Justinian and the system of Bologna. He also met the wants of the poorer students by publishing extracts from Justinian, with concise glosses, under the title *Liber ex enucleato jure exceptus, et pauperibus præsertim destinatus*. Another very celebrated glossator was Azo, whose importance to us is vastly enhanced owing to the indebtedness of Bracton to his writings. The last of the glossators was Accursius (1182-1260), a pupil of Azo's, who was a professor of law for many years at Bologna, and afterwards occupied his retirement in compiling the "Great Gloss." This work "contains extracts, collected and combined in the margin of each text, from the entire *Corpus Juris*, and is a collection of the ancient annotations of the whole school of the glossators, supplemented by his own annotations." For the next eighty years the authority of the gloss was even superior to the authority of the text.

In spite of all the useless and absurd matter abounding in the writings of the glossators, their labours are valuable—(1) on points of construction of the text; and (2) for references to all parallel, similar, and contradictory passages in the whole *Corpus Juris*.

There are two elementary manuals of Roman law, formed on the model of Justinian's *Institutes*, and belonging to the period between the later part of the eleventh and of the twelfth centuries, that cannot be definitely assigned as producers or as products of the activity of the glossators. Though based on the *Institutes*, and similarly disposed in four books, both works show variations from the order of subjects in the *Institutes*, and they contain also passages from the Pandects, the Code, and Julian's Epitome of the Novels. The *Brachylogus totius juris civilis* (also known as *Corpus Legum*, or *Summa Novellarum*, or *Enchiridium*), Savigny is inclined to think, was composed in Italy about the opening of the twelfth century, and perhaps by Irnerius himself. The *Petri Exceptiones Legum Romanarum*, which may also be dated in the first half of the twelfth century (Savigny would place it before, Laferrière after, the rise of the Bologna school), was composed by Petrus, a jurist of Valence

in Dauphiné, otherwise unknown. In this work the author has adapted the Roman law to the circumstances of the Province (Arles), modifying it by rules of canon law and by local customs.

The revival of the study of Justinian law and the rise of the Bologna school were long (till 1726) erroneously attributed to the alleged discovery of a MS. copy of the Pandects (said to have been sent by Justinian to Amalfi) at the sack of Amalfi by the Pisans in 1137. But the study of Roman law, we have just seen, was pursued with ardent enthusiasm long before 1137, and the sack of Amalfi in that year by the Pisans is not an absolutely certain historical event. However, the MS. in question, now called the *Pandectæ Florentinæ*—having been carried to Florence on the conquest of Pisa in 1406—was well known to the glossators, who referred to it as the *Littera Pisana*. It is a very ancient and valuable copy of the entire Pandects, the only one now extant that dates before the age of the glossators. The glossators, however, possessed many other MSS. of ancient date ; and it was by the diligent critical comparison of these with each other and with the Pisan MS., that they succeeded in reconstructing the received text of the Pandects (*Littera Bononiensis*, or *Vulgata*, the Vulgate). The division of the Vulgate into three sections or volumes—the *Digestum Vetus* (containing the Digest, Bks. i.-xxiv. 2), the *Infortiatum* (D., xxiv. 3—xxxviii.), and the *Digestum Novum* (D., xxxix.-l.)—was traditional till the seventeenth century, after which it ceased to be maintained in the new editions. The origin of it has been attributed to the piecemeal obtaining of texts by the early glossators. (See Savigny, *Gesch. d. Röm. Rechts im Mittelalter*. iii. 422 follg. (Kap. xxii. sect. 157). Maynz, *Cours*, 1.266 (*Introd.* 87)).

The fame of the Bologna school spread throughout Europe, attracting crowds of students from all quarters, and kindling widely a vivid interest in the books of the law. About 1135, if not earlier, the Code of Justinian was translated into French, and in the thirteenth century many French translations were made of the Digest and the Institutes as well as of the Code. The canon law itself seems to have been in danger of suffering complete neglect in the ardour of the clergy to study the law of Justinian. In the twelfth century three successive councils (at Rheims, 1131 ; the Lateran, 1139 ; at Tours, 1162) stringently forbade ecclesiastics to study the secular laws (*physicam legesve mundanas*) ; early in the thirteenth century (1220) this prohibition was confirmed by a decretal of Honorius III., which also extended it specifically to Paris and the neighbouring towns ; and, notwithstanding the protest of Dumoulin three hundred years later, and the exceptional order of the Parliament of Paris in 1576 in favour of Cujas and other Parisian doctors of canon law, it was re-enacted in 1579, and not finally removed till a century later (1679), having lasted for four centuries and a-half.[1] The strict limitation of Parisian teaching to theology (with only such references to civil law as might be absolutely necessary) was favourable

[1] Hallam says the prohibition was silently disregarded. He refers to Crevier, *Hist. de l'Univ. de Paris*, i. 316, and ii. 275. *Middle Ages*, iii. 417 (ch. ix. Part i.). Cf. Maynz, *Cours de Droit Romain*, i. 263 (*Introd.* sect. 86). Savigny, *Gesch. d. Röm. Rechts im Mittelalter*, iii. 337-374 (Kap. xxii. sect. 126-140). Laferrière, *Hist. du Droit Français*, iv. 328 follg.

to the continued predominance of Bologna in civil law, to the growth of the Montpellier school, and to the establishment of new schools, the chief of which were located at Toulouse (1233), and at Orleans (before 1236). All those great schools (except Paris), and the numerous schools that sprang up in the succeeding centuries, taught the civil law on the basis of the texts of Justinian.[1]

The Scribentes (A.D. 1260, or rather 1340,—1510).—For about eighty years (1260-1340) the reputation of Accursius was supported by his sons and a series of followers, in whose servile preference of his gloss the text itself was forgotten. A reaction gathered head with Cinus (1270-1336), and was carried to a successful issue by his distinguished pupil, Bartolus (1314-57), a native of Sasso Ferrato in Umbria, professor of law at Pisa (1339) and at Perugia (1343-57). Bartolus was the chief of the *Scribentes*—a school that rejected the authority of the glosses, and taught principles drawn directly from the texts. Bartolus wrote commentaries on the three sections of the Digest and on the Code, as well as *Consilia*, *Quæstiones*, and *Tractatus;* and all his works were received with distinguished honour throughout western Europe—in Italy, France, Spain, and Portugal.

The Humanists (A.D. 1500—1600).—During the latter half of the fifteenth century, the study of classical literature, revived throughout the West by the refugees from the catastrophe of the empire of the East, had suggested, especially to the students of Italy, the helpfulness of philology, literature, and history to the progress of the study of jurisprudence. With the sixteenth century begins the so-called school of the *Humanists*—jurists that extended their studies beyond the legislation of Justinian (which had till recently for the most part engrossed their attention) to the whole history of Roman law from the earliest times, in the East as well as in the West, and that carried their researches beyond legal documents into all the works of classical literature (*Lettres Humaines*, *Litteræ Humaniores*).

The first three humanists of note were quite as much scholars as jurists. In 1508, Guillaume Budé (Budæus) of Paris, secretary to Louis XII., and Master of Requests to Francis I., a great scholar and antiquarian, published twenty-four books of annotations on the Pandects. About the same date, Johann Ulrich Zaze (Zazius) published annotations and interpretations of ante-Justinian legal works. In 1518 André Alciat (1492-1550), a greater jurist than either, published commentaries on the three last books of the code (the *Tres Libri*) ; and subsequently was professor of law at Avignon (1522), Bourges (1529), Pavia, Bologna, and Ferrara successively. But the greatest of all the Humanists was Jacques Cujas (1523-90), of Toulouse, who began to lecture on the Institutes in his native town about fifteen years after the arrival of Alciat at Bourges. In 1554 he became professor of law at Cahors ; next year he passed to Bourges, and in 1557 to Valence ; and, after several other changes, he finally settled at Bourges in 1577. Instead of accepting the Roman law as a homogeneous whole, he set himself to recompose it, by separating the works of the different jurists. In particular, he annotated Ulpian and Paul, and restored Papinian. He thus fell into a

[1] Savigny, *Gesch. d. Röm. Rechts im Mittelalter*, Bd. III. Kap. xxi., treats of the Universities.

rudimentary historical method, but he possessed no philosophical conception of law as a science. (Hugo, *Gesch. d. R. R.*, sect. 243.) He was a concise and clear writer ; and such was his renown in the German schools that every one is said to have raised his hat at mention of his name. His reputation rests on the study of the original MSS. of the Roman law, and his philological treatment of the texts. His own library contained 500 Roman law MSS. Doneau (1527-91), a contemporary of Cujas, applied his logical mind to the matter of the law, fearlessly laying down principles and deducing results. He composed dogmatic treatises on the chief portions of the civil law.

Later French Jurists.—With the night of St Bartholomew and the victory of Jesuitism, the life-thread of Roman law study in France was cut. (Bruns, *Gesch. u. Quellen d. Röm. Rechts*, sect. 4, in Holtzendorff's *Encyclopädie d. RW.*, 3te. Aufl., 1877, page 83.) Doneau found refuge at Leyden. Denys Godefroi (Gothofredus) (1549-1622) withdrew to Geneva, and afterwards settled at Strasburg. He is famous for his edition of the *Corpus Juris*. His still greater son, Jacques, was considered by Hugo as perhaps the most meritorious writer on the history of Roman law. His most celebrated work is a commentary on the Theodosian Code. In the latter half of the seventeenth century, Domat (1625-95) may also be mentioned. In the eighteenth century Pothier (1699-1772) shall stand alone. His practical method contrasts alike with the philosophical method of Doneau and with the antiquarian method of Cujas. It was left to Pothier laboriously to execute the bold conception of Leibniz, by rearranging into systematic order the whole of the chaotic mass of Roman law in his splendid work, *Pandectæ Justinianeæ in novum ordinem digestæ* (1748-52)—the result of twelve years' unremitting labour. He has preserved the ancient sequence of the books and titles of the Pandects, rearranging the texts (with the cognate matter of the Institutes, the Code, and the Novels under each title in such order as to set forth in a single systematic view the whole teaching of the law on each particular subject—showing at a glance the state of the ancient law, with all the subsequent confirmations, interpretations, modifications, and abrogations of its provisions—the whole being accompanied with learned notes of admirable conciseness and lucidity.

Roman Law in French Law.—The *personality* (or nationality) of the laws was still recognised in Gaul in the sixth century ; for the *Constitution générale* of Clotaire I. (about 560) decrees that causes between Romans shall be decided by the Roman laws. Three centuries later, the law had become *territorial*, for the *Edit sur la paix du royaume* of Charles the Bald (in 864 refers to different districts as under, or not under, the Roman law. The Roman law in Gaul, we have already seen, was ante-Justinian law, the Breviary of Alaric and Julian's Epitome of the Novels. But after the spread of the scientific study of Justinian's works from Bologna to Montpellier and other parts of France, the Justinian law in the twelfth and thirteenth centuries gradually replaced the ante-Justinian, as being the more perfect form of the Roman law. In 1250 France was still divided under two laws : in the south (*pays de droit écrit*), the Roman (now called the written) law ruled, modified by local customs ; in the north (*pays coûtumiers*), local customs ruled, slightly modified by Roman law—which, however, was taught in northern schools, and has left numerous traces in the legal works of the

period. Or, the Roman and customary law conjointly ruled both divisions, each holding the supremacy in one of the divisions. And so the law generally remained till a uniform code was prescribed for the whole republic in the end of last century.[1] Besides the Roman and the customary law, there enter into modern French law other elements, derived from barbarian, feudal, monarchical, and canonical law.

Roman Law in Holland.—The Dutch school of jurists arose in 1575 with the foundation of the University of Leyden, and the occupation of a chair of law in it by Donellus (Doneau), who had been expatriated for embracing Protestantism. Presently more universities were established, and the study of the law advanced. In the seventeenth century are the great names of Grotius, Vinnius, Van Leeuwen, and Huber; in the eighteenth century, Voet, Westenberg, Schulting, Noodt, and Bynkershoek. The reputation of these professors drew students even from Bourges and Toulouse to Leyden and Utrecht. But political vicissitudes by-and-by crippled the schools of law, and the lead passed over to Germany. On the whole, Goudsmit himself feels compelled to "admit that it is not without cause that the Dutch jurists are accused of having expended a vast amount of scholarship to little purpose, and of having failed either to sound the depths of Roman law, or invariably to apply its principles with success to the ordinary relations of life." (Goudsmit, *Pandects*, transl. by Tracy Gould, p. 11, *Introd.* sect. 7.)

Roman Law in Germany.[2]—In addition to the ancient native usages, the common law of Germany includes foreign elements drawn from the Canon law, the Lombardian feudal law, and the Roman law; and the chief of the foreign elements is the Roman law. The acceptance and validity of the Roman law in Germany has perhaps been most carefully and concisely stated by Professor Windscheid, in five propositions:—(1) The Roman law operates not as absolute common law, but only as subsidiary common law—that is to say, it does not override the injunctions of particular laws, but it comes into application only in the absence of such express injunctions. (2) It has been accepted in the form imposed upon it by the Justinianian codification, and the labours of the school of Bologna, and in this form alone. (3) It has been received, not as particular propositions, but as a whole.[3] (4) It is current as modified by three influences—the canon law,

---

[1] "It is universally known that, with regard to Roman law, Pothier is the pole-star of the modern French jurists, and that his works exercised the most immediate influence upon the code." *Of the Vocation of Our Age for Legislation and Jurisprudence*, translated from the German (*Vom Berufe unserer Zeit für Gesetzgebung u. RW.*) of Savigny, by Abraham Hayward. Mr Hayward adds in a note: "Dupin, in his *Dissertation sur la vie et les ouvrages de Pothier*, says that three-fourths of the *Code Civil* were literally extracted from his treatises."—Cf. also Windscheid: "In particular, the law of Obligations is to a great extent little more than a compilation from the various *traités* of Pothier." (*Pandektenrecht* I. 16, note 2 *ad fin. Einl.*, sect. 6.)

[2] Windscheid, *Lehrbuch des Pandektenrechts*, I. 1-7 (sect. 1, 2). Brunner, *Gesch. u. Quellen d. Deutschen Rechts*, sect. 26, in Holtzendorff's *Encyclopädie*, 218-221. Stobbe, *Gesch. d. Deutschen Rechtsquellen*, I. 609-655; II. 1-142.

[3] This used to be expressed as "in complexu." The view has been impugned. Windscheid refers to Wächter, *Gemeines Recht Deutschlands*, 193-202. Cf. also the

the German imperial statutes, and the general customary law of Germany. (Cf. Savigny, *Syst. d. Heut. Röm. Rechts*, I, 4.) (5) Its validity was not affected by the dissolution of the German empire.[1]

The reception of the Roman law in Germany was a process of long duration. It was not accomplished by a legislative act, but through customary use; and, as Windscheid puts it more definitely, not through the usage of the people, but through the practice of the jurists, who based their legal decisions and opinions on the Roman law. This principal influence of the jurists was strongly supported by the ancient popular notion that, as the Roman empire comprehended the whole world, so the Roman law had a claim to acceptance throughout the whole world; and, in particular, that, as the Roman empire, whose crown the German sovereign wore, was a continuation of the empire of the Roman emperors, so the Justinianian law should be accorded a like binding force with an imperial statute. Already in the tenth century, from the time of Otto III. (983-1002), this idea had begun to influence the laws and legal documents of the German emperors. (Stobbe, I. 612-24.) In the twelfth and thirteenth centuries German students were numerously attracted to the famous schools of Italy, and brought back new legal lights with them. In the thirteenth century traces of acquaintance with the Roman law appear here and there, particularly in notarial documents (Stobbe, I. 646-50); and even single propositions of Roman law occur in the *Schwabenspiegel* (or collection of the usages of Swabia). About the middle of the fourteenth century, native universities began to be founded, although another century elapsed before these could spare from theology and scholastic philosophy more than a secondary consideration to the Roman law. (Stobbe, I. 625-31; II. 9-22). Just before the middle of the fourteenth century (1342) King Ludwig directed that in the Aulic Council judgment should thenceforth be given only in accordance with the laws of the Roman empire of their forefathers and the written laws. In like manner the Imperial Chamber, established at Wetzlar in 1495, was enjoined to decide "in accordance with the imperial and the common laws" —"the common laws" being either wholly, or at least in part, the Roman law. The influence of this court in introducing and establishing doctrines of Roman law was very important. From the middle of the sixteenth century the reception of the Roman law may be regarded as completed.

Like the jurists of other countries, the jurists of Germany were greatly struck with the superiority of the Roman law to the native law, both in form and in substance; and their admiration naturally induced them to put it forward in practice. Brunner even charges them with inverting the relation originally intended to subsist between the native and the Roman law—except in the lands where the Saxon law prevailed,[2] in which the Roman law

very definite statements of Vangerow, *Pandektenrecht*, I. 13 (*Einl.*, sect. 5), with the authorities there mentioned.

[1] Windscheid argues strongly against the view (Wächter & Meyer) that, with the dissolution of the German empire, the Roman law ceased to be common law for Germany, and remained valid only in those individual German states that specially retained it as particular law.

[2] The Saxon usages had been put in writing (*Sachsenspiegel*) early in the thirteenth century.

still remained subsidiary. He regards as a national misfortune their narrow-minded ignoring of the native law, and their lifeless and purely external grafting of propositions of Roman law on the facts of German society. And he suggests that the confusion introduced into German law with the juristic application of the Roman law may be estimated from the fact that the Roman law has not even yet been completely assimilated.[1]

The German school of students of Roman law was founded by Zaze, whom we have already numbered among the Humanists. From the very first their labours manifested much industry and research, and were displayed in voluminous works, not adorned with the graces of style. Most of the very distinguished professors of the sixteenth century were foreigners, and their names establish a certain connection with the contemporary activity of the Humanists in France—Gifanius, Wesembeck, Donellus (Doneau), Balduinus, Gothofredus. The names of the seventeenth century are less brilliant, and the main tendency was practical, but some beginnings were made in the historical study of law. In the eighteenth century dogmatic works were elaborated on a philosophy of natural law, and such historical studies as existed were rather ornamental than actively influential. Bach (died 1758) was a good historian of the Roman Law. But the one great name of the century, that of "the learned and perspicuous Heineccius," whom Gibbon places at the head of his "most temperate and skilful guides." (Gibbon, *Decline and Fall*, chap. xliv.) Heineccius (Heineck, died 1741) wrote, in elegant style, a history of Roman and German law, Roman Antiquities illustrative of Jurisprudence (1719), and Elementary Treatises on the Institutes and the Pandects. For a whole century and for the whole of Europe he was the decisive authority on both the external and the internal history of law. With the nineteenth century there came in a certain reaction towards the natural-law dogmatism of the eighteenth century. And now the historical school was really founded by Hugo and Savigny, who conceived the law of a people as an emanation of their national life, the outcome of their special historical development and national peculiarity of ideas. Presently followed Niebuhr's important discovery of the Institutes of Gaius (1816), which added a strong impulse to the new movement. Histories of law appeared in rapid succession, and gradually inquiry began to be directed to the differences and relations between Roman and German law. Besides Hugo (1768-1844), and Savigny (1779-1861) may also be mentioned Haubold (1766-1824), Mackeldey (1784-1834), Goeschen (1778-1837), Klenze (1795-1838), Thibaut (1722-1840), Mühlenbruch (1785-1843), Zachariä (1769-1843), Puchta (1769-1845), Keller (1799-1860), Warnkönig (1794-1866), Dirksen (1789-1868), Vangerow (1808-1870), Rudorff (died 1873), Bethmann-Hollweg (died 1878).

Roman Law in Spain.—The Roman domination in Spain covered a period of six centuries, during which the Roman laws must have permeated the social system of the country. On the conquest of Spain by the Visigoths in 412-15, the Visigothic laws, which consisted of Germanic customs (with

[1] For a somewhat detailed examination of the mutual relations of the German and Roman law elements in German private law, see Brunner (*ut supra*), sect. 28, in Holtzendorff's *Encyclopädie*, 224-5.

some written rules founded on the Theodosian code), gradually displaced the existing Roman laws. It would seem not improbable that conquerors and conquered continued for a considerable time to be governed each by their own laws; and that, finally, although it may appear too broad an assertion that the *Fuero Juzgo* arose from the amalgamation of the Gothic and Roman Law on the coalescence of the two peoples in the seventh century, yet a portion of the Roman law mingled with the victorious Germanic law.[1] For Mr Stubbs's view (*Const. Hist.* I. 9) that "the *fueros* which contain the customary jurisprudence are distinctly akin to the customs of England and Germany" need not be accepted so strictly as to exclude the statement of Schmidt that "the law of descents, contracts, etc., were in general conformable to the Roman law." During the medieval period, however, the Germanic element was predominant; and "it is not until the fourteenth century that the civil law of Justinian supersedes the ancient customs, and then with its invariable results." The Bologna revival in the early part of the twelfth century soon spread its influence as far as Spain; but the compilation called *Siete Partidas* was not published till 1263, and not promulgated or generally adopted as the law of Spain till the reign of Alonzo XI. in 1348. The matter of the *Partidas* is very largely derived from the Roman law —*Partida III.* being taken from it almost exclusively, and *Partida V.* almost word for word. *Partida I.* is substantially a digest of the canon law.

Roman Law in Scotland.—From the close alliance that so long subsisted with France, Scotland, besides borrowing many of its institutions from that country, also "imported a large portion of Roman jurisprudence to make up the deficiencies of a municipal law, long crude and imperfect, and which had made little progress as a national system till some time after the establishment of the Court of Session in 1532 by James V., after the model of the Parliament of Paris. . . . . Properly speaking the teaching of the civil law commenced in Scotland at the Reformation in 1560;" after which date, as well as before it, the more ambitious students of the civil law also availed themselves of the best professorial teaching of the continental universities. "In Scotland a knowledge of the Roman law has always been regarded as the best introduction to the study of the municipal law. . . . . All the best writers on the law of Scotland, such as Stair, Bankton, Erskine, and Bell, were able civilians; and though they have not produced separate treatises on the subject, their works abound with admirable illustrations of the Roman law, evincing great learning and research, and a familiar acquaintance with the writings of the continental jurists." (Mackenzie, *Studies in Roman Law*, 40-41.)

Roman Law in England.—The influence of Roman on English law has been very differently estimated by different historians. The extreme conservative view may be represented by Professor Stubbs. "England," says Mr Stubbs, "has inherited no portion of the Roman legislation except in the form of scientific or professional axioms, introduced at a late period, and through the ecclesiastical or scholastic or international university studies.

[1] Schmidt, *Civil Law of Spain and Mexico, Introd.* 29. Schmidt quotes Cujas (*De Feudis*, ii. 11) to the effect that the *Fuero Juzgo* is nothing else than the Roman law modified to suit the condition of the Goths (*Introd.*, 37).

Her common law is, to a far greater extent than is commonly recognised, based on usages anterior to the influx of feudality — that is on strictly primitive custom." (Stubbs, *Const. Hist. of England*, I. 10, sect. 8.) The other extreme is expressed in the less recent authorities relied on in the Introduction to Reeves's *History of the English Law*, where such writers as Guizot and Mackintosh are followed with too much confidence. For the first stage we shall agree with Mr Stubbs and follow Savigny ; on the crucial point of Bracton's obligations to Roman law we shall put ourselves under the fresh and trustworthy guidance of Professor Güterbock, of Konigsberg.[1] At every step it is necessary to bear in mind the vital distinction between the analogy of two systems and the derivation of one from the other.

The definite traces of Roman law surviving the Roman domination of the island are exceedingly slight. Selden (*Diss. ad Fletam*, cap. 7) affirms that the Roman law wholly disappeared in England, until it was reintroduced from Bologna in the twelfth century. Savigny[2] adopts this view, denying absolutely its practical application as law for the people, but at the same time admitting the existence of some indications of its study by the clergy and in the schools. These indications, however, amount to no more than three or four small points—two in the laws of Cnut, one in a law of Henry I. (1133),[3] and one in the laws of Wales (about 940). To these we may add some regulations of Æthelstan, Edgar, and Æthelred respecting coin, which Mr Stubbs[4] compares with those of Lewis the Pious and Charles the Bald, finally tracing them all to the Justinian Code.[5]

A little before the middle of the twelfth century, Vacarius, a Lombard, came over to England with Archbishop Theobald, and presently

---

[1] Güterbock, *Henricus de Bracton und sein Verhältniss zum Röm. Recht.* The English translation, by Brinton Coxe, "Bracton and his Relation to the Roman Law" (Lippincott), will be the edition quoted from. Brunner, *Gesch. d. Franz., Norm., u. Engl. Rechtsquellen*, sect. 12, in Holtzendorff's *Encyclopadie*, 256, follows Güterbock.

[2] Savigny, *Gesch. d. R. R. im Mittelalter*, ii. 167 (Kap. x. the whole) ; iv. 356 (Kap. xxxvi.).

[3] Stubbs, *Const. Hist.* i. 494, note 1 (sect. 147), says, "many extracts from the civil and canon law are found in the so-called Leges Henrici Primi."

[4] Stubbs, *Const. Hist.* i. 206, note 5 (sect. 78).

[5] King Æthelberht (died 616) is said to have caused the publication of the laws of the English, after the example of the Romans (Bæda, *Hist. Eccl.*, ii. 5). But this refers only to the form, not to the contents, which contain no traces of Roman law (cf. Savigny, *loc. cit.*).—With the view in the text, contrast Reeves, *Hist. of the Engl. Law*, Introd. xlii. (cf. also xcii. and xciv.) : "The Saxons neither created nor destroyed ; they adopted and appropriated, trying, no doubt, to mix up their own barbarous usages, which, however, it was found, would not coalesce or unite with civilised institutions, so that this baser matter soon fell off and left the entire fabric of Romanised laws and institutions, save that the Saxons infused into the Roman institutions their own rough spirit of freedom, which gave them fresh life and vigour. But this did not destroy the Roman laws and institutions." As to the real nature of the English conquest of England, see Freeman, *Old English Hist.*, 27-28, and Green *Making of England*, ch. iv.

began to lecture on the civil law at Oxford with remarkable success. The new teaching, however, soon aroused warm opposition, and King Stephen, out of dislike to the primate, silenced Vacarius, and by royal proclamation prohibited anyone from even retaining in their possession the obnoxious books of the law; but persecution had its usual effect, and the futile prohibition was removed either by Stephen himself or by his successor.[1]

For the next century and a half, from the teaching of Vacarius to the death of Edward I., the influence of the new element in the formation of the English law "was so great, and its results were so important, that the whole of that period is very properly styled by Biener its Roman epoch." (Güterbock, 17.) Mr Stubbs admits that "before the end of the reign of Henry II. the procedure of the Roman civil law had become well known by the English canonists," but he holds that "its influence was not allowed much to affect the common law of the kingdom." (Stubbs, *Const. Hist.*, i. 494, note 1, sect. 147.) Shortly before 1190 appeared Glanville's *Tractatus de Legibus et Consuetudinibus Regni Angliæ*. Glanville's preface imitates the prœm to Justinian's *Institutes*, and the work itself shows traces of acquaintance with Roman law, but nowhere can the actual use of it be demonstrated, except in the discussion of agreements and contracts. (Glanville, *Lib.* 10.) Glanville regards Roman law as foreign law, contrasting *leges Romanæ* with *consuetudo regni*. But a great advance was made in the state of the English law in the next two generations separating Glanville from Bracton.

About seventy years after Glanville, in the middle of the thirteenth century, flourished Henry of Bracton, the first scientific commentator on the law of England. His great treatise, *De Legibus et Consuetudinibus Angliæ Libri Quinque*,[2] was most probably completed in 1256-59. The foreign elements in it are derived from Roman and canon law; the greater and more important part, from the Roman law. It shows close familiarity with the *Corpus Juris*. The Novels are not quoted; but the Institutes are generally referred to in one passage, and there are twelve express quotations from the Digest and ten from the Code, while a very large number of passages "are incorporated into the text itself and into the tissue of the author's commentary without any statement of their source." (Güterbock, 50-51.) The original authorities have been less used than a secondary treatise, Azo's *Summa* of the Code and of the Institutes—a work that exerted an important influence on the design, if not on the origin of Bracton's book, and seems to have served him as a model. "Like Azo, Bracton calls the dogmatic exposition of the law of his nation a *summa*. . . . Throughout nearly the whole of Bracton's book, we can distinctly trace the scientific influence of Azo's views and doctrines, especially in the definitions and divisions of legal notions and conceptions, which are generally clothed in Azo's words. . . . Particularly where Bracton follows the course of the

[1] The references are collected and partly quoted in Stubbs, *Const. Hist.*, i. 494, note 1 (sect. 147).

[2] The whole of our account of Bracton and his work is compiled from Güterbock. For discussions of doubtful points, reference must be made to his volume (as above).

Institutes—that is to say, in his exposition of the law of persons, of the division and modes of acquiring things, and of the law of actions, he generally does not lay down the text of the original authority as a foundation, but gives unaltered Azo's corresponding commentary in his *Summa* of the Institutes, merely omitting his citations and making such abbreviations and other changes as might be necessary" to accommodate his text to the prevailing state of the law of England. (Güterbock, 52-53.) There is no trace of acquaintance with the work of Vacarius, which would appear to have been generally neglected in favour of the Italian commentators. The general character of the commentary shows clearly the training of Bracton in the school of the Glossators, but there are no passages that indicate the direct use of any writings but those of Azo.[1]

In Bracton the Roman law no longer occupies the same position as it did in Glanville; it "no longer appears as a stranger, nor as a merely tolerated element of the law, but as one which in rank and origin is equal to the common law." Both the external historical evidence and the internal evidence demonstrate that no inconsiderable part of the Roman law must, at the period when Bracton lived, have been practically applied in England, and that Bracton acted on the principle of adapting from the works of Azo only such rules of Roman law as were actually received and valid law in England. For Bracton intended, not merely to compose a systematic law treatise, but, above all things, to accomplish the purely practical object of explaining and teaching "qualiter et quo ordine lites et placita decidantur *secundum leges et consuetudines Anglicanas*," using familiar and purely English materials, "facta et casus qui quotidie emergunt et eveniunt in regno Angliæ."[2] "The reader, instead of getting the impression that sometimes domestic and sometimes foreign materials are presented to him, finds before him the picture of an indivisible homogeneous whole, in which the Roman elements are no longer merely Roman law, but have become integral parts of the *leges et consuetudines Anglicanæ*." Bracton's practical purpose rigidly prevents him from entering unnecessarily into the Roman law; and even "where he seems, as it were, to copy the Roman law, he does not leave us in any doubt that he is laying it down as English law, and only as such; in some places by interpolating a word, or making a slight addition, in others by an omission or alteration of what does not conform to the common law." In order to set forth a complete view of the extent of the English reception of the Roman law in the thirteenth century, and to ascertain with precision its influence on English

[1] A single passage recalls a point in Placentinus's *summa* of the Institutes and the Code (*ad Inst.* 3, 12).

[2] Bracton, 1, 2. Güterbock, 56-57. Güterbock agrees substantially with Spence. Reeves seems (dubiously: cf. ii. 88 with ii. 54) to regard the Roman law in Bracton as a mere embellishment of scientific learning. F. A. Biener thinks Bracton accords it only the authority of a *naturalis ratio*. (Güterbock indicates all necessary references to Biener's writings.) Coxe (Güterbock, 62, note) says "Bracton seems to have been of opinion that the Roman jurisprudence, as that of all Christendom, was in force in England, as a *jus naturale* or *jus gentium*, except where supplied or displaced by general or local English usages, or by English constitutions (statutes)."

law, Güterbock devotes the Second Part of his work to a detailed investigation of the Roman elements and rules of law adopted and digested by Bracton. A summary of the more important results is presented in an Appendix to this chapter.

Though Bracton was soon overshadowed, and in many respects superseded, by the legislation of Edward I., for which his labours had to a considerable extent prepared the way, his teaching was not lost; besides what entered into legislation, it was adopted by succeeding writers, who, instead of rejecting his Roman law as an arbitrary addition, on the contrary reproduced it entire.[1] In Fleta, written soon after the thirteenth year of the reign of Edward I., not only is much of Bracton repeated, but there is also found certain additional matter derived from the Roman law, on the author's own researches, or from some other source. (Fleta, 5, 23 (*De Dotis Constitutione*); Güterbock, 70.) On the later revival of the scientific study of law, Bracton was duly remembered by Fitzherbert, Staundforde, and other inquirers; and remarkable use was made of his work by Coke in his Institutes, and especially in his commentary upon Littleton. "Coke throughout recognises Bracton not only as an original historical source, but also as an authority for existing law." (Güterbock, 73.)

The English criminal law, as set forth in Bracton, shows marks of contact with Roman law; but the Church and the canon law had a greater influence on its development. We find in Bracton, however, little more than "some general principles concerning criminal penalties and the punishment of crime, which are taken from the Digest" (D. xlviii. 19; Güterbock, 166-170) and the Institutes of Justinian.[2]

"The English system of Equity and the Ecclesiastical law have been formed more or less extensively on the Roman law, or on the Roman through the canon law." (Mackenzie, *Studies in Roman Law*, 40.)

The reception of the Roman law in England, which was indeed but of

---

[1] Güterbock, 60, 70. Cf. Stubbs, *Const. Hist.*, ii. 107 (chap. xiv. sect. 179), on the fate of Bracton and the influence of Roman law on the legislation of Edward I.: "Bracton had read English jurisprudence by the light of the Code and the Digest, and the results of his labour were adapted to practical use by Fleta and Britton. Edward had by his side Francesco Accursi, the son of the great Accursi of Bologna, the writer of the glosses on the civil law, a professional legist and diplomatist; but he found probably in his chancellor Burnell, and in judges like Hengham and Britton, practical advisers to whose propositions, based on their knowledge of national custom and experience of national wants, the scientific civilian could add only technical consistency."

[2] "The Roman criminal law," says Mr Justice Stephen, "exercised greater or less influence on the corresponding law of every nation in Europe, though in all it was far more deeply and widely modified by legislation than any other part of the Roman jurisprudence. Perhaps it was preserved with less alteration in Holland than elsewhere, as may be seen by reference to Grotius and Voet's commentary. It still retains a sort of vitality in the colonies conquered by England from the Dutch, though in Holland, as in other parts of the continent of Europe, it has been superseded by more modern legislation."

The close analogy between the modes of development of Roman and of English law is commented on (after Rossi) by Mr Justice Stephen. (*History of the Criminal Law of England*, i. 49-50 (ch. ii. *ad fin.*)).

a limited character, was, like its reception in Germany, not an act of legislation, but a long process of custom. "Many causes combined to open the way for the practical application of Roman law. Among them were the impulse given by the universities and the Oxford School of Civil Law, the recognition of the Roman law in the clerical courts, whose jurisdiction extended over a class of civil matters,[1] and the personal influence of the higher judges, who mostly belonged to the clergy, and were therefore versed in the Roman law. Above all, however, was the necessity of supplying the defects of the common law, which had become manifest from the growth of trade, the increase of intercourse, and the greater importance of moveable property; for the common law had expended its best energies in the completion of the legal constitution of the feudal system, and had showed no tendency towards creating an original commercial law. To these causes must also be added the scientific superiority of the foreign law with its completeness, over the domestic law with its want of theoretical development. Even at an earlier period it is not improbable that the Roman law had been used as an assistant and complementary authority in the Curia Regis, upon which court it was incumbent to instruct the inferior judges in regard to the law in doubtful and omitted cases. A legal principle enunciated by that court had authority beyond the particular case in which it was laid down, and became, by means of its actual use, part of the *jus non scriptum, consuetudinarium.* As Roman legal matter obtained reception, although the written sources of the Roman law were not at all received as having a legislative authority, Bracton properly included the former among the *leges et consuetudines Angliæ.*" (Güterbock, 60-62.)

After the reign of Edward I. the influence of Roman law in the English courts, though favoured for the most part by the crown and the church, undoubtedly declined. This result may no doubt be traced in part to the appointment of laymen, uninstructed in the civil law, as judges, in place of ecclesiastics learned in the civil as well in the canon law. (Reeves, *Introd.* cxii.) But probably the strongest reason is to be found in the absolutism of the Roman public law, which was abhorrent to English lovers of freedom; and the repudiation of this by the spokesmen of the people, whether barons or common lawyers, tended to involve the indiscriminate rejection of the Roman private law also.[2]

We have thus seen that "the public reason of the Romans has been silently or studiously transfused into the domestic institutions of Europe; and the laws of Justinian still command the respect or obedience of independent nations." (Gibbon. *Decline and Fall*, xliv.)

---

[1] "To testaments, to successions *ab intestato* of moveable property, to legitimacy, and even to agreements or contracts so far as their violation came within ecclesiastical censure as *laesio* or *transgressio fidei.*" (Güterbock, p. 61, note *o*).

[2] Cf. Mackenzie, *Roman Law*, 40, who refers to Hurd, *Mor. and Polit. Dialogues*, II. 194-209. Some further reason may also be found in the conservatism of ignorance and the popular dislike of further, and especially of foreign, additions to the law administered by what were considered as oppressive and troublesome institutions. (Pike, *History of Crime*, I. 133-4.)

APPENDIX TO THE FOREGOING SECTION.

SUMMARY OF CHIEF POINTS OF ROMAN LAW IN BRACTON.[1]

BRACTON'S work is planned on the threefold division of the Institutes, although the order and arrangement of the matter is original; and numerous correspondences in detail can be shown.

The Roman law is followed in certain general legal notions and divisions. In the law of persons, villeins are legally assimilated to *servi*; the nature of *patria potestas*, and the grounds of dissolving it, are referred to (with a difference), as well as distinctions in regard to sex and sanity. In the law of things, "Bracton follows his Roman models in his commentary on the general doctrines relating to things and rights concerning them. He does so especially in regard to the division of things, and the terminology of the *Corpus Juris*, which he has adopted in his chapter (Lib. I. chap. xii.) *De Rerum Divisione* has since remained fixed in the English law."[2]

But "while the principles of the *Corpus Juris* were adopted without hesitation for moveable property by Bracton and the English lawyers of his time, the progress of the Roman law towards influencing the law of immoveables was checked by the powerful obstacle of a legal system, already fully developed and complete within itself, which had grown up on purely feudal foundations, and which was thoroughly penetrated with the spirit of the feudal polity. Some particulars were indeed borrowed from the Roman law, but its fundamental principles were unaffected by any contact with the Roman law and its influence."[3] . . . . "Notwithstanding, however, the obstacles which the English law of realty opposed to the progress of the Roman law, the latter exercised an important influence upon a subject relating both to the law of immoveables and that of moveables, viz., the doctrine of *possession*. The clear distinction between proprietary right carrying with it possession (and thus constituting legal possession) and actual corporal possession, is found in the English as well as in the Roman law. It might indeed be difficult to prove that the theory of possession in England, or rather the appearance of possession as a peculiar institution of the English law, was connected with the introduction of the Roman law. There can, however, be no doubt of the Roman character of the doctrine of possession in Bracton and Fleta, which must not only be regarded as existing law in their day, but must also be considered as the basis of subsequent legal development upon this head. Their doctrine of possession is based and developed upon Roman notions and ideas; and those writers look at the subject in the same light as the contemporary Civilian school, and in many respects copy its views."[4] (See chap. xi. for the points in detail.) With regard to the modes of acquisition of property by the *jus naturale*, Bracton "almost always copies both the matter and form of his Roman authorities (the Institutes, II. 1, and Azo's commentary), and even expressly refers the reader to those sources as being, as it were, the *ratio naturalis* of the law upon such matters (Bracton, p. 10, Lib. II. chap. iii.). These principles of the Roman law, as found in Bracton, and repeated in Fleta, in fact at once became common law in England, and are still of practical validity at the present day."[5] Of course, in case there existed a particular law or custom sanctioning something different, the Roman law did not apply—it was then merely subsidiary.

Under modes of acquisition by the Civil or Municipal Law, first stands *Donatio* (not our *donation*, but "at least with reference to immoveables, every alienation or gift according to the forms of the feudal system without reference to its distinctive

---

1 Complied from the second part of Güterbock's work, pp. 79-170.
2 Güterbock, 85. 3 Güterbock, 86. 4 Güterbock, 88-89.
5 Fleta, III. 2. Cf. Stephen, *Comm.*, II. 5, 16 follg. Güterbock, 101.

legal effect"). Bracton's obligations appear in definition, divisions, and especially in the adoption of the Roman prohibition concerning donations between husband and wife. "That even at a later period the foreign law was looked upon as the real source of this prohibition is shown by Fleta, who gives the Roman law as authority for it."[1] "In the requisites of the English *donatio* we meet with many Roman principles;" for example, "free will on the part of the donator, and mutual consent on the part of both contractors (quod donator habeat animum donandi et donatorius animum recipiendi)," and "the requisite free will might be destroyed by the existence of violence (*vis*) or compulsion (*metus*)."[2] So "error prevented consent,"[3] and delivery (*traditio*) was essential to the validity of the donatio (as in the old English law, as stated in Glanville). "The question, which of several conflicting claimants of possession had the better right? is also decided according to Roman rules."[4] "The modifications of *donationes* are considered and classified according to the four kinds of innominate contracts of the Roman law,"[5] and various different kinds of conditions mentioned in the Roman law are recognised by Bracton.[6]

"Prescription (*usucaptio*) was unknown to the old English law, and also to Glanville."[7] Bracton, however, not only makes the rule general, but also connects it with certain legal effects resulting from long possession. The notion, however, "never passed beyond the limits of the first crude attempts at development. Prescription as a legal institution failed even later to obtain a firm footing in England.[8] Bracton considers the essential element of prescription to be in acquisition *per longam continuam et pacificam possessionem ex diuturno tempore*, the requisite period of time being left to the discretion of the judges. "He considers usucapio to be a means of acquiring not the right of property, but only rights of possession."[9]

"Touching predial servitudes, some general fundamental principles are borrowed from the Roman law."[10]

"As early as the end of the twelfth century the English law of inheritance had become perfected in a manner so peculiarly national, and its main principles so strongly established, that there was little ground left upon which the Roman law could operate with much effect. This was so much more the the case, because it was just in their systems of inheritance that the two laws presented the most marked contrast."[11] Still, on some points, chiefly unessential, an impression was made; for example, on the law of the legitimacy and bastardy of children as bearing on their capacity to inherit. Bastards were incapable of inheriting. Between the time of Glanville and the time of Bracton the English law appears to have "accommodated itself to the ordinances of the Church, and expressly recognised the legitimacy of the children of *putative marriages*, even when the *bona fides* was only unilateral."[12] "On the other hand, the Church met with violent resistance in its attempt to introduce and establish the *legitimatio per subsequens matrimonium*, sanctioned by its own and the Roman law, and failed to overcome the popular opinion." The proof of legitimacy was the same (with deviations). "The order of succession according to the English law was influenced by the Roman in one point only. In my opinion, the gradually established recognition of the so-called right of representation in the succession of descendants must be referred to legal views derived from the Roman law and from the Church."[13] "The *communio* between co-heirs was dissolved by a proceeding in partition, which was copied, without doubt, from the Roman *judicium familiæ herciscundæ*."[14]

"Testamentary causes were left to the cognisance of the courts Christian. The form of making testaments was far from following the strict rules of the Roman Law."[15]

---

1 Güterbock, 111.
2 Güterbock, 112.
3 Güterbock, 113.
4 Güterbock, 116.
5 Güterbock, 116.
6 Güterbock, 117.
7 Güterbock, 118.
8 Güterbock, 118.
9 Güterbock, 119.
10 Güterbock, 122.
11 Güterbock, 125.
12 Güterbock, 127.
13 Güterbock, 131.
14 Güterbock, 132.
15 Güterbock, 133.

"On the other hand, Bracton regards the *donatio mortis causa* as a distinct legal institution, belonging to the jurisdiction of the lay courts; a doctrine undoubtedly taken from the Roman Law."[1] Bracton's division of *donationes mortis causa* accords with the threefold division of Ulpian.[2]

"Notwithstanding the difference between the Roman and the English dotal law, individual technical terms were transferred from the former to the latter," more so in Fleta than in Bracton.[3]

Bracton goes but superficially into the law of obligations: at a length, however, in conformity with "the limited importance which the English in his time still attributed to moveable property and its relation to the law."[4] Bracton follows the Roman law in his definition and account of the origin of obligations, and his ideas had many points of contact with the Roman Law and its distinction between actionable and non-actionable conventions. Especially did the English lawyer find pertinent analogies for his peculiar ideas and views in the doctrinc of stipulations, which the then civilian school taught as still practically applicable law.[5] "The principles of the Roman stipulation easily came to be thought applicable by English lawyers. What Bracton and Fleta say shows that they found general rules in the doctrine of stipulations, upon which they might reason with applicability to the solemn English conventions upon which actions were maintainable, and that they have therefore reproduced them."[6]

There is no English distinction of *contractus* and *pacta;* but the English lawyers adopted the distinction of *pacta nuda* and *pacta vestita*, derived from the same source, for the purpose of discriminating between the non-actionable and the actionable conventions of their own law, and they borrowed from the then civilian school its list of the different *vestimenta factorum.*[7]

"The place of verbal obligations (stipulations) is thus clearly indicated: *verba* were words reduced to writing. The *Real* contracts of the Roman law very naturally found an easy and early reception into a law which had not developed rules of its own in such matters. Even in Glanville we find that the commentary upon '*causa mutui, commodati, pignoris,*' is chiefly made up of Roman principles, while Bracton's exposition of this class of contracts is nothing but an almost literal extract from the corresponding titles of the Institutes."[8] "What he says regarding stipulations is also copied from the same source."[9]

"The Roman Consensual contracts were least of all suited to the English law of contracts, since there was no outward difference between them and the English *nuda pacta.* It is true that Bracton expressly mentions them, naming *emptio, locatio, societas, mandatum*, but discussing only the two first at any length, and not under the head of obligations."[10] Numerous points of similarity are pointed out on the subject of the extinction of obligations.[11]

Bracton borrows from Justinian's Institutes the definition and division of Actions, and in many points of his exposition he borrows from Azo. Still, "Procedure offers but little for our purpose in Bracton. In its main features the development of that branch of the law had been so much upon the basis of peculiarly English views and principles, and, as far as actions *in rem* were concerned, so much in the forms and spirit of the feudal system, that the Roman law had not been able to exercise the same influence there as elsewhere, and has left in it but few and detached traces. . . . On the other hand, however, a certain number of principles were transferred from the procedure of the canon to that of the civil law."[12]

---

1 Güterbock, 133.
2 Güterbock, 133.
3 Güterbock, 135.
4 Güterbock, 138.
5 Güterbock, 139.
6 Güterbock, 139.
7 Güterbock, 140.
8 Güterbock, 141.
9 Güterbock, 141.
10 Güterbock, 144.
11 Güterbock, 147.
12 Güterbock, 154.

"Some principles are also to be found in the English law of Bracton's day relative to proof by charters." [1]

"Only *one* of the English legal remedies discussed by Bracton demands our particular attention—the *assisa* (*recognitio*) *novæ disseisinæ*. This assize was an action to remedy disseisin—*i.e.*, where a man, actually seized, was deprived of, or obstructed in his possession. It corresponds to the interdicts *unde vi* and *uti possidetis*, and still more strikingly to the *remedium spoliationis* of the then Canon law. . . . It originated by an act of legislation." The first mention of it is in the Assizes of Northampton (1176), by which the Constitutions of Clarendon were revised. "It is not impossible that our assize derives its existence from the Assizes of Northampton, if not from the Constitutions of Clarendon, both of which have unfortunately come down to us incomplete. There was previously known to the English law no special remedy to protect possession against disseisin. When, therefore, the want of such protection and the need of a speedy relief for such wrongs came to be felt, the legislative authority, especially if it was advised by judges and ecclesiastics of civilian training, found its most convenient models to be the Roman possessory actions, which were then most extensively used in the actual practice of the courts Christian." [2]

We have referred in the text to Bracton's transference of certain principles of criminal law from the title of the Digest (48, 19) *De Pœnis*. As to particular crimes there is little to remark. The definition of *furtum*, and what Bracton says about *injuria*, are simply extracted from the Institutes. In the state of legal science in Bracton's day, he could not be expected to present a complete theory of penal law. [3]

At this point it will be convenient to collect the passages in Gaius and Justinian bearing on some of the topics considered in this short history of Roman law.

Jurisprudentia.

Law learning (*jurisprudentia*) is the knowledge of things divine and human, of the just and the unjust. (J. 1, 1, 1.)

Jurisprudentia is the abstract name corresponding to *Jurisprudentes*. Justinian's definition, which is taken from Ulpian (D. 1, 10, 2), was a rhetorical commonplace of the Stoic philosophers. Chrysippus, a distinguished Stoic, defined law as the Queen of all things, divine and human. (D. 1, 3, 2.) It is hardly necessary to say that the statement in the text has no scientific value.

Jus Justitia.

Justice is the constant and perpetual wish to give each man his due. (J. 1, 1, pr.)

The precepts of law (*jus*) are these :—To live honourably, not to hurt another, to give each man his due. (J. 1, 1, 3.)

For an interesting account of the derivation and history of the word *jus*, see Clark's Practical Jurisprudence, 16.

Jus means generally "Law" as distinguished from *lex* a statute; *jura* often = rules or principles of law. Sometimes it means "a right," as in *jus praediorum* = easement. Again, it means the place where law is administered, *vocatio in jus*, *in jure*

[1] Güterbock, 156. [2] Güterbock, 160. [3] Güterbock, 166-170.

(before the Prætor) as opposed to *in judicio* (before a *judex*). In the phrase *sui juris* or *alieni juris* it means power or control. Again *jus sanguinis*, the relation or tie of blood. Ulpian uses *jus* = *juris prudentia*, when he says that *jus* is the art of distinguishing the good and the fair (*ars boni et æqui*). (D. 1, 1, 1, pr.)

Jus Publicum et Privatum.

In this study there are two parts, public and private. Public Law is what looks to the standing of the affairs of Rome ; Private Law to the advantage of individuals. (J. 1, 1, 4.)

Elsewhere (D. 1, 1, 1, 2) we are told that Public Law is the law relating to sacred rites (*sacra*), to Priests and Magistrates. The distinction that seems to be intended by Justinian may perhaps be expressed with more precision from a different standpoint. Two kinds of cases come before legal tribunals. In one, private individuals seek redress from private individuals for evils affecting themselves ; in the other, persons sue or are sued not in their own behalf, but as representing the State or Sovereign. Causes are thus either (1) between private individuals or (2) between the Sovereign and private individuals. Public Law therefore embraces Ecclesiastical Law, Constitutional Law (including the Administration), and Criminal Law. The Institutes of Gaius and the Institutes of Justinian (with the exception of the short title at the end) are concerned exclusively with Private Law.

Jus Naturale, Jus Gentium, Jus Civile.

We must say, therefore, of Private Law that it is threefold (*jus tripertitum*), for it is gathered from the precepts of the *Jus Naturale*, of the *Jus Gentium*, and of the *Jus Civile*. (J. 1, 1, 4.)

The *Jus Naturale* is what nature has taught all living things. That law is not peculiar to the race of men, but applies to all living things that are born in the sky, on the earth, or in the sea. Hence comes to us the union of male and female that we call matrimony, hence the begetting of children and their upbringing. We see indeed that all other living things as well are held to know that law. (J. 1, 2, pr.)

The *Jus Civile* and the *Jus Gentium* are distinguished in this way. All people ruled by statutes and customs use a law partly peculiar to themselves, partly common to all men. The law each people has settled for itself is peculiar to the State itself, and is called *Jus Civile*, as being peculiar to that very State. The law, again, that natural reason has settled among all men, the law that is guarded among all peoples quite alike, is called the *Jus Gentium*, and all nations use it as if law. The Roman people therefore use a law that is partly peculiar to itself, partly common to all men. The nature of each severally we will set forth at the proper places. (J. 1, 2, 1 ; G. 1, 1.)

The laws of nature, indeed, that are observed equally among all nations, settled by a certain divine forethought, remain always firm and unchangeable. But those each State has settled for itself are usually changed often, either by the tacit consent of the people, or by another statute being passed afterwards. (J. 1, 2, 11.)

The *Jus Gentium* is common to all the race of men : for the requirements of actual life and the needs of men have led the nations of men to settle certain things for themselves. Wars indeed, and often captivity and

slavery, have followed contrary to the *Jus Naturale*, for by the *Jus Naturale* all men from the beginning were born free. By this *Jus Gentium* also nearly all contracts were brought in, as purchase and sale, letting and hiring, partnership, deposit, loan, and countless others. (J. 1, 2, 2.)

The *Jus Civile* takes its name from each several State—that of the Athenians, for instance; for if any one wishes to call the statutes of Solon or of Draco the *Jus Civile* of the Athenians, he will not be mistaken. So, too, the law the Roman people use we call the *Jus Civile* of the Romans, or the law of the *Quirites* (*Jus Quiritium*) that the *Quirites* use; for the Romans are called *Quirites* from Quirinus. But whenever we do not add what State's law it is, we mean that it is our own law; just as when we say "the poet," and add no name, it is understood that among the Greeks it is the pre-eminent Homer, among us Virgil. (J. 1, 2, 2.)

To individual men, things come to belong in many ways. Of some things we become owners by the *Jus Naturale*, which, as we have said, is called the *Jus Gentium;* of some by the *Jus Civile*. It is more convenient, therefore, to begin with the older law. Now it is manifest that the *Jus Naturale* is the older, since it was put forth by universal nature along with the actual race of men; whereas the rights under the *Jus Civile* began to be only when States began to be founded, magistrates to be elected, and written statutes to be enacted. (J. 2, 1, 11.)

These passages state fairly the philosophy of Law as understood by the Roman jurists; and they throw light upon the ancient theory of a "Law of Nature," which has played so conspicuous a part in the political thought of Europe. Before criticising the theory of Natural Law, it is advisable at once to point out an ambiguity in the phrase *Jus civile*, or Civil Law. *Jus civile* as opposed to *jus gentium* is defined in the text; it means the peculiar local law of Rome. But this is not the only, or even the general use of the words. What the Roman jurists had chiefly in view when they spoke of *jus civile* was not local as opposed to cosmopolitan law, but the old law of the city as contrasted with the newer law introduced by the Prætor (*jus Prætorium, jus honorarium*). Largely, no doubt, the *jus gentium* corresponds with the *jus Prætorium;* but the correspondence is not perfect. The Law of Sale, for example, was not brought in by the Prætor, but it is part of the *jus gentium*.

If the definitions of the text be taken strictly—that *jus civile* is the law found in Rome and nowhere else, while *jus gentium* is the law found in Rome and everywhere else—it will appear that the great bulk of the Roman Law belonged to neither category. There is very little, if any, of the old law that cannot be matched by similar laws in other countries; and if again we look for any institution of law that is to be found in every State, we must either admit vague generalities, or allow that scarcely a single rule of law is of absolutely universal application. The triviality of the distinction may be gathered from the instances given by Theophilus, one of the compilers of the Institutes of Justinian, and the oldest commentator on that work. As an example of *jus civile*, Theophilus quotes the rule of the Spartans not to allow aliens to settle in their midst, lest the institutions of Lycurgus should be depraved by contact with a foreign element. But the Spartans are not the only people in ancient and modern times that have exhibited a similar jealousy of aliens. Again, he cites as examples of the *jus gentium* the punishment of death for murderers, criminal proceedings for adultery, and a pecuniary fine for theft. If it be said that these were probably good instances with the information possessed by Theophilus, then what is the worth of a generalisation that is liable to be upset with every fresh accession of knowledge?

The Roman jurists would probably have attached less importance to the distinction

between Local and Universal Law, had it not been for the theory of a Law of Nature (*jus naturale*) adopted by them from the speculations of the Stoics. The supreme maxim of ethics was expressed by the Stoics in this form, "act according to Nature." A vague notion of the Universe as governed by law, on the moral as well as the physical side, led to the identification of the *jus gentium*, the general or universal element of law, with the *jus naturale* or Law of Nature. How feeble a hold the Romans had of the idea of Natural Law may be gathered from the instances quoted by Ulpian, who confounds the gratification of appetite with law. On one point only do the Romans seem to have opposed the *jus gentium* to the *jus naturale* in a case that redounds more to the credit of their good feeling than to the solidity of their speculative philosophy: they declared that slavery, although an institution of the *jus gentium* was opposed to the Law of Nature. This barren declaration, however, seems to have exercised no appreciable influence in reforming the law. (See p. 35.)

Sources of Roman Law.

It is agreed that our law comes in part from what is written, in part from what is unwritten; just as among the Greeks, of laws (*νόμοι*) some are written (*ἔγγραφοι*), some unwritten (*ἄγραφοι*). (J. 1, 2, 3.)

The division of the *jus civile* into two species seems not at all inappropriate, for its origin seems to flow from the institutions of two States; Athens, namely, and Sparta. In these States the usual course of procedure was this —the Spartans preferred to commit to memory what they were to observe as statutes; but the Athenians guarded (only) what they found enacted in their written statutes. (J. 1, 2, 10.)

Written law includes statute (*lex*), decree of the commons (*plebiscitum*), decree of the Senate (*Senatus Consultum*), the decisions of the Emperors (*principum placita*), the edicts of the magistrates [that have the right to issue edicts], and the answers of learned men (*responsa prudentium*). (J. 1, 2, 3; G. 1, 2.)

From what is unwritten comes the law that use has approved; for ancient customs, when approved by consent of those that use them, are like statute (*legum imitantur*). (J. 1, 2, 9.)

To these Cicero adds judgments at law (*res judicata*), and equity (*aequitas*). (Cic. Top. 5, 28.) Custom (*inveterata consuetudo, diuturna consuetudo*), as being, so to speak, collected from the informal suffrages of the people, had the force of law (D. 1, 3, 33); and in like manner laws might be repealed not merely by the legislature, but through tacit disuse by the people. (D. 1, 3, 32, 1.) The best evidence of custom was the judgments of Courts of Law. (D. 1, 3, 34.) It was held that no custom could be recognised if it were opposed to law or reason. (C. 1, 14, 2.)

A statute (*lex*) is what the Roman people, when asked by a senatorial magistrate—a Consul for instance—[ordered and] settled. A decree of the commons (*plebiscitum*) is what the commons, when asked by a magistrate of the commons—a Tribune for instance—[ordered and] settled. The commons (*plebs*) differ from the people (*populus*), as species does from kind (genus); for the name people means the whole of the citizens, counting the patricians and senators as well. But the name "commons" means the rest of the citizens without the patricians and senators. [Hence in old times the patricians said that they were not bound by the decrees of the commons, because they had been made without their authority.] But afterwards the

lex Hortensia was passed [providing that the decrees of the commons should bind the whole people]; and in that way they were made quite equal to statutes. (J. 1, 2, 4; G. 1, 3.)

For the history of the term *lex*, see Clark's Practical Jurisprudence, p. 29. See above pp. 60, 75, 8.

A *Senatus Consultum* (decree of the Senate) is what the Senate orders and settles. [It takes the place of a statute, although this was formerly questioned.] After the Roman people grew so big that it was hard to bring them together on one spot in order to ratify a law, it seemed fair that the Senate should be consulted instead of the people. (J. 1, 2, 5; G. 1, 4.)

Theophilus traces the authority of the Senate to the *lex Hortensia*, which gave full validity to the *plebiscita*. See pp. 60, 75.

An imperial constitution is what the Emperor settles by decree, edict, or letter. It has never been doubted that this takes the place of a statute, since the Emperor himself receives his power by statute. (G. 1, 5.)

Nay, more: what the Emperor determines has the force of a statute (*quod principi placuit legis habet vigorem*), since by the *lex regia* that is passed to give him imperial power, the people has yielded up to him all its own power, both military and civil. Whatever, therefore, the Emperor settles by a letter, or after inquiry decrees, or commands by an edict, is (it is agreed) a statute. These are what are called Constitutions. (J. 1, 2, 5.)

Plainly some of these are personal, and are not to be dragged into precedents, since this is not the Emperor's wish. For if he grants some one a favour because he deserves it, or inflicts a penalty on some one, or helps some one without a precedent, he does not go beyond the person. Others, again, since they are general, bind all beyond a doubt. (J. 1, 2, 6.)

See above, p. 76.

Edicts are the orders of those that have the right to issue Edicts (*jus Edicendi*). This right the magistrates of the Roman people have; but the largest right in regard to Edicts is that of the two Prætors, the city Prætor and the Prætor for aliens, whose jurisdiction in the provinces belongs to the Presidents; and again that of the Curule Ædiles, whose jurisdiction belongs to the quæstors in the provinces of the Roman people. Into the Emperor's provinces no quæstors at all are sent; and therefore in these provinces no such Edict is put forth. (G. 1, 6.)

As to the distinction between Provinces of the Roman People and Emperor's Provinces, see p. 72.

The Prætors' Edicts have no slight authority in law. These we usually call also the *Jus Honorarium;* because those that bear high honours, the magistrates that is, have given their authority to this branch of law. The Curule Ædiles, too, put forth an Edict in certain cases; and that Edict is a portion of the *Jus Honorarium*. (J. 1, 2, 7.)

See above, p. 34, sq.

The answers of learned men (*responsa prudentium*) are the decisions and opinions of those that have been allowed to build up the laws. It was an institution of ancient times that there should be men to interpret the laws on

behalf of the State. To them the Emperor gave the right to answer (*jus respondendi*), and they were called jurisconsults. [If all their opinions coincide, what they thus declare takes the place of statute; if they differ in opinion, the judge may lawfully follow which he pleases. This is pointed out by a rescript of the late Emperor Hadrian.] The decisions and opinions of all of them held such authority that, as has been settled, a judge could not lawfully depart from what they answered. (J. 1, 2, 8; G. 1, 7.)

See above, p. 76, sq.

CLASSIFICATION OF ROMAN LAW.

Two errors may be committed in dealing with the classifications of ancient bodies of law. On the one hand, it is a mistake to disparage the attempts of old writers to bring order into the description of legal topics, because their arrangements will not stand the tests that analytical jurisprudence applies. On the other hand, it is a greater mistake blindly to follow imperfect classifications, merely because in their time they were worthy efforts of the human intellect. Critical wisdom is not exhibited by contempt of the old-fashioned pack-horse, but something less than wisdom would be shown by a merchant, in these days, if his admiration for antiquity were to induce him to revive that ancient mode of conveyance in opposition to railways and steamboats.

If we examine the so-called codes of ancient law, we are struck not less by the peculiar order in which the various topics are discussed, than by the contents of the codes themselves. The farther back we go, and the nearer we get to the dawn of civil jurisdiction, the more conspicuous is the place assigned to Courts of Justice and rules of Procedure. In the XII Tables Procedure occupies the foremost place. In Narada, one of the oldest of purely legal treatises on Hindu law, the order of topics is as follows:[1]—

"The eight constituent parts of a legal proceeding are the King, his Officer, the Assessors, the Law Book, the Accountant and Scribe, gold and fire for ordeals, and water for refreshment.

"Recovery of a Debt, Deposits, concerns among Partners, Abstraction of Gift, Breach of promised obedience, Non-payment of Wages, Sale without ownership, Non-delivery of a commodity sold, Rescission of Purchase, Breach of Order, contests about Boundaries, the duties of Man and Wife, the law of Inheritance, Violence, Abuse and Assault, Gambling, Miscellaneous Disputes."

"The principle and meaning," says Sir H. S. Maine,[2] "of this ancient classification, strike me as obvious. The compiler of

[1] Narada. Trans. by Dr Jolly, 6. [2] Early Law and Custom, p. 381.

Narada or his original, makes the assumption that men do quarrel, and he sets forth the mode in which their quarrels may be adjudicated upon and settled without bloodshed or violence. The dominant notion present to his mind is not a Law, or a Right, or a Sanction, or the distinction between Positive and Natural Law, or between Persons and Things, but a Court of Justice. The great fact is, that there now exists an alternative to private reprisals, a mode of stanching personal or hereditary blood-feuds other than slaughter or plunder. Hence in front of everything he places the description of a Court, of its mechanism, of its procedure, of its tests of alleged facts. Having thus begun with an account of the great institution which settles quarrels, he is led to distribute law according to the subject matter of quarrel, according to the relations between human beings which do, as a fact, give rise to civil disputes. Thus Debt, Partnership, the Marital Relation, Inheritance and Donation are considered matters about which men at a certain period of civilisation do, as a fact, have differences, and the various rights and liabilities (as we should call them) to which they give rise, are set forth simply as guides towards determining the judgment which a Court of Justice should give when called upon to adjudicate upon quarrels."

Next to the XII Tables, the Prætorian Edict ranks as the most important source of Roman law. In form, each item in the Edict was a declaration of the Prætor that, under given circumstances, he would grant an action, or a special defence. The Perpetual Edict was thus a collection of actions; and the order in which they were mentioned naturally followed, with more or less fidelity, the XII Tables, of which the Edict was at once a supplement and an emendation. The Codes of Hermogenian, Theodosius, and Justinian do not strike out any new classification ; the Digest and Code are not arranged upon any logical or scientific principle. The plan that is followed hardly gives any clue to the place where we should expect to find a given text, and not seldom, some of the most important texts are not to be found in the place where the arrangement, such as it is, would lead us to expect them. Pothier spent many years of his life in bringing into order the detailed exposition of the *Titles* of the Digest of Justinian, but he scarcely ventured to alter any of the titles themselves, although he omitted a few that were absorbed under others. Even within those limits, Pothier's arrangement of the Digest is

simply invaluable to any one that has occasion to consult that work.

But in some of the elementary works prepared by Roman jurists as introductions to the study of the law, a remarkable attempt is made to introduce a logical classification. Gaius, and after him Justinian, in his Institutes, introduced a famous threefold division of law. All our law, he says, may be divided into three branches, for it relates to Persons, to Things, or to Actions.[1]

The striking feature in this arrangement is the place assigned to Actions—a topic closely corresponding with Law of Procedure. It comes last, while in the XII Tables, as in Narada, it stands first. In the time of the classical jurists, Substantive Law has thus definitively taken precedence of Adjective Law. Gaius recognises as clearly as Bentham or Austin, that Procedure is only a means to an end, and that the primary object of consideration in a legal treatise is not the form of action, but the vindication of Rights and the enforcement of Duties. The precedence given to actions in the XII Tables was as much out of place in the Roman Empire as it is in any modern system of law. In substance, the arrangement of Gaius is an arrangement of Rights and Duties; but as such it is open to objections that Gaius could not well have avoided. The reason is that although, in fact, Right and Duty formed the pivot of classification, yet the fact was too much obscured to be readily appreciated even by the jurists themselves. The explanation, from one point of view, is to be sought in the defects of their technical language. They were familiar with *obligatio* as an equivalent for legal Duty, but they had not seized the corresponding idea of legal Right. This incompleteness may be traced in the forms of actions.

In the largest class of actions (*obligatio*) the question was whether the defendant was bound to do or give.[2] In the other class of actions (*actiones in rem*) the form was not usually so distinct; if the action were for ownership, the plaintiff alleged "that the thing was his own."[3] By this phrase, the fact was obscured that the action was to enforce "rights" of ownership. The "right" of the plaintiff is implied, but it is not

[1] *Omne autem jus, quo utimur vel ad personas pertinet, vel ad res vel ad actiones.* (J. 1, 2, 12; G. 1, 8.)

[2] *Cum intendimus dare, facere, praestare* OPORTERE. (G. 4, 2.)

[3] *Rem intendimus nostram esse.* (G. 4, 2.)

explicitly asserted as "duty" is in *actiones in personam.* But in one class of actions *in rem*, namely those relating to servitudes, the right of the plaintiff was explicitly asserted.[1] The plaintiff alleged that he had a right of use or usufruct; of passing, or leading water; or of building higher or of prospect, as the case might be.

Jus, the nearest equivalent to the conception of a Right, was thus confined to an insignificant class of rights of property; it was not used with reference to ownership; and consequently the jurists were a long way from perceiving that even *obligatio* is only a *right* looked at from the point of view of the promisee instead of the point of view of the promisor. The order of development of juridical ideas among the Romans stands thus: —ACTION, OBLIGATION, JUS.

In the early stage of law, as will be seen more fully hereafter (Book IV. Law of Procedure), the legal remedy is the only conception brought to the front; the notion of obligation even is latent, and the question submitted for trial is whether the plaintiff has made a true assertion, not whether he has a legal right or the defendant has failed to perform a legal obligation. Next, the idea of obligation is introduced in a manner highly instructive. The question submitted for trial is whether the defendant *ought* to pay a sum to the plaintiff, that sum being in fact a wager as to the truth of an assertion. Another step, and we find the plaintiff claims explicitly—*rem suam esse*, implying, but not asserting, that the plaintiff has A RIGHT of ownership.

Attention to these facts enables us to understand how Gaius came to classify law substantially as a system of rights and duties, while he himself was not fully conscious of the principle by which he was guided. Men learn to use language with propriety before they discover and name the parts of speech. Roman law had assumed a shape in which the determining principle of arrangement was the formation of groups according to the character of the rights or duties of which they were composed; but the principle was not consciously recognised. Gaius, indeed, lays down a principle of division, but that serves only to separate the *jus de personis* from the general body of the law. With the exception of the *jus de personis*, the whole body of law is grouped together under the uninstructive

[1] *Intendimus jus aliquod nobis competere.* (G. 4, 3.)

heading of *jus de rebus*. Gaius offers no explanation of the principle of sub-division of *res*, except the fallacious and misleading division of *res corporales* and *res incorporales;* and it is just the part left unexplained that is, on the whole, his best and most enduring contribution to the orderly arrangement of legal rules.

The classification of Gaius, leaving aside the Law of Procedure, is substantially as follows :—

LAW CONCERNING PERSONS.
- I. Slaves and Freedmen.
- II. *Potestas* over children.
- III. *Manus* or Marital Power.
- IV. *Mancipium*.
- V. *Tutela* of persons under age of puberty.
- VI. *Tutela* of women above the age of puberty.
- VII. *Cura*.

LAW CONCERNING THINGS.
- A. Res Corporales.
  - I. OWNERSHIP, or rather Titles to ownership, including a passing reference to Servitudes.
  - *Res divini juris, res communes, res publicae, res universitatis* (merely mentioned in passing).
- Res Incorporales.
  - A. Acquisition *per universitatem*.
    - I. HEREDITAS.
      - (I.) *Testamenta*, with appendix on *Legatum*.
      - (II.) *Fideicommissa* (both universal and singular).
      - (III.) Succession *ab intestato*.
    - II. Bankruptcy. (*Bonorum venditio*.)
    - III. *Arrogatio* and *in manum conventio*.
  - (Gaius omits the contrast to acquisition *per universitatem*.)
    - I. OBLIGATIO.
      - (I.) *Contractus*.
      - (II.) *Delictum* (including wrongs to Person and wrongs to Property).

Throwing out of account minor points, the leading divisions of Substantive Law, according to Gaius, are as follows :—

A. Law relating to PERSONS (*Slavery*, *Potestas*, *Manus*, *Tutela*, etc.)

B. Law relating to OWNERSHIP and SERVITUDE.

C. Law relating to INHERITANCE and LEGACY.

D. Law relating to OBLIGATIO (including I. Contract, and II. Delict.)

A comparison of this table with the classification followed in the present work, shows how very near Gaius came to an arrangement based rigorously upon the modern conception of RIGHTS.

α. Rights of Freemen as such. (Appears in Gaius under *Delictum.*)

A. Rights over persons regarded as things. Slavery, *Potestas*, *Manus*, *Mancipium* (not *Tutela*).

B. OWNERSHIP (including torts to property), SERVITUDE, and MORTGAGE.

C. OBLIGATIO.

1. Contracts and Quasi-Contracts (as in Justinian).
2. Status. Rights over persons of a tutelary not proprietary character.

D. INHERITANCE and LEGACY.

The reader will observe in this table a change in the position of Inheritance and Legacy. That topic, on account of its highly complicated character, ought clearly to come after, instead of before, *obligatio*. The arrangement of Gaius sins against the cardinal rule of all scientific classification, which requires that the SIMPLE should come before the COMPLEX. The position of Inheritance in the work of Gaius was probably determined by an accident. Having concluded the subject of Title as a means of acquiring ownership of individual things, he was led to consider Title by universal succession, of which Inheritance is, by a long way, the most important instance.

So much must suffice in the meantime about acquiring single things : for the law of legacies, by right of which you acquire single things, as well as that of trusts when single things are left you, we will bring in more fitly further down. Let us see now, therefore, in what way you acquire things *per universitatem*. If then you are made a man's heir, or claim *bonorum possessio*, or if you adopt a man by *arrogatio* [or receive a woman as your wife *in manu*], or if a man's goods have been made over to you in order to uphold the grants of freedom to slaves, in that case all that is his passes over to you. First, let us look narrowly at inheritances ; these are of two kinds, for they belong to you either under a will or by way of intestacy. First, let us look narrowly at those that come to you under a will. In this it is necessary at the outset to set forth how wills are drawn up. (J. 2, 9, 6 ; G. 2, 97-100.)

Apart from the mistake into which Gaius was thus led in making Inheritance precede Obligation, the difference between the tables lies in two points. In the second Table, *delictum* does not appear as a separate head, but in so far as it consists of wrongs to the person, it appears under the category of "Rights of Free men as such ;" and, in so far as it consists of wrongs to property, under "Slavery," "Ownership," etc. The

other change is the transfer of *Tutela* from group A. to a new group "Status," not in Gaius, and consisting of rights over persons of a class, but not rights partaking of the character of ownership. With these exceptions, the arrangement of Gaius coincides with a classification based upon the distinguishing marks of Primary Rights. When we once understand why Gaius classified *tutela* with *potestas*, although there is nothing in common in the nature of the institutions, and why he co-ordinated delict with contract as sub-classes of *obligatio*, it will appear how completely the Romans had passed away from the mode of thought that dictated the precedence of actions in the XII Tables, and how nearly they came to classify the substantive law on the basis of rights. It may be readily granted that the arrangement of Gaius was excellent and even, allowing for certain peculiarities in the Roman law, almost theoretically perfect, but it does not follow that in a modern treatise we ought to follow him slavishly in the points where he is weak as well as in the points where he is strong.

Of the seven classes included in the Law concerning Persons, only one—Guardian and Ward—is represented in English law. We need only ask, would any writer on English law begin with Guardianship and Committees of lunatics as a leading division of substantive law, and throw all the rest into a vague category called "Things?" The mere statement of the question is enough to show us that there must have been some special features in the Roman law making a division of Law of Persons at least plausible, while the absence of such features in English law makes it absurd. Those reasons are not far to seek.

If we omit the class of Freedmen (which introduces a cross-division) and add the class of persons that are at once *sui juris* and not under any form of guardianship, we get a curiously exact and exhaustive classification of Persons.[1] If the inhabi-

[1] Men—

- I. Slaves, — A. Slavery.
- Freedmen, ... { 1. Roman Citizen. 2. *Latini Juniani*. 3. *Dediticii*.
- II Free,
  - 1. Persons *alieni juris*, ... { B. *Potestas*. C. *Manus*. D. *Mancipium*.
  - 2. Persons *sui juris* ... ... { E. *Tutela Mulierum*. F. *Tutela Impuberum*. G. *Cura*.

tants of Rome had been assembled, they could all have been arranged in the classes. Each would have found a place in one class, and no person would have been entitled to go into two classes. Thus, if a man was ranked as a slave, he could not appear in any of the subsequent classes; if a person were under *potestas*, he could not be in any of the other classes; and so on throughout. There is, however, a more substantial ground for connecting the topics of the "Law concerning Persons." Slavery, *potestas*, *tutela*, etc., are examples of subordination. The law of persons contains an account of the different species of authority to which a person in Rome might be subjected. These facts point to a much closer connection between the various groups brought under the Law of Persons than is found to exist in the Law of Things. But the case does not end there. Whether a person was subject to one of the kinds of authority, was a question of the utmost consequence in the practice of the law. A slave or other person subject to authority laboured under numerous legal disabilities, and naturally the first question that suggested itself to a legal adviser was whether his client or the opponent was under one or other of the species of authority. The first book of Gaius and Justinian is occupied with a statement of the rules for determining whether a given person was in slavery, or under *potestas*, or *tutela*, etc.

These considerations explain why the several classes forming the *jus de Personis* formed a distinct group, and why that group was placed in the foreground. In the Roman world, legal capacity was the exception, as with us it is the rule; and frequently before a case could be heard on the merits, it was necessary to determine a question of *status* or *conditio* of one of the parties in a preliminary action, called *actio prœjudicialis*. Both theoretical and practical considerations therefore point in the same direction—to give the first place to the law concerning persons.

It is a mistake to regard the object of the jurists to be an enumeration of the cases of legal incapacity. As a matter of fact, Gaius deals with incapacity under the several heads of Property, Testament, Contract, etc., connecting, very properly, the instances of incapacity with the particular rights that the classes of persons were incapable of enjoying. Moreover, if the object had been to enumerate the classes of persons incapable of acquiring, *peregrini* could not have been omitted. But

Gaius does not mention *Peregrini* among the classes of persons; he refers to them under the several heads of acquisition of which they were incapable. The element common to all the classes of persons is that they are under various forms of authority, and except in the case of *impuberes* and *furiosi*, the incapacities to which they are subject are not inherent, but are a consequence of their subordination. Thus a slave cannot acquire property for himself. Why? Because whatever he acquires belongs to his master. He cannot bind himself to render services to another; because all his services are the property of his master. The incapacity of a slave to act for himself is merely the other side to the rights of his master.

There is an objection to the grouping of the several classes under one category; but it is an objection that no jurist in the time of Gaius could have been expected to entertain. It is an objection, however, that, in the present state of knowledge, must be considered and decided. On looking more narrowly into the several classes we meet a cross-division. Gaius treats Freedmen (*i.e.*, manumitted slaves) in connection with slavery. But manumitted slaves are free and *sui juris*, and therefore logically fall into the same class as *Tutela*. Again, *Tutela* and *Cura* have little or nothing of a legal character in common with the other classes with which they are associated. Slavery, *potestas*, *manus* and *mancipium* have one important common characteristic. They are all cases of rights closely akin to ownership over human beings. They resemble each other also in the modes of acquisition and in the nature of the relative actions. They form a group of the most distinctive character. But the relations of patron and freedman or of *tutor* and *pupillus* are entirely different. In no sense is the patron owner of his freedman or the *tutor* owner of his *pupillus*. On the contrary, these classes are distinguished by *reciprocity of Rights and Duties*,—a notion that is the exact antithesis of *property*. If to these classes we add two others omitted by Gaius and Justinian—(1) the relation of Parent and Child, where the parent has no *potestas*; and (2) the relation of Husband and Wife, where the wife is not *in manu*, we have four classes of persons having in common the characteristic of reciprocity of rights in contrast with the four classes characterised by a relation of Ownership. By collecting the several classes in one group, this essential and fundamental difference between them is slurred over and obscured. If the groups are to be arranged on any consistent principle, we must

put those classes of persons that illustrate the idea of property in juxtaposition to property, and place those classes that are based upon the idea of obligation, alongside other obligations. It has been suggested that the consideration of slaves naturally suggests freedmen, that *potestas* suggests the relation of Parent and Child, that *manus* is naturally associated with the relation of husband and wife. But to fall in with this, would be to make contiguity instead of similarity the basis of classification, and to destroy the possibility of any consistent or logical arrangement.

A similar question is raised by the position of Delict. Gaius treats *contractus* and *delictum* as two co-ordinate classes forming the division of *obligationes*. Justinian adds Quasi-contract and Quasi-delict. Quasi-contract is a distinct class and will be explained hereafter; but quasi-delict is not logically distinguishable from delict. It means certain new delicts introduced by the Edict of the Prætor.

To understand the connection that subsisted in a Roman mind between two such unconnected subjects as an assault and a contract of sale, we must look to the forms of action. Delict and contract were alike enforced by actions *in personam;* and in this respect they stand in contrast with the other topics dealt with by Gaius, where the proceeding was by an action *in rem.*

Obligatio was coextensive with actions *in personam*, and it was natural that the jurists should unite in one class the several groups of rights or duties that were enforced by actions *in personam.*

An action is nothing else but the right to follow up by legal proceedings what is one's due. (J. 4, 6, pr.)

It remains to speak of actions. If now we ask how many kinds of actions there are, it seems true to say there are two, *in rem* and *in personam.* Those that have said there are four—a number reached by bringing in the kinds of *sponsiones*—have not observed that they have brought some species of actions in among the kinds (*genera*). (G. 4, 1.)

Of all actions in which a question between parties is raised on any matter before judges or arbiters, the chief division is into two distinct kinds, namely, *in rem* (for a thing), and *in personam* (against a person). (J. 4, 6, 1.)

The actions a man brings against a person under an obligation to him, either by reason of contract or of wrong-doing (*ex maleficio*), are actions *in personam* given to meet the case. In them he alleges in his statement of claim that his opponent ought to give or do [or furnish] something, or he puts it in certain other ways. (J. 4, 6, 1; G. 4, 2.)

An action is *in rem* when we allege in the statement of claim either that a corporeal thing is ours, or that we may avail ourselves of some right—of use or usufruct, for instance; of passing, driving beasts, or leading water; or of building higher, or of prospect. The opponent, again, has a negative action quite the other way. (G. 4, 3.)

An action may be brought against a man that is under no legal obligation, but against whom some one is moving about something in dispute. In this case the actions that are given are *in rem*. If, for instance, a man is in possession of some corporeal thing which Titius affirms is his, and the possessor says he is owner, then if Titius alleges in the statement of claim that it is his, the action is *in rem*. Similarly, if a man brings an action to assert a right he claims over a thing—a farm for instance, or a house, or a right of usufruct, or of passage over a neighbour's farm, or of driving beasts, or of leading water from a neighbour's farm—the action is *in rem*. The action to assert a right to landed estates in town is of the same kind; as when one brings an action to assert a right he claims to raise his house higher or to a prospect, or to throw out anything, or to run a beam into a neighbour's house. On the contrary, too, return actions have been given in regard to usufruct and servitude over landed estates both in country and in town; so that a man can allege in his statement of claim that his opponent has not a right to a usufruct, to pass, to drive beasts or lead water, and again to build higher, to have a prospect, to throw away something, to run in a beam: these actions too are *in rem*, but negative. An action of this kind is not given in disputes about corporeal things. In them the plaintiff is the man not in possession; and the man in possession has no action given him by which he can deny that the thing is the other's. One case no doubt there is in which the man in possession none the less comes to play the part of plaintiff, as will appear more fittingly in our larger book, the Digest. (J. 4, 6, 1-2.)

Actions *in rem* we call *vindicationes* (claims to a thing): actions *in personam*, in which it is alleged in the statement of claim that one ought to give or do something, are called *condictiones*. (J. 4, 6, 15; G. 4, 5.)

The classification in the present work is based explicitly, as that of Gaius was implicitly, on Rights and Duties. The leading divisions of Rights and Duties must be sought in their most elementary characteristics. The object of law is to prevent harm and ensure benefits. The acts forbidden by law are, or are supposed to be, noxious; the acts required are, or are supposed to be, beneficial. Now it is manifestly easier to prevent harm than to promote good. It is easy to say, "Thou shalt not kill;" it is harder to say, "Thou shalt save from death, if it be in thy power." In moral guilt there may be little difference between the man that pushes another into deep water, and the man that, seeing him there in danger of drowning, refuses to admit him into his boat; but in law, between those men lies the gulf that separates innocence from the gravest of crimes.

In making a distinction between Acts and Forbearances, we touch upon something that has a practical, as well as a logical value. The State entertains no difficulty in requiring *all* men universally to forbear from doing harm; but it seldom ventures to impose on men generally the duty of rendering services. All men must "not kill;" but only parents and guardians or specified individuals are bound to preserve the life of others. This is a type of many cases. Duties to forbear bind all men generally; duties to do are imposed on specified individuals, and for the most part not without their own consent. Some few duties to forbear (generally or always of the nature of forbearance to exercise a Right) are imposed on specified individuals only. We may thus divide Duties (and by implication Rights) into two classes.

I. Duties binding all men generally. These are always Duties to forbear, or NEGATIVE DUTIES.

The correlative Rights are called RIGHTS *IN REM*.

II. Duties binding specified individuals only. These are nearly always Duties to do, or POSITIVE DUTIES. Sometimes, however, they are Negative Duties.

The correlative Rights are called RIGHTS *IN PERSONAM*.[1]

Rights *in rem* correspond to Universal, Negative Duties. They may be divided into three classes. In the first class,

---

[1] The phrases *in rem* and *in personam* are not altogether satisfactory, but they were used by the Roman jurists in an analogous sense, as in the distinction between actions *in rem* and actions *in personam*. In an action *in rem*, no duty is alleged against any specific individual; but the plaintiff merely alleges that the thing in question "is his own," and the action lay, not against any specified individual, but against any one in possession of the property. In an action *in personam*, a breach of duty was alleged against a specified individual.

A few other examples of the expressions *in rem* and *in personam* may be cited.

Exceptiones, i.e., special defences introduced by the Prætor, were said to be *personae cohaerentes*, when they could be used only by one or more specified individuals; and *rei cohaerentes*, when they could be used not merely by the debtor, but by any one against whom the debt might be claimed. (D. 44, 1, 7, pr.—1.)

Agreements (*pacta*) might be either *in rem* or *in personam*. (D. 2, 14, 7, 8.) Thus if I, a creditor, agree "not to sue," the debt is extinguished, and neither the heirs of the debtor nor his sureties can be troubled. But if I agree "not to sue the debtor, Lucius Titius," it is open to me to sue his sureties; or, if it was so understood, his heirs. (D. 2, 14, 57, 1.) Lucius Titius is a specified individual, and an agreement in favour of him alone is said to be a *pactum in personam;* on the other hand, an agreement generally in favour of all persons that are liable is called a *pactum in rem*.

When a creditor applied to be put in possession of the goods of his debtor, the benefit of the act accrued to all the other creditors, and the goods when sold were

the Duties may be expressed in the general form, "Thou shalt not harm *any free man*;" in the second, "Thou shalt not harm or take away the *persons* that are his;" and in the third, "Thou shalt not harm or take away the *animals* and *things* that are his." The rights that a freeman has to himself differ from the rights he has to the persons that belong to him, and these again from his rights to the animals and things that belong to him.

The first class, then, of Rights *in rem*, are the Rights that a free man has in respect of his own personality—such as his right to life, liberty, immunity from wilful harm, and to his good name. What, for example, is the meaning of a "right to liberty"? It means that all men are bound to abstain from interfering with a man's freedom of action, except in the cases where such constraint is authorised by law. This duty is negative; it is a duty to forbear; and it binds all men generally. The right to freedom is therefore a right *in rem*. One characteristic of these rights is worthy of remark. Not only the Duty but the corresponding Right is universal—among free men. All men have such Rights; all men owe these Duties. They are Duties owing *by all* men *to all* men. The corresponding Rights are universal and primary. Without these Rights no others could exist. A man that had not a Right to himself could not have a right to anything else. Such Rights, moreover, precede others not only in a logical but also in a historical order. On every ground, therefore, as the simple, elementary, primordial rights of men, these deserve the first place in a scheme of classification.

The second group, of which the most striking example is

---

divided among them. The bankruptcy (*missio in possessionem*) was said to be allowed not for the benefit of the applicant alone (*personae solius petentis*), but to be general (*in rem*), in favour of all having claims against the debtor. (D. 42, 5, 12, pr.)

A contract or other transaction was made void equally by force or fraud. But there was a difference between them. A contract obtained by the fraud of the creditor was void; but it was not void if the fraud were by anyone else. But a contract procured by force was void, by whomsoever the force was exerted. The edict making the exercise of force by all men without distinction a reason for invalidating a contract was said to be *in rem*. (D. 4, 2, 9, 1; D. 43, 24, 5, 13.)

Under an edict of the Prætor, any one threatened with injury by any alteration of a building or construction could formally prohibit the change, and the person making the change could not then proceed until he had obtained the authority of the Prætor. This prohibition was called *nuntiatio operis novi*. As it was a general prohibition to all who might seek to do what was forbidden, it was said to be *in rem*. (D. 39, 1, 10.)

Slavery, consists of those Rights *in rem* that a free man could have over other human beings. A slave owed his master no Duties. As against the slave, the master had no rights. But as against all the world he had rights in respect of the slave, for all men generally were bound not to harm or take away the slave from the master. In what respects the rights of a master over his slaves differed from his rights to his ox, or to any other article of property, will duly appear. It is enough here to say that there are sufficient reasons for separating the group that consists of Slavery, *Potestas*, *Manus*, *Mancipium*, from Ownership, to which in most points it is very closely allied.

The third group of rights *in rem* corresponds with Property in the widest sense. At this point, the question arises, what ought to be included in the consideration of Property? Gaius gives only the modes of acquisition with the limitations to which they are subject, and does not, in this connection, refer to the Rights of an owner. Under the head of "Delict" we are introduced to the remedies that an owner of moveables had for the protection of his rights; but as the rights of an owner of immoveables were not protected by actions *ex delicto*, but by Interdicts, that branch of the subject is passed over. It has been explained why Delict was classed by Gaius along with contract as co-ordinate members of the class of *obligationes*. It now remains to consider, whether such an arrangement is consistent with a proper scheme of classification.

The place to be assigned to Delict must be determined by the juridical characteristics of Delict. What is a Delict? Every Delict is a violation of a right *in rem*. We are, therefore, in a dilemma. Either we must dispose of delicts once for all under the several groups of rights *in rem*, or we must treat the same subject twice over, once under rights *in rem*, and once again under obligations. This is the incongruous result arrived at by Blackstone in the case of Rights of the Person. He begins his commentary in the same way as the present work, with primordial, personal rights; but he returns again to the subject towards the end of his book, when he treats of "wrongs" to the person. This is inconsistent with the most rudimentary notion of a logical classification,—to have a place for everything, not two places. In the case of Rights *in rem* to things, Blackstone avoids the difficulty by omitting in his discussion of ownership, all consideration of the Rights of an owner, and dealing with

them obliquely at a later stage, under the category of wrongs to property.

Blackstone, however, carries the anomaly much further. He boldly divides Law into the Law of Rights and the Law of Wrongs. But Right and Wrong are not two distinct legal entities; they mean the same thing looked at from two points of view. A wrong is simply the violation of a Right, and has no more a separate existence than breathing has apart from the lungs. Except in bringing to the front a new class of Personal Rights, Blackstone has copied Gaius in the position he assigns to delict; but not understanding the reasons that made such a course inevitable to Gaius, he has started an absurd division of his own, in order to justify his imitation of the Roman Institutional writers. If Gaius had ever attained the distinct conception of Rights as a basis of classification, he would never have committed the solecism of co-ordinating Rights with themselves under the name of wrongs, as the two leading divisions of Law.

In point of fact, however, Blackstone's arrangement is not so bad as his explanation might lead us to suppose. Rights are of two types. Some Rights we are in the habit of considering as Rights, before they are violated; other Rights we seldom or never think of as rights, unless they are violated; and even then our attention is fixed more upon the violation than upon the Right. A landlord thinks of his rent as something that he has a right to receive, before payment is refused, for in the ordinary case payment is not refused; but he does not in the same way think of his ownership as a right of exclusive possession, until some one trespasses on his land. One does not think of an abstract right to the preservation of one's good name; and even when that right is violated by slander or libel, one's attention is given rather to the particular words in which one's right is assailed, than to the right itself. This distinction runs through the whole law, and may be thus stated in general terms:—Rights to services or acts are always and naturally presented to our minds under the aspect of Right or Duty; we think of the services as something to which we are entitled, that is, to which we have a Right, or as something that some one is bound to do for us, that is, has a duty to perform to us. The violation of such rights is exceptional; usually the Duty is performed, and thereupon the Right is extinguished. But Rights to Forbearances—to the absence of acts, do not call

for notice until they are violated. They are not rights against specified persons, but against all men generally, and, as Rights, unlike the other class, they are not extinguished by performance. Rights to positive services are rights *in personam;* Rights to forbearances are, almost invariably, rights *in rem.* When, therefore, Blackstone divides Law into Rights and Wrongs, he in reality divides Law into Rights *in personam,* and Rights *in rem.* By Rights he does not mean all rights, he means only Rights *in personam;* by wrongs he means a violation, not of all Rights, but only of Rights *in rem.* He is inconsistent in one point, for under the head of Rights he includes one class of rights *in rem,* namely Personal, or, what he calls Natural Rights. But when he comes to deal with wrongs he repeats himself by including the same topic under the category of violations of rights *in rem.* In point of fact, however, Blackstone's classification is threefold—(1) Titles to Property; (2) Rights in *personam;* and (3) Violations of Rights *in rem* or Wrongs.

Consistency and symmetry of arrangement imperatively demand that Delicts should be distributed in the manner in which they are in the present work. Two reasons of convenience—one general, the other special to Roman law, may be noticed as leading to the same result. By separating wrongs to the person from wrongs to property, between which there is no real connection, we are enabled to put in the foreground, in its proper place, the class of rights to the person. Even supposing wrongs to property were to be retained as a class under that designation, it would be necessary to sever them from wrongs to the person. Again, in Roman law, there is a special difficulty in treating wrongs to property from the point of view of Delicts. A delict was a wrong in respect of moveable property. Wrongs in respect of immoveable property were set right by Interdicts. From the Roman point of view there is an awkwardness in associating Interdicts with actions *ex delicto,* and including them under a common category, for which the vocabulary of the jurists provided no special or distinctive name.

We have now to consider the classification of Rights *in personam.*

Rights *in personam* are divided not according to their objects, but in respect of their origin. Most Positive Duties are imposed on individuals only with their consent; in other words, by Contract. In a very few cases, duties are imposed on persons without their express consent, but under circumstances where, although

their consent may not be presumed, it ought in fairness to be given. These cases are known under the name of QUASI-CONTRACT. In other cases, Duties are imposed upon persons without regard to their consent, as in the case of Patron and Freedman, Parent and Child, and *Tutela*. For these cases I have ventured to employ the term "STATUS," — a word that in jurisprudence has been much given to wandering at large, and may now, without impropriety, be assigned to a useful and unoccupied position.[1] Reasons have already been given in favour of the removal of *Tutela* from the same class as slavery and *potestas*.

In all the groups that are included in the present work under the foregoing divisions, it may be said that each species either consists wholly of one kind of Rights (*in rem* or *in personam*), or consists of one kind of Rights in so predominant a degree that no difficulty arises. But a very extensive and complex topic remains outside both categories. If mere logical distinctions were to be pedantically adhered to, the subject of INHERITANCE would be taken under Rights *in rem*. The right of an Heir in the Roman Law was a Right *in rem*, and both theoretically and practically was dealt with as a kind of property. But Inheritance has a peculiarly complex and distinctive character. It includes Rights both *in rem* and *in personam*; and not merely Rights, but Duties or liabilities. While, therefore, it must be taken as a distinct group if placed under the head of Rights *in rem*, there is an inconvenience in taking it up before the consideration of Rights *in personam*. The simple ought to go before the complex, and the separate groups of rights should be discussed before entering on so complicated a form of succession as Inheritance. Legacy, as a mode of acquiring individual rights, ought in strictness to appear in Book I. and Book II. as an Investitive Fact. But Legacy cannot be discussed except after Wills; and in the Roman Law, the proper place for Wills is among the Investitive Facts of Inheritance. Legacy must unavoidably be taken after Inheritance.

The distribution of the large groups of law on some consistent principle is essential; but there remains a question of

[1] Lord Stair, a celebrated writer on Scotch Law, made a similar class under the title of "Obediential Obligations."

even higher importance, a consideration of the best means of arranging the innumerable details of the groups into which law is divided. It is here that Gaius is defective; the Digest of Justinian most of all. In that voluminous work the arrangement of texts under the Titles resembles nothing so much as a heap of ill-shaped stones thrown out of a waggon. Nor can Gaius be improved by filling in the voids that he has left; the piling of notes upon the text makes confusion worse confounded. As a text book, the work of Gaius (and the same may be said of Justinian's Institutes) labours under two great disadvantages. It gives much that is of little use to a student of law even from a historical point of view; and it is extremely brief on those topics where the Roman law is of most value to a student of modern jurisprudence. Accordingly the present work is based on the Digest, and it becomes necessary to seek some principle of arrangement in grouping the multifarious details with which the Digest furnishes us.

In pursuing the plan adopted in the present work, the author has taken a hint from a well-known work on logic. Professor Bain (Logic of Induction, p. 248), in pointing out the defects of writers in the natural sciences, makes the following pertinent observation:—"In chemistry, no less than in the natural history sciences, a *regular and uniform plan in the descriptive arrangement* is more than an aid to memory; it is, further, an instrument of investigation." In the following exposition two rules have been observed:—(1) That the order of exposition should be uniform; that in whatever manner we arrange the details of one group, we should arrange the details of all other groups; and (2) that the details under each group should be arranged in divisions that shall be exhaustive and mutually exclusive. Uniformity is at once the merit and the test of a classification. If the groups are selected on a sound principle, they must admit of uniform exposition; if they admit of uniform exposition, they must have been selected on a sound principle.

In the present state of Comparative Jurisprudence, a sound and uniform system of exposition has a special importance. Much of the future progress of the scientific study of law must be sought in a comparison between the laws of different countries. The presence or absence, the fulness or scantiness of particular topics of law, gives a ready measure of the difference between two states of civilisation. Thus,—to take

the division of Rights *in rem* in respect of other human beings, and comparing the age of Gaius with Justinian, we have to remark the disappearance of three forms (*Manus*, *Mancipium*, and *Tutela Mulierum*). Comparing, again, the Institutes of Justinian with English law, we observe that other two (Slavery, *Potestas*) also disappear. Take again *Status*. The relation of patron and freedman disappears in modern law, but the other branches are more fully represented in modern than in Roman law. The meaning of this change appears at a glance. It is, that the old relation of *ownership* has given way to one of *reciprocal duties*. Again, the chief contents of the Law of Inheritance would find a different place in a modern code, and we should thus avoid the inelegance of treating Legacy as an appendage to Universal Succession: but it would not be possible to give a more just and vivid idea of the character of Inheritance in the Roman law, than by assigning to it a distinct and peculiar place.

The order of exposition followed is expressed by the several classes:—(I.) DEFINITION; (II.) RIGHTS AND DUTIES; (III.) INVESTITIVE FACTS; (IV.) DIVESTITIVE FACTS; (V.) TRANSVESTITIVE FACTS; (VI.) REMEDIES. The nature of this division will be easily understood from an example, say the *potestas* enjoyed by fathers over their children.

The *potestas* is a group under the sub-class of Rights *in rem*. The first question naturally is, what is the meaning of it? The answer is in the DEFINITION. The full scientific definition of *potestas* would include a statement not merely of the points on which it differs from other kinds of Rights *in rem*, as Slavery or *Manus;* but an enumeration of the Rights of the father over the son, and the Rights, if any, of the son against the father. But advantage may be taken of a very convenient distinction adopted by Mr Mill in his Logic (Vol. I. p. 155) to define *potestas* in a less exhaustive and more summary manner. In the "definition," then, of a group, is given not a complete statement of the essence of a species, but only as much as is necessary to distinguish it from other groups in the same class, while a separate division is assigned to the enumeration of RIGHTS AND DUTIES.

When the nature of the *potestas* and the rights and liabilities of the father are understood, the next question is, How is this group of Rights and Duties created? How does a person acquire over another the rights summed up in the word

"*Potestas*"? The answer to this question is given in the words used by Bentham, "INVESTITIVE FACTS." The term is not quite satisfactory. We may speak of investing a man with a Right, but not so well of investing him with a Duty. But although the association connected with the word implies an acquisition of gain, there is decided convenience in using the same word, whether the question is of Rights or Duties, or both.

Corresponding to the Investitive Facts are the facts that extinguish the *potestas*. By what means may a person be released from subjection to the *potestas*? To this question the answer is, the DIVESTITIVE FACTS.

There remains a third class of facts, at once Investitive and Divestitive. Of this nature is Adoption. When a person transfers the rights he has to another, the transfer divests him of the *potestas*, and invests that other with it. This is quite distinct from the creation or extinction of the *potestas*. A new descriptive term is wanted, and after the analogy of the other words, "TRANSVESTITIVE" has been coined for the purpose.

After examining the Rights and Duties expressed by the word *potestas*, and the circumstances under which such rights may be created, extinguished, or transferred, we come at last to a consideration of the REMEDIES applicable to the foregoing Rights and Facts. By Remedies a full account of the Procedure to vindicate rights is not intended; but only a brief statement of the special actions applicable to the several groups, with any facts peculiar to them.

These divisions, while manifestly distinct, are also exhaustive. Every rule of law relating to any group may be introduced under one of the divisions, and cannot be placed in more than one. Moreover, the divisions correspond with practical wants. A father, for example, or a *tutor*, desires to know his Rights and Duties. The information is at once open to him, and he need not trouble himself about Investitive or Divestitive Facts or Remedies. Another person, again, wishes to know whether he is a *tutor*, or how he may avoid the office. He must look to the Investitive or Divestitive Facts, and he need not concern himself with the Rights and Duties or Remedies. The Remedies would never be consulted except when a dispute arose and the parties contemplated litigation. A Code drawn up on this arrangement would thus be adapted

to the wants of different classes of persons. Again, this arrangement facilitates comparison. The rights of a master over his slaves may be at once compared with the rights of a father over his children, and of a husband over his wife *in manu;* and these again with the reciprocal obligations of parent and child in the absence of the *potestas*, and of husband and wife in the absence of *manus*. In like manner the Investitive Facts and Divestitive Facts may be compared, and when these are enumerated in historical order, singular light is often thrown upon the character of Roman institutions.

BOOK I.

RIGHTS *IN REM*.

BOOK I.

RIGHTS *IN REM*.

First Division.

RIGHTS *IN REM* IN RESPECT OF ONE'S OWN PERSON.

Definition.

TO prevent men hurting one another is naturally a paramount object in every system of law. It is vain to protect property, if life and limb are not secure. But no system of law attempts to provide a remedy for every hurt that may be done to body or mind. The harm may be trifling, and therefore undeserving of attention; or it may be grievous, but beyond reach of the instruments that a lawgiver has at his disposal. A line must be drawn. The law specifies the instances where it requires all men to abstain from doing harm or giving pain to one another. In other words, every man has a right, within the limits fixed by law, to personal immunity. In the technical language of jurisprudence, such a right is described as a right *in rem* in respect of one's person. The unlawful causing of pain or hurt is a violation of such a right.

But pain or hurt may be caused in two ways; either INTENTIONALLY or through NEGLIGENCE. If pain or hurt were caused *intentionally*, the wrong done was technically called an *injuria*. The term *injuria* may be defined with almost perfect exactness as a wilful violation of a right *in rem* that one has in respect of one's own person.

For harm done to free men by Negligence, the Roman law, at first, provided no remedy. By the XII Tables (T. VIII. 24, p. 21), it was provided that a person accidentally killing another should atone for the deed by providing a ram to be sacrificed in his place. In the analogous case, however, of harm done to property, the XII Tables seem to have provided compensation in cases of negligence, and even of accident; but the last point must be considered at least doubtful. (T. VIII. 5, 10, pp. 20, 21.) Later on the *lex Aquilia* (see under Ownership) provided an action for all direct damage to property, whether proceeding from intention or negligence, but certainly not in cases of accident. This statute did not apply to the case of harm done to a free man (*liberum corpus aestimationem non recipiat*), (D. 9, 1, 3); but ultimately the Prætor extended the application of the *lex Aquilia* to the case of harm done to free persons by negligence. (D. 9, 2, 5, 3.) The measure of damages included charges for medical attendance, and for loss of work, both past and future. (D. 9, 1, 3.)

A free boy was sent to a shoemaker to learn a trade. The shoemaker, in a moment of irritation caused by the dulness of his pupil, threw a last at him, and destroyed his eye. Could the father of the boy sue the shoemaker for the damage? The answer given in the Digest well illustrates the slow growth of the law upon the subject of personal injuries. Julian said that clearly no *injuria* had been committed, because the shoemaker did not intend to gouge the boy's eye, but to teach and correct him. He had a doubt whether the father might not sue on the contract of apprenticeship, because the shoemaker had exceeded the fair limits of castigation. But Ulpian said undoubtedly an action would lie upon the *lex Aquilia*, as extended by the Prætor. For, said he, *nimia saevitia culpae adsignatur*. (D. 9, 2, 5, 3; D. 9, 2, 6.)

The conception of NEGLIGENCE as a ground of responsibility, will be discussed more conveniently in relation to the violation of rights to property, and, at this stage, attention may be confined to intentional violations of rights *in rem;* in other words, to the characteristics and limits of the delict of *injuria.*

The subject may be considered under two heads,—First, an enumeration of the several rights constituting the class of rights *in rem* in respect of one's person; and, second, the circumstances that made the infliction of pain or harm an *injuria*, or violation of these rights.

First, ENUMERATION OF RIGHTS *in rem* TO ONE'S OWN PERSON.

1. HARM TO THE BODY.—It is an *injuria* to strike a man with your fist, for instance, or with a whip, much more to scourge him. (J. 4, 4, 1; G. 3, 220.)

The protection of the body was naturally an object of solicitude in the earliest period. The XII Tables contain provisions on this subject, the terms of which have been preserved to us.[1] All wilful hurt to the body was included under *injuria;* and also a threat of personal violence, if accompanied with an apparent intention of immediately executing it. (D. 47, 10, 15, 1.)

An injury inflicted on the mind by drugs, being primarily an injury to the brain, may be included under the head of wrongs to the body. Examples are love-philtres or potions. (D. 47, 10, 15, pr.)

2. PERSONAL FREEDOM.—To imprison a man, or forcibly keep him as a slave, knowing him to be free, was an offence dealt with by a statute (Lex Fabia or Favia) in existence before Cicero. (Pro Rabirio, 3; D. 48, 15, 6, 2.) That statute imposed only a pecuniary penalty, and it fell into disuse when kidnapping freemen was made a crime. (D. 48, 15, 7; C. 9, 20, 7; C. 9, 20, 16.)

3. INSULTS.—It is an *injuria* to revile a man in public (*convicium facere*). (J. 4, 4, 1; G. 3, 220.)

Convicium[2] was the offence of publicly insulting or mobbing a particular individual (D. 47, 10, 15, 11; D. 47, 10, 15, 9), or assembling before his house or shop to annoy him. (D. 47, 10, 15, 7.) This offence was created by the Prætor.[3]

In some cases insults to the dead become an *injuria* to the living, not exactly for the reason assigned by Lord Coke in a celebrated case (Wraynam's) that justice lives although the person be dead, but because in popular estimation a man's personal dignity might be wounded by insults offered to his predecessors.

An heir was supposed to be bound to uphold the good name of the person whom he succeeded, and an insult offered to the corpse of the deceased was looked upon as an insult to him. (D. 47, 10, 1, 4.)

When the statue of a man's father, placed on a pedestal, is struck with stones, an *injuria* is done to the man himself. (D. 47, 10, 27.) If the statue were joined to a tomb, so as to become an immoveable, the offence was regarded rather as sacrilege, and the remedy of the son was the action for a violated tomb (*actio sepulcri violati*).

---

[1] *Manu fustive si os fregit libero, CCC, [si] servo CL poenam subito.*
Si membrum rupsit, ni cum eo pacit, talio esto. (T. VIII. 2, p. 20.)

[2] *Convicium autem dicitur, vel a concitatione, vel a conventu, hoc est a collatione vocum: cum enim in unum complures voces conferuntur, convicium appellatur, quasi convocium.* (D. 47, 10, 15, 4.)

[3] *Qui adversus bonos mores convicium cui fecisse, cujusve opera factum esse dicetur quo adversus bonos mores convicium fieret: in eum judicium dabo.* (D. 47, 10, 15, 2.)

4. SLANDER, LIBEL.—It is the duty of every one to abstain from diminishing the reputation or good name of another.[1] The Prætor says, "Let nothing be done to defame any man. If any one does anything against the foregoing, I will take up each case on its merits, and visit it accordingly." This statement, although it indicates exactly the object of the law, is too wide, and must be qualified by the illustrations here subjoined. A man's reputation may be assailed by acts, or by words written or spoken.

1°. By words.

(1.) To insult a freeman by calling him a slave is an *injuria*. (C. 9, 35, 9.) So likewise to call one's grandmother a slave falsely. (C. 9, 35, 10.)

(2.) To call a man an informer falsely, is an *injuria*. (C. 9, 35, 3.)

2°. By writing.

And it is an *injuria* to defame a man in prose or in verse whether you write the libel, draw it up, or publish it, or wilfully instigate or abet those that do. (J. 4, 4, 1; G. 3, 220.)

The words of Justinian are taken from the Lex Cornelia (B. C. 81), which proceeds thus:[2] "Even if he published it in the name of another, or anonymously, an action on the subject shall be allowed; and if he that did such a thing is condemned, it is ordained that he shall be by statute incapable of taking any part in the making of a will."

Carmen is the word employed in the XII Tables, which sanctioned the punishment of beating. That punishment was taken away by the Lex Portia. *Carmen*, says Paul (Paul, Sent. 5, 4, 15), includes not only inscriptions (*epigrammata*) and satirical poetry (*satiræ*), but every form of writing. *Psalterium* was a libel composed to be sung in public. (Paul, Sent. 5, 4, 16.) Insults conveyed in pictures were also libels.

It must be borne in mind that there was no *injuria* without an intention to destroy another's good name. Hence, in litigation, each party might lawfully make injurious statements of the other; but even in this case moderation must be observed. (Paul, Sent. 5, 4, 15.) The mere circumstance, however, of a libel being contained in a document sent to the Emperor, did not protect it from punishment. (D. 47, 10, 15, 29.)

---

[1] *Ait Prætor: "Ne quid infamandi causa fiat: si quis adversus ea fecerit, prout quæque res erit, animadvertam."* (D. 47, 10, 15, 25.)

[2] *Etiamsi alterius nomine ediderit, vel sine nomine, uti de ea re agere liceret, et, si condemnatus sit qui id fecit, intestabilis ex lege esse jubetur.* (D. 47, 10, 5, 9.)

"*Intestabilis*" here means that the convicted person could neither make, nor be witness to, a will. (D. 28, 1, 18, 1.)

The truth of an alleged libel was a good defence. To constitute a libel the statements must be not merely defamatory but false. (D. 47, 10, 18, 4; C. 9, 35, 10.)

3°. By acts.

(1.) And it is an *injuria* to take possession of a man's goods as if for debt [and to put them up for sale] when you know he owes you nothing. (J. 4, 4, 1; G. 3, 220.)

(2.) Akin to this is the offence of demanding as a debt what is not due, in order to injure another's credit. (D. 47, 10, 15, 33.)

(3.) It was usual to sue a debtor before proceeding against his sureties, and whoever, therefore, passed over a solvent debtor as if he were insolvent, and proceeded against the sureties to damage his credit, committed an *injuria*. (D. 47, 10, 19.)

(4.) A creditor is bound to accept a solvent surety; and if he refuses one who is able to answer for the debt, with the object of defaming him, he commits an *injuria*. (D. 2, 8, 5, 1).

(5.) To apprehend a person as a fugitive slave, or to bring an action to claim a person as a slave, knowing him to be free, is an *injuria*. (D. 47, 10, 12; D. 47, 10, 22.)

(6.) He that flees for refuge to the statues or images of the emperors, to make it appear falsely that another has unlawfully imprisoned him, commits an *injuria*. (D. 47, 10.)

5. To enter a man's house against his will, even to serve a summons, was regarded as an invasion of his privacy. (D. 47, 10, 23; D. 47, 10, 15, 5.)

The *lex Cornelia* (B.C. 81), too, speaks of *injuriae*, and has brought in a special *actio injuriarum*. This action lies when a man alleges that he has been beaten or scourged, or that his house has been entered by force. And by "house" in this case is understood his own house in which he dwells, or a hired house, or one in which he lives rent-free or as a guest. (J. 4, 4, 8.)

In one sense this offence can hardly be considered as directed against the person of the occupier, but it was against his dignity; for the majesty of a Roman citizen was supposed to extend beyond his strict personality to his immediate belongings, and even to his clothes. (D. 47, 10, 9, pr.) *Directarii*, who sneak into a house to steal, were guilty of a criminal offence. (Paul, Sent. 5, 4, 8.)

6. Attempts directed against the chastity of boys and women constitute *injuriae*.

And it is an *injuria*, to keep following about a respectable woman, or a youth still wearing the praetexta, or a young girl, or to attempt any one's chastity. And clearly there are many other forms of *injuria*. (J. 4, 4, 1; G. 3, 220.)

This offence consisted in persistently following them about, as such constant pursuit was in itself a reflection on their character. (D. 47, 10, 15, 22.)

The *praetexta* was worn till the age of puberty.

The use of obscene language is an *injuria*, although not successfully accomplishing the immoral intention. (D. 47, 10, 15, 21.)

To accost (*appellare*) and address a respectable woman in the dress of a matron was an *injuria* if the object were to conquer her chastity. But a respectable woman, if dressed as a slave or as a prostitute, had no remedy if she were so accosted. (D. 47, 10, 15, 15.)

7. It is the duty of every one to abstain from vexatiously setting in motion against another the machinery of the law. (D. 47, 10, 13, 3.)

8. Another case is this:—If at a spot where men commonly pass anything is kept so placed or hung that it might, if it fell, do harm to some one. For this there is a fixed penalty of ten *aurei*. (J. 4, 5, 1.)

In this case the penalty is exacted although no one is hurt (D. 9, 3, 5, 11); it was a measure of police for the safety of the streets. (D. 9, 3, 1.)

This injury is called a quasi delict (*quasi ex maleficio*). This means nothing, however, except that it is a late addition to the roll of delicts, made not by any statute, but by the judicial authority of the Prætor.

Second, WHAT CIRCUMSTANCES MADE THE INFLICTION OF PAIN OR HURT AN *injuria?*

In its general sense, *injuria* means an unlawful act (*quod non jure fit*). In a special sense, it is used to mean sometimes an affront (*contumelia*, from contemno, in Greek ὕβρις); sometimes a wrong (*culpa*, in Greek ἀδίκημα)—and this is the sense of *damnum injuria* in the *lex Aquilia;* and sometimes unfairness or injustice (in Greek ἀδικία), for when a decision is wrongfully given (*non jure*) against a man by the Prætor or *judex*, that man is said to suffer an *injuria*. (J. 4, 4, pr.)

Of the four meanings here given to *injuria*, only one is applicable to the present case. Generally, it may be said that an injury is the intentional and illegal infliction of pain or hurt. To constitute a violation of a freeman's rights to his own person, three elements chiefly must concur.

1. The violation must be intentional; mere negligence does not give rise to *injuria*. It is not, however, necessary that the wrong-doer should know whom he hurts, provided he has a general intention to hurt some one. (D. 47, 10, 3, 2.)

A strikes B in joke or in a sparring-match. As A has no intention to injure B, A does not commit any *injuria*. (D. 47, 10, 3, 3.)

An astrologer or soothsayer, a sincere believer in his art, says a man is a thief who is not; he has uttered a slander, but he has not committed any *injuria*, for he is himself in error. (D. 47, 10, 15, 13.

A strikes B, believing him to be his slave, and therefore considering himself as exercising his just right. A does not commit any *injuria*, although it should turn out that in reality B is free. (D. 47, 10, 3, 4.)

A man intending to hit his slave, misses his aim, and accidentally hits a freeman standing by; there is no *injuria*. (D. 47, 10, 4.)

2. The act must be illegal. Every infliction of pain is not an injury, but only such as the law forbids. Pains inflicted by the law itself were not an infraction of the rights of personality. (D. 47, 10, 13, 1.) Hence a magistrate could not be compelled to give compensation for such losses as he caused in the course of administering justice, provided he did not intentionally abuse his authority. (D. 47, 10, 33.) Teachers also, and others set over the young, were permitted to chastise those committed to their care, provided they did not employ undue severity. (D. 9, 2, 6.) The powers of masters over slaves, fathers over children, husbands over wives, in this respect, will be examined more fully hereafter.

But the most usual case in which violence was permitted was in self-defence. An attack upon me releases me from the duty of respecting the person that assaults me. It is a general principle of law to permit men to repel force by force, or to use force in defence of a right. (D. 1, 1, 3; D. 9, 2, 4, pr.; D. 4, 2, 12, 1.) Within what limits, on what occasions, is it lawful in self-defence to hurt, or even to kill another? The first broad distinction is between a wrong already completed, and one in process of consummation or immediately impending. When the wrong is consummated, when the mischief is done, it is never lawful to resort to force; the peaceful remedy of an action or criminal accusation can alone be employed. But if the invasion of my right or the attack on my person is not completed, as a general rule force may be used in defence. (D. 43, 16, 3, 7; D. 43, 16, 3, 9.)

A shopkeeper placed a lamp in a lane by night, and a passer-by stole it; the shopkeeper pursued and caught the thief. The thief thereupon began to strike the shopkeeper, to make him let go, and the shopkeeper in the fight scratched out his eye. The shopkeeper was in this instance justified, but he would not, if the thief had not begun the fight, nor if he had scratched out the thief's eye merely from irritation at the theft. (D. 9, 2, 52, 1.)

A second point is whether force could be used in defence of property as well as of personal safety. As regards personal safety, any amount of force was justifiable, if it was reasonably necessary. A man put in fear of his life, could with impunity

kill his assailant; but if he could have caught the man, and there was no necessity for killing him, he was not justified. (D. 9, 2, 5, pr.; C. 9, 16, 2; C. 9, 16, 3.) In defence of property less latitude was given.

To kill wrongfully (*injuria*) is to kill when you have no right to. Therefore he that kills a robber does not come under the *lex Aquilia*, especially if there was no other way in which he could escape the danger. (J. 4, 3, 2.)

According to the law of the XII Tables, it was lawful to kill the nocturnal thief, but not a thief during the day, unless he was provided with deadly weapons. The Aquilian law is understood to have imposed a restriction on this somewhat dangerous power, by admitting the justification only when the sufferer had called lustily for help. (D. 9, 2, 4, 1.) In later times, the latitude given by the XII Tables seems to have been taken away. Ulpian says (D. 48, 8, 9) that even in the case of the nocturnal thief, killing him is to be justified only if the owner of the property could not have spared his life without peril to himself. Thus, in effect, the extreme step of killing an intending thief was allowed only when the life of the person assailed was in peril, as well as his property. Any minor degree of force was, however, justifiable, if necessary for the defence of one's property.

3. The injury must be inflicted without the consent of the person that suffers the injury.[1] But when one wrong affects two persons, one of whom alone consents, such consent does not take away the remedy of the other.

Thus a slave may willingly be led to risk his money at games of chance, but his master may still suffer an injury, and have an action against the person who through the slave has injured him. (D. 47, 10, 26.)

Perhaps the same idea led to the rule, that if a person suffering an injury showed at the time no indignation, he was considered to forgive the wrongdoer, and to forego all rights to damages or penalties for the wrong.

The right to sue is lost if you pretend not to be hurt. And therefore if you overlooked an *injuria*—that is, at the moment you suffered it gave it no further heed—you cannot afterwards change your mind, and revive the *injuria* you have once let rest. (J. 4, 4, 12.)

---

[1] *Nulla injuria est quae in volentem fiat.* (D. 47, 10, 1, 5.)

Investitive Facts.

From the nature of the case, rights *in rem* to one's person are not created by any special investitive facts, nor can they be extinguished by any divestitive facts. The duties corresponding to the rights are nearly universal; they are duties owing by all men to all men. The rights are indelible, and they belong to one simply as a member of civil society.

Broadly, but not quite accurately, it may be said that rights *in rem* belong to every man against every man. The exceptions fall into three classes—(1) Persons that have not rights *in rem;* (2) Persons that are exempt from the corresponding duties; and (3) Substituted or vicarious responsibility.

I. Persons that have not rights *in rem* in respect of their own personality.

Slaves were incapable of suffering an *injuria.* Persons subject to *manus, patria potestas, mancipium* could suffer *injuria,* but, as a rule, only the persons in whose power they were could sue for the wrong done. (See under Slavery, *Potestas,* etc.)

II. Persons against whom rights *in rem* are not available.

The only persons that were not punishable for their wrongful acts were those presumed to be incapable of having a wrongful intention. Inasmuch as intention is of the essence of *injuria,* it follows that those who are destitute of understanding, and are unable to comprehend the consequences of their acts, should be exempt from the penalties of the offence. Hence madmen (*furiosi*) and children under seven years of age (*infantiæ proximi*) were considered incapable of committing an *injuria.*[1] (D. 50, 17, 111, pr.)

III. Persons that are liable for wrongs done by others,—vicarious responsibility.

1. If you have a lodging, whether your own, or hired, or occupied rent-free, and from that lodging anything is thrown down or poured out so as to harm some one, then you incur an *obligatio quasi ex maleficio;—quasi ex maleficio,* and not *ex maleficio,* for often the fault is another's, either a slave's or a child's. (J. 4, 5, 1.)

If a *filiusfamilias* lives apart from his father, and if from his lodging anything is thrown down or poured out, or if he has anything so set or hung that its fall would be dangerous, in this case Julian was of opinion that

[1] *Cum enim injuria ex affectu facientis consistat.* (D. 47, 10, 3, 1.)

against the father there is no action, but only against the *filiusfamilias* himself—just as in the case of a *filiusfamilias* that when judge has given an unlawful judgment (*qui litem suam fecerit*). (J. 4, 5, 2.)

In like manner, when a slave inhabited a house separate from his master, and anything was thrown down or poured out, to the damage of passers-by, but not by him, the master was not responsible. The slave, if he were blameworthy, might, however, be punished. (D. 9, 3, 1, 8.)

2. Not only the doer of the wrong (*injuria*) is liable to an *actio injuriarum*, but he too whose malicious deeds or schemes have led to its being done; not only he that strikes a man on the face with his fist, but he that caused him to be so struck. (J. 4, 4, 11.)

The principal is responsible for the wrongs done by the agent whom he has engaged (*mandatum*) or hired (*conductio*) for the purpose. (D. 47, 10, 11, 3; D. 47, 10, 11, 4.) So a person that has induced another to do a wrong, which, but for such persuasion, he would not have done, is responsible. (D. 47, 10, 11, 6.) But the person acting in consequence of such persuasion or bargain is also responsible. (C. 9, 21, 5.)

3. The responsibility of masters for slaves, fathers for children, etc., will be discussed under these respective heads, Slavery, *Potestas*, etc.

Remedies.

A. Negligence—The remedy is a *utilis actio Legis Aquiliae.* (D. 9, 2, 13, pr.; D. 17, 2, 52, 16.) An account of this statute will be found under the topic of Ownership.

B. Intentional Harm—*Actio Injuriarum.*

1. The measure of compensation in simple injury (i.e., *non atrox*).

(1.) According to the law of the XII Tables.

The penalty for *injuria* was fixed by the XII Tables as follows:—For a limb disabled, to suffer the same in turn (*talio*); for a bone broken or crushed, in the case of a freeman, 300 asses, in the case of a slave, 150 asses; in all other cases, 25 asses. And in the great poverty of those times these money penalties seemed perfectly adequate. (G. 3, 223, and more shortly J. 4, 4, 7.)

At the time of the XII Tables, *talio* seems to have been used as a means of compelling the wrongdoer to offer compensation (*si membrum rupsit, ni cum eo pacit, talio esto*). The next step was to compel the plaintiff, if he were unreasonable in his demands, to submit the question of compensation to a *judex.*

(2.) Modification of the penalty by the Prætors.

But the rule of law now in use is different, for the Prætor allows the sufferer to claim a specific sum; and the judge condemns the wrongdoer to pay any sum not exceeding this, to be fixed at his discretion. (J. 4, 4, 7; G. 3, 224.)

The penalty for *injuria* introduced by the XII Tables has fallen into disuse. That introduced by the Prætors, and therefore called *honoraria*, is in daily use in the courts. For according to a man's rank and respectability the estimate of the harm done by an *injuria* rises or falls. And the same gradation is observed, and properly, even in the case of slaves; for there is one estimate in the case of a slave that is manager, another in the case of a slave in a position of some trust, and a third in the case of an utterly worthless slave,—one, for instance, that works in chains. (J. 4, 4, 7.)

When anything has been thrown down or poured out from a lodging, the amount for which the *actio injuriarum* may be brought is fixed at twice the damage done. For killing a freeman the penalty is fixed at 50 *aurei*. But if he lives, and it is alleged that he has suffered harm, an action may be brought for a fair sum to be fixed at the discretion of the judge. And the judge ought to reckon the doctor's fees and the other outlay required for the cure, as well as the wages of labour that the sufferer has lost or will lose through being disabled. (J. 4, 5, 1.)

2. Compensation for aggravated injury (*atrox injuria*).

(1.) When is an injury aggravated?

An *injuria* is held to be aggravated by considerations—(1) Of the nature of the act, as when a man is wounded, or scourged, or beaten with sticks; or (2) Of the place, as when he is injured in the theatre or in the forum or in sight of the Prætor; or (3) Of the person, as when it is a magistrate that suffers the *injuria*, or when senators are injured by a person of low degree, or a parent by his children, or a patron by his freedmen. For an injury to a senator, a parent, or a patron, is held to differ widely from an injury done to a stranger or to a person of low degree. (4) Sometimes, too, the position of a wound aggravates an *injuria*, when, for instance, a man is struck in the eye. And then it matters little whether it is a *paterfamilias* or a *filiusfamilias* that is injured, for in both cases alike the injury is held to be aggravated. (J. 4, 4, 9; G. 3, 225.)

(2.) Compensation.

An aggravated *injuria* is usually assessed by the Prætor. And when once he has fixed the amount in which the defendant is to give security to appear, the plaintiff rates the damage at the same sum in his *formula;* and the judge, although he can award a less sum, yet often out of deference to the Prætor does not venture on a reduction. (G. 3, 224.)

(3.) A person condemned for *injuria* suffered infamy, as also the person at whose instigation it was done. (Paul, Sent. 5, 4, 20.)

(4.) In cases where the *lex Cornelia* applied, involving an injury to reputation, the defendant was allowed to take an oath and clear the plaintiff's character, thereby escaping punishment. (D. 47, 10, 5, 8.)

(5.) The *actio injuriarum*, being penal, could not be brought against the heirs of the wrongdoer; and also, herein differing from other penal actions, it could not be brought by the heirs of the sufferer. (D. 47, 10, 13, pr.)

(6.) Prescription.

When the remedy was given by the edict of the Prætor, no action could be brought after one year. But when it was given by the *lex Cornelia*, it could be brought at any time; until at a subsequent period, like all personal actions, it was limited to thirty years.

(7.) Concurrence of criminal jurisdiction.

Lastly, it must be observed that for *injuria* the sufferer may elect to bring either a criminal prosecution or a civil action. If he elects to bring a civil action, the damages are assessed as has been said, and they form the penalty imposed. But if a criminal prosecution, it is the duty of the judge to inflict on the accused a penalty *extra ordinem*. Note, however, that a constitution by Zeno brought in the rule that *viri illustres*, and those above them, may either bring or defend an *actio injuriarum* (if brought criminally) through their procurators. Such is its tenor, as may be seen more clearly by referring to it. (J. 4, 4, 10.)

Viri illustres.—The officials under the Empire formed a hierarchy, arranged in different ranks, the highest of which was the *viri illustres*. This class embraced the Prætorian Prefects, the Urban Prefects, the Masters of the Horse (*magistri equitum*) and certain others of the highest officials in the imperial household.

As to criminal prosecutions for *injuria*, see Appendix on Criminal Law.

Second Division.

RIGHTS *IN REM* TO OTHER HUMAN BEINGS.

I.—SLAVERY.

Definition.

I.—Relation of Slave to his Master.

Slavery is an institution of the *Jus Gentium*, by which, contrary to nature, a man becomes the property of a master. (J. 1, 3, 2.)

Freedom, in virtue of which men are called free, is the natural right (*facultas*) each man has of doing what he pleases, except in so far as he is hindered by force or law. (J. 1, 3, 1.)

According to this definition, a master is the *owner* of his slave. But an examination of the law shows that although the nearest legal relation to that between master and slave is ownership, yet in several important respects the position of a slave was not quite so bad. This will appear from a consideration of the elements of property, as commonly described,—the right of exclusive use; the right of destroying; and the right of alienating.

1. Every master had a right to the use of his slave, to all the services he was capable of rendering, and to everything that the slave, if free, would have acquired for himself. (G. 1, 52.) Conversely, the slave himself had no right of property. It will be seen afterwards how far, under the name of *peculium*, a sort of customary ownership was allowed to slaves, and to what extent it was recognised by law.

2. The right of destroying.

Slaves, therefore, are in the power of their masters; and this by the *Jus Gentium*. For among all peoples alike, as may be observed, masters have over slaves the power of life and death, and all a slave's gains are the master's gains. (J. 1, 8, 1; G. 1, 52.)

Until the Empire, no legal check seems to have been placed on this terrible power. During the whole period of the Republic, the only security of the slave was the conscience of his master and the influence of general opinion. The history of the Empire from Claudius to Constantine is marked by successive efforts to throw around the slave the shield of law. According to Suetonius (Life of Claudius, c. 25), the Emperor Claudius was the first to declare the killing of a slave by his master to be murder. This was indisputably the law under Antoninus Pius. Claudius is also alleged to have given another lesson of humanity, by ordering a slave to become free who had been exposed without assistance in illness, but had recovered. The *lex Petronia* (A.D. 61) took away from masters the power of compelling their slaves to fight with wild beasts, and enacted that this species of cruelty should be adopted only as a public punishment for the misconduct of the slave. (D. 48, 8, 11, 2; D. 18, 1, 42.) The sale of a slave for such a purpose subjected both buyer and seller to punishment. (D. 48, 8, 11, 1.) Hadrian (Spartianus in Hadrian, c. 18) abolished the private prisons (*ergastula*) in which masters were accustomed to immure their slaves. He banished a woman for five years who had been guilty of great cruelty towards her female slaves. (Mos. et Rom. Legum Collat. 3, 3, 4.) He also made castration of a slave as well as of a freeman a capital crime, even when the act was done with the consent of the slave. The age of Antoninus Pius is also marked by a distinct advance in humanity.

But now no subject of ours is allowed to treat his slaves with a cruelty that is legally groundless and excessive; for by a constitution of the late Emperor Pius Antoninus, he that without cause kills his own slave, is to be punished equally with him that kills the slave of another. And even too great severity on the part of masters is checked by a constitution of the same Emperor. For, when consulted by certain provincial governors in regard to slaves that flee for refuge to some sacred building, or to the Emperor's statues, he gave command that, if the masters' cruelty seemed beyond endurance, they should be forced to sell the slaves on favourable terms, and have the purchase-money given them:—a righteous decision; for it is for the public good that no man abuse his property. [For we ought not to abuse our rights; and on this very principle spendthrifts are interdicted from managing their own possessions.] And the words of that rescript sent out to Ælius Marcianus are these:—"The masters' power over their own slaves ought to remain unimpaired; nor ought any man to lose his lawful rights. But it is the masters' interest that relief be not denied to the victims of cruelty or starvation, or of unbearable ill-usage (*injuria*): for they implore it

on good grounds. Therefore look into the complaints of the slaves of Julius Sabinus' household that have fled for refuge to the Emperors' statues; and if you find that they have been too harshly treated, or subjected to shameful ill-usage, order them to be sold, with this reservation, that they are not again to fall under the power of their present master. And let Sabinus know that, if he evades this constitution of mine, his misconduct shall be severely visited." (J. 1, 8, 2; G. 1, 53.)

Another rescript of the same emperor deserves notice; it is addressed to one Alfius Julius (Mos. et Rom. Legum Collat. 3, 3, 5–6), and is related by Ulpian. It provides that, if a master treat his slave with great severity, or exact oppressive services, or neglect to give him a sufficiency of food, he shall be compelled to sell the slave. Finally, Constantine attempted to mark off the narrow line that separated homicide from death through flogging. The rule is clearly stated by Paul (Mos. et Rom. Legum Collat. 33, 2, 1). If the slave dies from a flogging, the master is not guilty of homicide, unless he intended to kill the slave. The use of a deadly weapon was conclusive evidence of such intention. (C. 9, 41, 1; C. Th. 9, 12, 2.)

3. The right of alienating the slave. A slave could be sold, pledged, bequeathed, or dealt with exactly like any other property. It is interesting, however, to observe that regard was had, in selling lots of slaves, to the claims of relationship. Seneca tells us that, in public auctions, brother ought not to be separated from brother. (Seneca, *Controv.* 9, 3.) When a partition of property took place, Constantine introduced the humane principle of keeping together children and parents, brothers and sisters, wives and husbands. (C. 3, 38, 11; C. Th. 2, 25, 1.) The same principle was observed in the partition of inheritances. In another class of cases, similar deference was paid to natural feeling. Thus, if a family of slaves were sold, consisting of father, mother, and children, and some of them were suffering from disease, such as gave the buyer the right to return them, the buyer was allowed a choice of keeping all, or sending all back, but he was not allowed to break up the family. (D. 21, 1, 35; D. 21, 1, 39; D. 32, 1, 41, 2.)

4. It was a consequence of the relation between master and slave that neither could bring against the other any civil action, even for delicts.

If a slave wrongs his master, no action arises. For between a master and a person in his power no obligation can arise. And therefore, also, if the slave passes under another's power, or is set free, still neither against him nor against his new master, in whose power he now is, can any action

be brought. Whence it follows, that if another man's slave wrongs you, and afterwards comes to be under your power, the action falls through; for under the changed circumstances it cannot be maintained. And therefore, even though he passes out of your power, you cannot bring an action; just as a slave that has been wronged by his master cannot bring an action, not even when set free or transferred to another, against his master. (J. 4, 8, 6.)

II.—A Slave was a Person.

Much, and somewhat unprofitable, discussion has taken place as to whether a slave was a person. So far as the language of the Roman law is any authority, there can be but one answer to the question. (D. 1, 6, 1, pr.-1.) Both Gaius and Justinian include slaves among persons (*de personis*), and that is conclusive as to the Roman use of the word. (J. 1, 8, pr.; G. 1, 17; 1, 48-52.) But apart even from usage, the question cannot be called perplexing. If we throw out of account the case of corporate bodies, which are called persons in a figurative sense, there can, in law, be only three meanings of the word "person." A person may be defined—(1) as simply a human being; or (2) as a human being upon whom are imposed legal duties; or (3) as a human being who enjoys rights. In the second acceptation of the word, a slave was a person in the sphere of the criminal law, although scarcely so in the civil law. In the third meaning, as has been pointed out, a slave had a right to protection from harm, and so was a person even within the sphere of the civil law. The language of the jurisconsults requires us to enlarge the word person so as to include slaves; the distinction they drew was, a slave had no *caput*. (J. 1, 16, 4.) They meant that he had not freedom, citizenship, nor any family rights; all which constitute the chief heads (*caput*) of status. (Austin, *Jurisp.* 364, 740.)

III.—Origin of Slavery.

Slaves (*servi*) are so called, because victorious generals order the prisoners to be sold, and so save them alive (*servare*) instead of killing them. They are called *mancipia* also, because they are taken from the enemy by the strong hand (*manu*). (J. 1. 3. 3.)

The theory expressed by the Roman jurists, and taken from their writings into the *Institutes*, assumes a historical fact as an explanation of a social anomaly. Capture in war was a recognised mode of acquiring slaves, and this was projected into the past as the sole and exclusive origin of the inequality of slavery.

Whether they were justified in doing so has been disputed (Maine's *Ancient Law*, p. 163); but the main interest attaching to their explanation is the light that it throws upon their notion of the rights of belligerents. In modern times, the principle has been accepted by all civilised nations, that the employment of force against an enemy is no further justified than is required by his resistance; but in ancient times the state of war seems to have been regarded as destroying all moral ties, and leaving the vanquished entirely at the mercy of the conqueror. If the victor might without blame take the life of his prisoner, much more might he take his liberty. Slavery was thus held up as a mitigation of the horrors of war.

The contrast drawn between the law of nature and the law of nations is nowhere so sharply defined as in regard to slavery. In Greece, the distinction between natural law and law created by men, was one of the favourite subjects of disputation from the Sophists to Aristotle. The Stoics took up the law of nature as one of the forms of expressing their moral ideal. From them the conception found its way into Roman law, and thus Ulpian[1] assigns to natural law the doctrine of the equality of all men. In several instances the jurists undoubtedly looked on the law of nations as containing the rules that nature prescribes; but in the present case, Florentine opposes the dictate of equality, ascribed to natural law, to the universal practice of all the nations with which the Romans had come in contact.

The justification of slavery that satisfied the classical jurists and Justinian, was known to Aristotle, without obtaining his approbation. To him the performance of the manual labour of a State by slaves seemed as much in the course of nature, as the use of hired labour and the separation of capital and labour appear to a modern economist. He acknowledged, indeed, that the relation of master and slave had not been all that could be desired, and that no one had been able to hit the happy medium in treating his slaves so as to avoid tyranny while yet securing obedience; but he pointed out that there must be a class of persons to do manual labour, whose bodies were fit for the purpose, and whose minds were fit for nothing better; and that it was no less an advantage to themselves than to their masters that they should be under government. Hence a typical family resolved itself, according to Aristotle's views, into three

[1] *Quod ad jus naturale attinet omnes homines aequales sunt.* (D. 50, 17, 32.)

elements—the herile or working, the nuptial, and the paternal or governing. To employ an analogy of a kind that did not seem to Aristotle unworthy of being regarded as an argument, the master ought to govern the slave just as the soul ought to govern the body. This theory, implying as it did a natural fitness of a slave for the servile condition, was of a more conservative tendency than the hypothesis of the Roman jurisconsults, and gave no stimulus to the process of manumission.

IV.—Serfdom.

In the condition of slaves there are no degrees, but among freemen many. For they are either born free (*ingenui*), or made free (*libertini*). 1, 3, 5.)

The Institutes, quoting Marcian (D. 1, 5, 5, pr.), affirm that there are no degrees of slavery. But the statement needs modification. Convicts were called slaves (*servi poenae*), without in every respect being treated as such. A more important class is passed over in silence in the Institutes, as also in the Digest, but is revealed to us in the Code—the *coloni inquilini*, and *adscriptitii* or *censiti*. These were serfs, enjoying a certain amount of personal freedom, but fixed to the soil, compelled to cultivate it, and inseparable from it. As a link between the slavery of the ancient world and the modern system of free contract, the colonists possess a high interest, although, unfortunately, our information regarding their origin is very scanty. The first notice of them in the Code is in some constitutions of the Emperor Constantine. He made an enactment for the recovery of fugitive colonists A.D. 332 (C. Th. 5, 9, 1), and imposed a fine on those who knowingly harboured any of them. As time rolled on, new constitutions were issued, the principal of which are to be found in the Code. (C. 11, 47 ; C. 11, 49 ; C. 11, 50 ; C. 11, 51 ; C. 11, 52 ; C. 11, 63.)

Those serfs were distinguished from slaves, and classed as free-born (*ingenui*) ; but they could not remove from the place on which they were born, nor could they be sold apart from the land. (C. Th. 13, 10, 3.) They paid a rent to their owner, generally in kind. (C. 11, 47, 5.) The amount of the rent was fixed by custom. (C. 11, 49, 1.) A distinction existed among those serfs. Those called free colonists, *coloni liberi*, *tributarii*, or *inquilini* (C. 11, 47, 12 ; C. 11, 47, 18), had rights of property as against the owner of the land, and were subject to few or no obligations beyond payment of the customary rent. (C. 11

48, 1.) The other class, *adscriptitii* or *censiti*, had no property, and all their acquisitions were treated as *peculium*, the ownership of which belonged to their masters.

A constitution of Anastasius (C. 11, 47, 18) throws some light on the origin of this institution. It appears that a person who remained as a colonist for thirty years retained his freedom, but was bound to the land. (C. 11, 47, 23, 1.) The usual mode, however, in which the state of serfdom was created, was birth. There were some doubts as to the exact rules to be followed, and Justinian declared (C. 11, 47, 21) that the rules determining the status of slavery should apply. If the mother was a colonist, *inquilina* or *adscriptitia*, the child followed her condition, whatever the status of the father. In like manner, if the mother was free the child was free, although the father were an *adscriptitius* or *inquilinus*. In this last case the father might be whipped by public authority and taken away from the woman, but still the children were free.

Rights and Duties.

A. Rights of the master.

As against third persons, the master's rights may be summed up under two heads; a right (1) to the exclusive possession, and (2) to the exclusive use of the slave.

I. Offences against possession. A slave was ranked as an object of moveable property, and might therefore be the object of theft or robbery. These offences will be more conveniently discussed under the law of ownership; but at this stage an offence peculiar to the law of slavery may be noticed—harbouring a runaway slave (*refugium, abscondendi causa, servo praestare*). (D. 11, 3, 1, 2.)

It was an offence, exposing the wrongdoer to a penalty of double the value of the slave, to give refuge to a runaway slave, unless the motive was simple humanity for the slave, or some other adequate reason. (D. 11, 3, 5, pr.) In addition to this provision under an edict of the Prætor, a Senatus Consultum imposed a fine, but gave pardon to those who, within twenty days, gave up the slave to the master or a magistrate. (D. 11, 4, 1, 1.)

II. Offences against the usefulness of a slave. Here again a slave, like other moveable property, was susceptible of damage; but in two ways a slave might be the object of a somewhat different wrong.

1. Corrupting a slave.

This is the offence of deliberately persuading a slave to do something that impairs his value. The Prætor says, "If it be alleged that a man has harboured a slave, male or female, belonging to another, or that he has with wrongful intent persuaded the slave to do anything to change him or her for the worse, against that man I will give a remedy for double the loss in the case."[1] It is, therefore, an offence to solicit a slave to do or conceive any mischief,—as to commit an *injuria*, or theft, or to run away, or to corrupt another man's slave, or to waste his time going to public shows, or to be seditious, or to interfere with his master's accounts (D. 11, 3, 1, 5), or to be disrespectful (D. 11, 3, 15), or contemptuous towards his master. (D. 11, 3, 2.)

2. *Injuria* done to a slave.

No *injuria* is regarded as an *injuria* to the slave himself, but always as an *injuria* to the master through the slave. Nor does it stand on the same footing as an *injuria* done to us through our children and wives. For aggravated offences only are recognised,—open affronts to the master. If, for instance, one scourges a stranger's slave, for this case an action (*formula*) is provided. But if he only reviles the slave in public (*convicium*), or strikes him with his fist, no action is open to the master [no *formula* is provided, nor is one readily granted]. (J. 4, 4, 3; G. 3, 222.)

An *injuria* is pre-eminently an affront to the dignity of the person; but a slave is so abject a creature, he has so little of the dignity of a freeman, that there is nothing to take away, nothing to diminish, nothing susceptible of contumely or *injuria*. Such is the starting point of the Roman law. To a slave, as such, no *injuria* could be done.

In two ways harm might be done to a slave. He might be lamed or lose his eye, and so be less useful as a labourer; in other words, he might suffer the same kind of damage as any other species of property—a loss of utility or value. But a different kind of injury might be perpetrated. It was a point of honour with masters to reserve all ill-usage of their slaves to themselves, and to punish those who assaulted or insulted their slaves. The slave might, therefore, be viewed as a mechanical medium through which an insult could be transmitted to his master. In short, an injury to the slave

[1] *Ait Prætor. Qui servum servamve alienum alienamve recepisse, persuasisseve quid ei dicetur dolo malo quo eum, eamve deteriorem faceret; in eum quanti ea res erit, in duplum judicium dabo.* (D. 11, 3, 1, pr.)

might be intended as, and therefore might be, an injury to the master.

Stichus, a slave belonging to Sempronius, represents himself as a slave of Titius, or as a freeman, and is struck by Seius. Mela (*temp.* Tiberius) says, that inasmuch as Seius did not know that Stichus was the slave of Sempronius, he could not have meant to insult Sempronius; and if Seius would not have struck Stichus had he known who his master really was, he cannot be sued for *injuria*. (D. 47, 10, 15, 45.)

Such was the position of a slave according to the rules of the civil law; but the Prætor introduced a more liberal legislation. He gave an action to the master, when his slave had been whipped or subjected to torture without his consent by another person, even when the wrongdoer did not intend to insult the master. When the injury was trifling, as a mere verbal insult, the master had no action, unless by leave of the Prætor, or unless the insult were meant for him. (D. 47, 10, 15, 35.)[1] Ulpian states the case thus: If a slave is struck lightly or only abused, the Prætor will refuse to give an action to the master. If, however, his good name is seriously hurt by some act or writing, the Prætor will compare the position of the slave with the nature and extent of the injury, and decide accordingly to give or refuse an action. Thus it makes a material difference whether the slave is in a position of trust or confidence, as an overseer (*ordinarius*) or steward (*dispensator*), or whether he is a household drudge (*mediastinus*), or of bad character. (D. 47, 10, 15, 44.) This was the furthest limit of humanity that the Roman law reached. For severe injuries, the master always, the slave never, had a remedy; for trifling insults, the master had an action only when the slave was made the medium of an insult to himself.

These principles will serve to explain the following passages from the Institutes:—

If an *injuria* is done to a slave owned in common, it is fair to assess the damage, not according to the share each owns, but according to the position (*persona*) of the masters: for the *injuria* is done to them personally. (J. 4, 4, 4.)

This rule, which proceeds upon the distinction between contumelious injury just explained, and damage diminishing the usefulness of property, is opposed to a statement by Paul, citing Pedius, in the Digest. (D. 47, 10, 16.)

---

[1] (D. 47, 10, 15, 34.) *Prætor ait: Qui servum alienum adversus bonos mores verberavisse deve eo, injussu domini, quaestionem habuisse dicetur, causa cognita, judicium dabo.*

But if Titius has the usufruct in the slave, Maevius the ownership, then the *injuria* is looked on as done to Maevius. (J. 4, 4, 5.)

The distinction between usufruct and ownership will be explained fully hereafter; for the present it is enough to observe that a person who has a usufruct has for a limited time (generally for his life), all, or nearly all, the rights that the owner has to the use and services of the slave.

But if an *injuria* is done to a freeman while in good faith in your service, no action will be granted you, but he will be allowed to proceed in his own name: unless, indeed, it was to affront you that he was beaten, for then to you also an *actio injuriarum* is open. And the same rule applies to another man's slave while, in good faith, in your service: for whenever an *injuria* is done to him in order to affront you, then you are allowed an *actio injuriarum*. (J. 4, 4, 6.)

This passage, taken from Ulpian (D. 47, 10, 15, 48), omits the final statement that the same rule applies to the case of usufruct. When a slave held in usufruct, or while really belonging to another, believed by the possessor of the slave to be his own (*bona fide*), was made the channel of contumely to the person to whom, for the time, his services were due, the action was brought by the person injured, not by the owner. But if the injury to the slave was more to him than to the master, then an action could be brought by the true owner, and not by the *bona fide* possessor or the usufructuary.

B. Duty of master in respect of wrongs done by his slave.

A wrong done *to* a slave was regarded solely as a wrong to the master; in like manner, a wrong done *by* a slave was considered only as a wrong done by the master. Within the sphere of criminal law, the responsibility of the slave was recognised; but in the civil law his personality in respect of third parties was submerged in that of his master.

The misdeeds of [a *filiusfamilias*] a slave, such as theft [*bona vi rapta, damnum*] or *injuria*, give rise to *actiones noxales*. But in them the [father or] master [if he loses] is allowed to elect whether he will pay the damages assessed, or surrender the wrongdoer (*noxae dedere*). By *noxa* is meant the body that has done the harm (*nocuit*); that is, the slave. *Noxia*, again, is the misdeed itself—the *furtum* for instance, the *damnum*, the *rapina*, the *injuria*. With perfect reason, the surrender of the offending body was made full satisfaction. For it was unjust that the offender's wickedness should bring on the [parents or] masters any loss beyond that of the offending bodies. (J. 4, 8, pr.-1; G. 4, 75.)

The statement of the text applies when the wrongful act was done spontaneously by the slave, and had not received the sanction of the master. When a slave, with the knowledge of his master, kills another slave, the master must pay the whole damage, as if he had done the wrong himself, and he cannot escape by merely surrendering the slave. (D. 9, 4, 2, pr.; D. 9, 2, 44, 1.) The master is directly responsible, even when he

does not encourage the slave, if he knows what he is doing, and has the power to prevent him. (D. 9, 4, 4, pr.; D. 50, 17, 50; D. 9, 2, 45, pr.)

(1.) For what wrongful acts of the slave is the master responsible? His responsibility extends not merely to the delicts enumerated in the Institutes (theft, robbery, damage, injury), but also to other acts of force, fraud, or mischief. When a fraud not falling within the law of contract has been committed by a slave, the master can be sued, the slave being a *noxa*. (D. 4, 3, 9, 4.) The slave is also a *noxa* when he has corrupted another's slaves (D. 11, 3, 5, 3), or has theftuously cut down another's trees. (C. 3, 41, 2.)

(2.) Limitation of the master's responsibility. If the master ceased to own the slave, he also ceased to be responsible. This was a consequence of the rule that the master could free himself by surrendering the slave. Hence the saying, the responsibility follows the slave: *Noxa caput sequitur*. Noxal surrender seems to be a relic of the ancient practice of surrendering a wrongdoer to the injured party, who was thereby enabled to wreak his vengeance upon him. The corporate liability of the household, expressed in later times, by the personal liability of the *paterfamilias*, might be got rid of by surrendering all claim to the protection of the wrongdoer.

All *noxales actiones* follow the person (*caput*). For if [your son or] your slave has done a wrong (*noxia, noxa*), as long as he is in your power (*potestas*), it is against you the action lies: or if he passes into another's power, then against that other. If he is set free [or becomes *sui juris*], the action must be brought against him directly, and there is no longer room for a surrender (*noxae deditio*). And conversely, a direct action may be changed into an *actio noxalis*. For if a free man does a wrong (*noxia*), and thereafter becomes your slave [if a *paterfamilias* does a wrong (*noxa*), and thereafter suffers himself to become your son by *arrogatio*, or is made your slave]—and this may happen in some cases, as we have laid down in the First Book—at once the action, hitherto direct, becomes a *noxalis actio* against you. (J. 4, 8, 5; G. 4, 77.)

Stichus, a slave of Maevius, commits a theft. Maevius sells him to Sempronius. It is against Sempronius that the remedy lies. (D. 9, 4, 7, 1.)

Stichus corrupts another man's slave, and is abandoned by his master Titius. Titius ceases to be responsible. (D. 9, 4, 38, 1.)

Stichus, after running away from his master Titius, commits a robbery. So long as Titius does not recover possession of Stichus, he is not responsible. (D. 9, 4, 21, 3; Paul, Sent. 2, 31, 37.)

Stichus, a slave of Sempronius, commits a theft, and, before any action is brought against his master, dies. Sempronius cannot be sued. (D. 9, 4, 42, 1.)

Stichus has been pledged by Balbus with his creditor Titius, and, while held in

pledge, insults Sempronius. Balbus the owner is responsible, not Titius the creditor. (D. 9, 4, 22, 1.)

Maevius gives his slave Stichus on loan to Caius, and Stichus commits a theft. The remedy is against Maevius the owner, not against Caius the borrower. (D. 9, 4, 22, pr.)

According to the statement of the text, a slave might be sued after manumission for delicts committed by him while a slave. But, except in case of crime, as murder, theft, piracy, he was exonerated when he acted under the orders of his master, for then he was only an agent of the master, who remained answerable for the whole damage. (D. 44, 7, 20.)

Stichus, in a brawl arising out of a lawsuit, assaults a person at the request of his master. Stichus is manumitted. The master may be sued as the instigator of the assault, but Stichus cannot. (D. 50, 17, 157 pr.)

Stichus, after committing a robbery unknown to Maevius his master, prevails upon Maevius to manumit him. Stichus may now be sued. [*noxa caput sequitur.*] (C. 4, 14, 4.)

Stichus commits a theft, and his master Julius coming to learn it, manumits him in order to escape responsibility. In this case the wronged party has a choice; either Stichus may be sued or Julius, but not both. (D. 9, 4, 12; D. 47, 2, 42, 1. But if Stichus offered to defend the action, the master (Julius) escaped. (D. 9, 4, 24.)

Investitive Facts.

A. Investitive Facts ascribed to the Law of Nations (*jus gentium*).

I. The offspring of a female slave belong to her master. *Ancilla* is any female slave. *Verna* is any slave, male or female, born in the master's house.

This rule is but a particular example of one of much wider application, governing the determination of *Status*, and which may be thus briefly stated: children born in wedlock have the same *status* that the father had at the moment of conception; children born out of wedlock have the same *status* as their mother at the moment of birth; but, in favour of liberty, a qualification was made, that if a mother was free at any moment between the conception and birth of the child, the child should be free. (Paul, Sent. 2, 24, 1-3; D. 1, 5, 19.)

The decision, that if a female slave conceives by a Roman citizen, and is set free before childbirth, then the offspring is born free, is a dictate of natural reason. And so if the mother is free at the time of their birth, the children are free. Nor does it matter by whom the mother conceived them, even though she was then a slave. The status of children regularly (*legitime*) conceived is determined by the time of conception, of children irregularly (*illegitime*) conceived, by the time of birth. (G. 1, 89.)

And with these rules the rule of the *Jus Gentium* agrees that the offspring

of a slave-girl and a freeman is a slave, while the offspring of a free woman and a slave is free. (G. 1, 82.)

If the mother is free and the father a slave, the offspring is none the less free-born (*ingenuus*); and so, too, if the mother is free, while from the looseness of her character there is uncertainty as to who is the father. It is enough that the mother is free at the time of the birth, although a slave when she conceived. On the other hand, if she is free when she conceives, and becomes a slave before childbirth, it is held that the offspring is born free, because the mother's misfortune ought not to harm a child still in the womb. Hence this question has been raised,—If a female slave, while pregnant, is set free, and again becomes a slave before childbirth, is the child a slave or free? Marcellus is of opinion that it is born free, for it is enough for a child in the womb that the mother was free at any intervening time. And this is true. (J. 1, 4, pr.)

The same general rule was applied to determine whether a child was a Roman citizen or an alien (*peregrinus*). (See Appendix to Slavery.)

II. Persons captured in war are made slaves. (J. 1, 3, 4.) The capture must, however, be in war between belligerents. The forcible seizure of freemen by brigands or pirates did not constitute a legal capture giving a lawful title to them as slaves. Such captives remained free in law. (D. 49, 15, 24; D. 49, 15, 19, 2.)

B. Investitive facts special to the Roman law (*Jure Civili*).

I. A Roman citizen who evaded inscription on the census (and thereby his military duty) lost his liberty (Cicero pro Caecina, 34). The quinquennial census was a republican institution, which ceased under the Empire. (Ulp. Frag. 11, 11.)

II. A thief taken in the act (*fur manifestus*) was by the law of the XII Tables punished capitally. For if free, he was scourged, and adjudged to the man from whom he had stolen. (G. 3, 189.)

This cause of slavery was extinguished when the Prætor substituted a penalty of fourfold the value of the thing stolen.

III. A judgment creditor (by the XII Tables) could take his debtor as a slave if he were unable to discharge his debt. (Aul. Gell. 20, 1.)

IV. The reduction of free women into slavery by the Senatus Consultum Claudianum. This enactment is said by Tacitus (Ann. 12, 53) to have been made in the reign of Claudius. It was abrogated by Justinian. (C. 7, 24, 1.)

Under the *Senatus Consultum Claudianum* there was a wretched mode of acquisition, *per universitatem*, viz., this:—When a free woman, in the frenzy of her passion for a slave, lost by that *Senatus Consultum* her very freedom, and with her freedom all her substance. But this we held unworthy

of our age, and have therefore blotted it out of the laws of our state, and given it no place in our Digest. (J. 3, 12, 1.)

The reason assigned for this enactment by Theophilus was that such connections interfered with the work of the slave. The master of the slave could send to any free woman cohabiting with his slave, and require her, in the presence of seven witnesses, to withdraw herself from his society. If she refused, a second, and even a third, formal warning (*denuntiatio*) was to be given. If the woman persisted in the cohabition, the master could go before the Prætor or President of a Province (Paul, Sent. 21[A], 17), who, if satisfied of the facts as alleged, adjudged the woman to the master as his slave, with all her property.

V. Certain convicts were regarded as slaves (*servi poenae*).

Those condemned to fight with wild beasts were considered as slaves (D. 48, 19, 8, 11); but this punishment was suppressed by Constantine (C. 11, 43, 1). In the time of Justinian, prisoners sent to the mines (*in metallum*), or to help the miners (*in opus metalli*), were called slaves without a master. Hence even the Fiscus did not acquire any legacy left to them. (D. 48, 19, 17, pr.; D. 49, 14, 12.) The punishment of the mines was for life; those sent to aid the miners were not sentenced for life; and the children of women suffering the lighter punishment were freeborn. (D. 48, 19, 28, 6.) Justinian (Nov. 22, 8) abolished the class of *servi poenae*, and prohibited the infliction of slavery as a punishment for crime.

VI. The ingratitude of a freedman to his patron.

The duties of freedmen (*liberti*) to their patrons will be explained hereafter.

During the Republic a rescission of liberty was unknown. In the time of Nero, the utmost severity that could be wrested from the Senate was the relegation of undutiful freedmen. Claudius ordered a freedman who had brought a false accusation against his patron to become again his slave. (D. 37, 14, 5, pr.) Commodus sanctioned the same punishment as a last resource to break a recalcitrant freedman. (D. 25, 3, 6, 1.) From Ulpian and Paul we learn that it was seldom, and only for very grave offences, that a freedman forfeited his liberty. (D. 37, 14, 1; D. 4, 2, 21, pr.) Constantine (C. 6, 7, 2) established the severe law that even for slight breaches of duty a freedman might be taken back into slavery, although we learn from a constitution of Diocletian and Maximian (C. 7, 16, 30)

that a mere want of reverence (*obsequium*) was not enough to cause a forfeiture of liberty. The law was left in this state by Justinian.

VII. The fraudulent sale of a freeman.

A man may be made a slave by the civil law; as when a freeman over twenty years of age suffers himself to be sold in order to get a share of the price. (J. 1, 3, 4.)

This law seems to have been established by Hadrian (D. 40, 14, 2, pr.) as a protection to purchasers. It was a rule of law that a sale of a freeman was void. Advantage was taken of this rule for the purpose of fraud. Two persons conspired together,—one of them represented the other as his slave, sold him, and got the price. Thereupon the person sold insists that the sale is void because he is freeborn. To check this fraud the above law was made. Freedom was not, however, rashly taken away, and it was only when four conditions concurred that the person fraudulently sold lost his liberty.

1. The person sold must not be under twenty years of age. But if a person just under twenty sells himself, and after reaching that age shares his price with his confederate, he is made a slave. (D. 40, 12, 7, 1.) 2. The person sold must have entered into the sale with the intention of sharing the price, and have actually done so. (D. 40, 13, 1, pr.; C. 7, 8, 1.) But if he restored the price to the purchaser, he was generally allowed to recover his freedom. (D. 40, 14, 2, pr.) 3. The person sold must have known that he was free. (C. Th. 4, 8, 2.) 4. The buyer must have been ignorant that he was free. (D. 40, 12, 7, 2; D. 40, 12, 33.)

Divestitive Facts.

First, Liberation of slaves by the voluntary act of their master (*manumissio*).

Manumission is the giving a slave his freedom; for as long as any one is in slavery he is placed under the *manus* and *potestas* of his master, and manumission frees him from the *potestas*. It takes its rise from the *Jus Gentium*. For by the *Jus Naturale* all were born free, and no manumission was known, since slavery was unknown. But after slavery came in by the *Jus Gentium* there followed the boon of manumission. And though nature gave all the one name of man, the *Jus Gentium* has divided men into three sorts:—Freemen; and their opposite, slaves; and a third sort, freedmen (*libertini*), who have ceased to be slaves. (J. 1, 5, pr.)

The forms of manumission varied at different times, and they

may be arranged in three periods. The first period embraces the whole of the Republic; the second, the Empire; while the changes made by Justinian form an epoch different from both. This division is nearly, although not quite, exact. During the Republic, the modes of manumission were Formal, by means of a fictitious lawsuit, by *census*, or by the solemnities of the testament. They had the double effect of releasing a man from slavery, and making him a Roman citizen. These two effects were not necessarily conjoined. One might be free without being a Roman citizen. But the ancient law contemplated no other manumission than that which added to the roll of citizens and soldiers. The State was represented by means of its magistrates or assemblies as a consenting party to the manumission, and hence this species of manumission is often called PUBLIC (*legitima, solemnis, justa manumissio*).

If a master, without resorting to one of these ancient solemnities, expressed in the presence of witnesses (*inter amicos*) his intention to give freedom to his slave, and followed up this declaration by allowing the slave to dwell in freedom, in strict law the indulgence and good intentions of the master availed the slave nothing. Unless manumitted in proper form, he remained a slave, and equally so if the act of manumission were imperfectly performed. The hardship, however, of turning back into slavery a man allowed to live in freedom by his master, merely on account of a technical flaw or defect, is obvious; but it was not until after considerable experience o the injustice of the law, if we may trust Tacitus (Tac. Ann. 13, 27), that the Prætor interposed. The mode and extent of his intervention are characteristic. He went just so far as was necessary to satisfy the conscience, to prevent the scandal of a man openly enfranchised being again, at the caprice of his master or master's heir, dragged back into slavery (Cervidii Scaevolae (?) Fr. Dosith, 5); but he went no further, and gave the half-enfranchised slave no rights of property. He secured him personal freedom, but nothing more. Such continued to be the law until A.D. 19, when by the *lex Junia Norbana* all slaves, whose personal freedom was guaranteed by the Prætor, were raised to the condition of Latin colonists. (See Book II. Div. II., *Latini Juniani.*)

During the Empire, from A.D. 19, an informal manumission operated as a divestitive fact in regard to slavery, but not as an investitive fact of citizenship. Formal manumission con-

tinued to exist, and to raise the slave to the dignity of Roman citizenship. These two kinds of manumission—the formal and the informal—co-existed down to the time of Justinian. Justinian enacted that a slave, whether manumitted formally or informally, should be a citizen; and thus the class of *Latini Juniani* and the distinction between formal and informal manumission passed away. There are accordingly three stages to remark in the history of manumission. In the first, the forms of manumission were strict and ceremonial, and they conferred the title of citizen; in the second, the inconveniences arising from a strict adherence to these forms became a serious evil, and through the edict of the Prætor and the *lex Junia Norbana* slaves released by their masters informally were protected in their liberty and raised to the condition of Latin colonists; lastly, the ancient forms were virtually abrogated, and any expression of the master's will, if attested as required by law, sufficed to liberate the slave.

Another distinction between formal and informal manumission is worthy of remark as illustrating the peculiar narrowness and formalism of the ancient law. If a slave were formally manumitted, although the master were induced to do so by fraud or compelled by force, the manumission was nevertheless valid; but the master had an action for damages. (D. 4, 2, 9, 2.) According to a rescript of Gordian, a master under twenty years of age, who was fraudulently induced to manumit a slave, could not rescind the manumission, and could only sue the person by whose fraud he was led to prejudice his interests. (C. 2, 31, 2; C. 2, 31, 3.) But an informal manumission, inasmuch as it derived all its efficacy from its being the free act of the master, was void if it were procured by force or fraud. This distinction may be compared with the law relating to formal and informal contracts. (Book II. Div. I. Subdiv. II.)

A. Modes of Manumission.

a. Formal Manumission.

I. By the *vindicta* (*per vindictam*).

The name *vindicta* is given either from the rod employed by the lictor in the ceremony, or, as Theophilus says without any probability, from one Vindicius, who gave information of a conspiracy, and was rewarded by being the first to enjoy a public manumission. It was a fictitious suit brought before one of the higher magistrates (consul, prætor, proconsul, or

president of a province—C. 7, 1, 4), in which judgment was given in favour of the liberty demanded on behalf of the slave with the consent of the master. The ceremony did not require to be in court.

Masters can manumit slaves [over thirty] at any time ; even on the street, when, for instance, the prætor, or proconsul, or provincial governor is going to the bath or the theatre. (J. 1, 5, 2 ; G. 1, 20.)

The part of the *adsertor libertatis*—the plaintiff in a suit for freedom—was taken by the lictor. The master laid hold of the slave's hand, or some other part of his body, and said, "I wish this man to be free;" and thereupon turned him round and let him go. (Livy, 34, 16.) A rod (*vindicta* or *festuca*) was then laid on the slave by the lictor, and the Prætor said to him, "I declare that you are free by the Law of the Quirites;" and to the lictor, "According to your plea, as I have given judgment, behold he is given to you." The lictor then touched the slave with the rod. In the time of Hermogenian (circ. A.D. 287) the solemn words were unnecessary (D. 40, 2, 23); and Ulpian tells us that in his time even the presence of the lictor was not essential. (D. 40, 2, 8.)

Corporations (*civitates, collegia*, etc.) could not manumit their slaves by the *vindicta*, because it was a ceremony in which the master himself must appear, and could not act by an agent (*procurator*). But Diocletian and Maximian refer to a *lex Vectibulici* (passed probably in the first century of the Christian era), by which slaves of municipalities could be manumitted. (C. 7, 9, 3.) Hadrian (C. 7, 9, 2) tells us that slaves belonging to corporations could be freed with the consent of the president of the province, on a decree by the local magistrates (*duumviri*).

II. Enrolment of a slave on the census.

At the quinquennial census, a slave whose name was registered as a citizen by the command of his master became free. (Ulp. Frag. 1, 7.) There was a doubt as to whether the freedom of the slave dated from the day when his name was inserted, or from the close of the quinquennial period. (Cic. de Orat. 1, 40.) The census was accompanied by a *lustrum*, or sacrifice of purification, and thus the ceremony had a religious as well as political import. (Cervidii Scaevolae (?), Fr. Dosith 17[B].) This mode of manumission was necessarily confined to Rome, and could have been of little practical use, as the occasion came only once in

five years. The master must be Quiritarian owner to be able to insert the slave's name on the census. (Cerv. Scaev. (?) Fr. Dos. 17.) After Vespasian no census was held for 180 years. Decius held one, the last, A.D. 249.

III. By testament or codicils.

Surprise may be excited at the enumeration of wills as a form of *public* manumission, inasmuch as secrecy and privacy are the most obvious characteristics of a will. The explanation is found in history. At first wills were made in the form of a law passed by the *Comitia Curiata* (Book III., Forms of Wills), and were then not only open, but sanctioned by the State. At such a time a will was a public mode of manumission, and it retained that advantage after its own nature had been completely changed.

Manumission by the *vindicta* was irrevocable; but a gift of liberty in a will could be revoked at any time during the life of the testator.

The slave who was ordered by his master's will to be free, did not acquire his liberty from the moment of his master's death, but only when some one became heir under the will. (Ulp. Frag. 1, 22.) Hence, if the heirs named in the will refused to accept the inheritance, the gifts of liberty were made in vain. The introduction of codicils extended the testator's power: it enabled him to impose on the heirs who took in default of his will an obligation to manumit a slave. (D. 40, 4, 43.) This leads to an important distinction between a direct bequest of liberty and a bequest indirectly, or by way of trust (*fideicommissum*).

1. Comparison of direct (*directa, justa*) and fidei-commissary bequest of freedom.

1°. A slave, to whom is bequeathed his freedom directly, becomes free as soon as any person named heir in the will enters on the inheritance. But in a bequest by way of trust the slave does not obtain his freedom until the person to whom he is committed manumits him by the *vindicta*.

2°. Freedom may be given a slave by a trust (*fideicommissum*); if the heir or legatee or trustee (*fideicommissarius*) is charged to manumit him. (J. 2, 24, 2; G. 3, 263). A slave directly set free by will—for instance, in the form, "Let Stichus my slave be free," or, "I order that Stichus my slave be free"—becomes the testator's freedman. (G. 2, 267.)

The formality on which Gaius insists was taken away by a constitution of Theo-

dosius and Valentian (C. 7, 2, 14) ; and henceforth a direct bequest of liberty might be made even in Greek.

In a direct grant of freedom, the testator charges no one to manumit the slave, but by his own testament wills that the slave shall thereby be made a freeman. (J. 2, 24, 2.)

3°. No slave can be directly freed by will, unless the testator owned him [*ex jure Quiritium*] both when he made the will and when he died. (J. 2, 24, 2 ; G. 2, 267.)

But it does not matter whether the slave, whose manumission is given by *fideicommissum* by the testator, is his own, or belongs to his heir or legatee, or even to an outsider. A slave, therefore, that belongs to another, ought to be bought from him, and then manumitted. [If his master refuses to sell him, his freedom is gone, because for freedom no price can be reckoned.]

If his master refuses to sell him, as he may, if he has taken nothing under the will that gives the slave his freedom, then the trust for freedom is not at once gone, but is only put off. For as time goes on, whenever there is a chance to buy the slave, his freedom may be secured. (J. 2, 24, 2 ; G. 2, 264-265.)

4°. A slave manumitted under a trust becomes the freedman, not of the testator, even if the testator was his master, but of the manumitter. But he whose freedom is directly assured by will, becomes the testator's own freedman—a *libertus orcinus*, as he is called. (J. 2, 24, 2 ; G. 2, 266.)

The rights of the patron were of considerable value, and it was therefore important to determine who was to be patron.

5°. Direct bequests could be made only by will, or by codicils confirmed by will. Fideicommissary bequests could be imposed by codicils not confirmed by will, or by codicils without any will being made ; in which case the heir to the intestate was bound to manumit the slaves named in the bequest. (D. 40, 4, 43.)

2. The bequest of liberty may be conditional or unconditional.

A slave to whom freedom is given in his master's will, subject to the fulfilment of any condition, is called a *statuliber ;* because, according to Ulpian (Ulp. Frag. 2, 2), while the slave remains the slave of the heir until the condition is fulfilled, as soon as the condition is fulfilled he becomes free (*statim liber*). One is also a *statuliber* whose freedom is to begin at a given time after the testator's death. (D. 40, 7, 1, pr.) If the time mentioned exceeds the duration of a human life, or the condition cannot be fulfilled, then the bequest is (by Paul) treated as void, because the testator must have written it in mockery. (D. 40, 7, 4, 1.) This construction, so unfavourable to freedom, was not sanctioned by Justinian, who directed that an impossible condition in gifts of liberty should be treated as void (*non scripta*). (J. 2, 14, 10.) A *statuliber,* until the condition is fulfilled, is in all respects a slave of the heir (D. 40, 7, 29, pr.) ; and

children born of a female slave are slaves. (C. 7, 4, 3.) The heir may sell the slave, but cannot deprive him of the benefit of the condition. (C. 7, 2, 13; Ulp. Frag. 2, 3.)

Those who are manumitted with the intention of defrauding creditors are *statuliberi* so long as it is uncertain whether the creditors will insist on their right to have the bequest of freedom cancelled. (D. 40, 7, 1, 1.)

IV. In the Church. (J. 1, 5. 1.)

In the enactments of Constantine we may trace signs of a disposition to facilitate the termination of slavery by the manumission of slaves. A declaration of the master, in presence of the congregation, to the bishop, of his desire that the slave should be free, operated as a manumission. The declaration was recorded in writing. (C. 1. 13, 1; C. 1, 13, 2.)

β. Informal Manumission.

I. An oral declaration of freedom in the presence of witnesses (*inter amicos*) (J. 1, 5, 1), was the oldest form of private manumission, and was in use during the Republic. Justinian fixed the number of witnesses at five, and required the declaration of manumission to be written, and attested by the witnesses or by notaries (*tabularii*) for them. (C. 7, 6, 2.)

II. By letter (*per epistolam*). (J. 1, 5, 1.) In this case Justinian also required the attestation of five witnesses. (C. 7, 6, 1.)

III. It was a custom for slaves manumitted by will to attend the funeral of their deceased master, wearing the cap of liberty (*pileus*). Advantage was taken of this custom to give a false impression of the liberality of the deceased, by making slaves who were not manumitted appear at the funeral with the cap of liberty. This form of ostentation was put an end to by enacting that slaves permitted to wear the cap of liberty at the funeral of their master, by the direction of the deceased, or with the consent of the heir, or who stood on the funeral-couch and fanned the corpse, should obtain their freedom. (C. 7, 6, 5.)

IV. A female slave who received a dowry (*dos*) from her master, and was given by him in marriage to a freeman, acquired freedom without any formal declaration. There must, however, be a written instrument giving the dowry. (C. 7, 6, 9.)

V. Cato wisely wrote, as the ancients tell us, that slaves, if adopted by their masters, are thereby freed. And, in deference to this opinion, we too, by our constitution, have decided that a slave to whom his master has by a

public process (*actis intervenientibus*) given the name of son is free, although this is not enough to give him the rights of a son. (J. 1, 11, 12.)

Acta are records kept in the court of a magistrate. *Insinuatio* or entry of an act in these records was a not uncommon way of securing irreproachable testimony. In some cases it was required to make certain dispositions, as gifts, valid.

VI. If the master gave the title-deeds of the slave to him, or destroyed them, with the intention of manumitting the slave, in the presence of five witnesses, the slave obtained his freedom. (C. 7, 6, 11.)

Other modes were recognised as sufficient to make a slave a Latin (*Latinus Junianus*), (one of which, sitting at table with his master, is mentioned by Theophilus), but they were all abrogated by the same constitution that abolished the Latin class of freedmen. (C. 7, 6, 12.)

B. RESTRAINTS ON MANUMISSION.

During the Republic, a master could manumit as many slaves as he pleased, either during his life or by his will. But in the beginning of the Empire, the self-interest of the master appears not to have been considered sufficient security against reckless manumission; and it was alleged that slaves more frequently gained their freedom by pandering to the vices of their masters, or assisting their political conspiracies, than by the steady practice of virtue and industry. (Dion. Halicarn. Antiq. Rom. 4.) Whatever truth may be in this statement, restraints were imposed in the interest of the master himself, or of his heirs, or of his creditors.

I. By the *lex Julia de adulteriis*, a woman, after separation from her husband by divorce, was prohibited from selling or manumitting a slave for sixty days (D. 40, 9, 14, 1)—a prohibition thought by Ulpian to be very hard. (D. 40, 9, 12, 1.)

II. Restraints introduced by the *lex Ælia Sentia*, A.D. 4.

1. This law prohibited manumission in fraud of creditors.

It is not every one that wishes to manumit that is allowed to do so. For a manumission to defraud creditors [or a patron] is void; because the *lex Ælia Sentia* bars the freedom. (J. 1, 6, pr.; G. 1, 36-37.)

And, finally, it must be known that the provision of the *lex Ælia Sentia*, that slaves manumitted in order to defraud creditors shall not be made free, applies to aliens too. This the senate determined at the instance of the late Emperor Hadrian. But the rest of the rules laid down by that statute do not apply to aliens. (G. 1, 47.)

What is a fraud upon creditors?

A man manumits to the fraud of his creditors, if at the very time of manu-

mission he is insolvent, or if to give freedom to his slaves will make him an insolvent. Yet it is the prevailing opinion, that unless the manumitter had, further, the intention to defraud (*animus fraudandi*), the gift of freedom is not barred, even though the goods are not enough for the creditors. For often men's fortunes seem larger to their hopes than they are in fact. We see, then, that to bar the gift of freedom there must be a double fraud upon the creditors,—a fraud in intention on the part of the manumitter, and a fraud in fact, for the goods must prove insufficient for the creditors. (J. 1, 6, 3.)

There must concur both design (*concilium*) and fraudulent result (*eventus*). (D. 42, 8, 15.) *Creditores* are any persons having an action against the manumitter. (D. 40, 9, 16, 2.)

X owed money to A, and knowing that he was insolvent, manumitted several slaves by his will. Afterwards he paid A, and became indebted to B, and died. Julian decides that the slaves are free, because X intended to defraud A and did not, and defrauded B without intending it. Now both intention and actual defeat of the creditor must go together. (D. 42, 8, 15.) A must, however, not have been paid off with money got from B. (D. 42, 8, 16; D. 40, 9, 25.)

X was worth 1000 *aurei*, but thought he had only 300. He was 400 *aurei* in debt. To defeat his creditors, he manumitted his slaves; but inasmuch as they will be paid in full, the manumission is valid. (Theoph. J. 1, 6, 3.)

A being worth 420 *aurei*, and owing 400 *aurei*, with the intention of defeating his creditors, manumits B, who is worth 20 *aurei*, and C, D, each worth 10 *aurei*. B will remain free, because he was first manumitted, and his manumission does not defeat the creditor; but C and D will remain slaves. (D. 40, 9, 24.)

A is worth 50 *aurei*, and he owes his creditors 35 *aurei*. A manumits B, worth 20 *aurei*, and C worth 15 *aurei*, with the object of defrauding his creditors. Here B, although first manumitted, cannot be free, because the creditors would be defrauded; but as C is worth exactly 15 *aurei*, and his manumission does not interfere with the creditors, C will obtain his freedom in preference to B. (D. 40, 9, 24.)

EXCEPTION.—A master is allowed, if insolvent, to set his slave free by will, and appoint him his heir. And in that case the slave becomes both free and his sole and compulsory heir, if only there is no other heir under the will. And that may be because no one was designated as heir, or because he that was designated, on whatever ground, did not become heir. This is a provision of the same *lex Ælia Sentia*, and a righteous provision. For it was highly necessary to look forward to the case of needy men, to whom no other one would become heir, and to see that a man should have his own slave as a necessary heir; for then he would satisfy the creditors: or if not, the creditors might sell the goods of the inheritance in his slave's name, and so the deceased would suffer no disgrace (*injuria*). (J. 1, 6, 1.)

And the rule of law is the same, even if no mention of freedom is made when the slave is appointed heir. And our constitution has settled this, not only in the case of an insolvent master, but generally; for we pay a regard to humanity that formerly was unknown. And so now the very entry of the slave as heir of itself gives him his freedom. For it is not likely that the master's wishes were, that the heir he himself chose (though he omitted to give him freedom) should remain a slave, and that thus he should have no heir. (J. 1, 6, 2.)

2. A master under twenty years of age cannot manumit a slave, except under certain restrictions.

By the same *lex Ælia Sentia* a master under twenty is not allowed to manumit except by *vindicta*, and that only after making good a valid reason to the satisfaction of the Board (*Consilium*). (J. 1, 6, 4; G. 1, 38.)

And even if he wishes to make him a Latin, still none the less he must make good a reason (*justa causa*), to the satisfaction of the Board, and then manumit before friends (*inter amicos*). (G. 1, 41.)

Effect of the restraint on the power of testation.

Since then the power of manumission, in the case of masters under twenty, was by the *lex Ælia Sentia* expressly limited, it followed that a master that had completed his fourteenth year, although he could make a will and therein appoint his heir and leave legacies, yet could not, so long as he was under twenty, give a slave his freedom. Now it was unbearable that a man that could by will dispose of all his goods was not allowed to give one slave his freedom. And therefore we allow him, as he disposes of all else, to dispose of his slaves too, according to his last wishes (*in ultima voluntate*), as he pleases; so that he can set them free. But freedom is beyond all price; and hence, in old times, it was forbidden to free a slave before the master reached his twentieth year. We, therefore, choose a middle path, and give a master under twenty leave to free his slave by will only if he has completed his seventeenth and entered on his eighteenth year. For since in old times men of this age were allowed to plead, even on behalf of others, why should we believe that their soundness of judgment will fail them when they come to give freedom to their own slaves? (J. 1, 6, 7; G. 1, 40.)

Justinian afterwards reduced the age from seventeen to fourteen. (Nov. 119, 2.)

A person under twenty was restricted from any mode of alienation (subject to the amendment of Justinian) except by the *vindicta*, with the consent of the Board, on definite legal grounds.

1°. The constitution of this Board.

The Board (*Consilium*) that is consulted, consists, in Rome, of five senators and five Roman knights above the age of puberty; in the provinces, of twenty *recuperatores*, Roman citizens. In the provinces it meets on the last day of the assize; but at Rome there are fixed days for manumissions before the Board. (G. 1, 20.)

The *Conventus* or assizes were held periodically in the provinces. On the last day of the assize the President took his seat on the tribunal, and along with his twenty *Recuperatores* [see Book IV., *Recuperatores*] heard the cases for manumission. At Rome the Prætor presided over the Senators and Equites. (Theoph. *Inst.* 1, 6, 4.)

2°. The legal grounds of manumission.

Valid reasons for manumission are such as these—that the slave to be manumitted is the father or mother, or son or daughter, or brother or sister

by birth, or the *paedagogus* or nurse, or teacher, or foster-child, or foster-brother, of the manumitter. Or again, that the slave is to become his agent or his wife; provided only that the wife must be married within six months, unless there is some valid reason to bar the marriage, and that the agent must not be under seventeen at the time of manumission. But if the reason is once approved, be it true or false, the approval cannot be withdrawn. (J. 1, 6, 5–6; G. 1, 19.)

. . . . . The reasons we set forth above in treating of slaves under thirty apply to this case too. And conversely, the reasons given in the case of a master under twenty may be extended to the case of a slave under thirty. (G. 1, 39.)

How, asks Theophilus, could a person be a freeman and a Roman citizen, and be the owner of his parents as slaves? This might happen in several ways.

A father, B mother, and C son, are slaves of D. D dies, making C free and his heir. A and B will be slaves of C.

A has two children, B a boy and C a girl, by his female slave. B and C are of course slaves, their mother being in slavery. A makes B his heir. C will be the slave of B.

A has a legitimate son B, and C a daughter by his female slave. A dies. B inherits, and C becomes the slave of B.

3. The slave must be thirty years of age.

The requirement as to the age of a slave was introduced by the *lex Ælia Sentia;* for that statute enacted that slaves under thirty should not, on manumission, become Roman citizens, unless, indeed, they had been freed by *vindicta* after a valid reason for the manumission had been approved by the Board. (G. 1, 18.)

If the slave manumitted was under thirty, Gaius says he became a Latin (§ 29, 30). The prohibition, therefore, of the law was not absolute, as in the case where the master was under twenty; and a manumission not complying with its terms was not wholly void, but had the effect of a private mode of manumission. Ulpian (*Frag.* 1, 12) states that to be the law when the manumission of a slave under age was by will; but that if it were by the *vindicta* it was wholly void,—unless, as has been suggested, the passage is not complete; but the point is unimportant. When Justinian abolished the class of Latin freedmen, the restraint on the age of the slave manumitted was tacitly repealed, and in the Institutes no mention is made of it.

The grounds that will justify manumission by a master under twenty would suffice for the manumission of a slave under thirty. (G. 1, 39.)

EXCEPTION.—Moreover, a slave under thirty may, when manumitted, become a Roman citizen, if manumitted by an insolvent master who makes him free and his heir by will; provided always there is no other slave whose

name comes before his in the like position, and that there is no other heir under the will. This is due to the *lex Ælia Sentia*. And Proculus is of opinion that we must lean to the side of freedom, and hold the rule the same in the case of a slave that is named as heir without any mention of freedom. (G 1, 21, as restored.)

Since by the *lex Ælia Sentia* the slave whose name is written first as heir alone becomes a Roman citizen, it was held that, if a man were to name as heirs his bastards by a female slave, all would remain slaves, for his words do not show who is to stand first; and that the estate should lose more than one would be a fraud upon the creditor. And at last, a *Senatus Consultum*, appended to the *lex Fufia Caninia*, provided that it should not be in a debtor's power by such devices to evade the statute. (G. 1, 21ᴬ, as restored.)

III. And further, the *lex Fufia Caninia* [A.D. 8] sets a fixed limit to the manumission of slaves by will. (G. 1, 42).

The owner of more than 2, and not more than 10, is { allowed to free any number not exceeding ½

„ 10, „ 30, „ ⅓

„ 30, „ 100, „ ¼

And lastly, „ 100, „ 500, „ ⅕

And the statute pays no heed to larger owners, so as to fix any proportionate part. But it enjoins that no man be allowed to manumit more than 100. On the other hand, too, if a man has but one slave in all, or two only, the law makes no provision for that case, and his power to manumit is unrestrained. (G. 1, 43.)

But what we have said as to the number of slaves that can be manumitted by will, must be taken in this sense,—that in each number, where only one-third, one-fourth, or one-fifth can be freed, one may always manumit as many as are allowed to the lower number that goes before. The statute itself so provides. For clearly it would be absurd that the master of ten slaves might free five—the half, namely, of all he has; and then that the owner of twelve could free no more than four. But those that have more than ten, and not more than thirty, may manumit any number not exceeding five, the number allowed to those that have but ten. (G. 1, 45, as restored.)

And if a testator exceeds these limits, but arranges the names of the slaves he frees in a circle; then, since no order of manumission is found, none will be free. For the *lex Fufia Caninia* annuls all such evasions. There are two special *Senatus Consulta* that annul all the devices framed to evade that statute. (G. 1, 46, as restored.)

To manumission not by will this statute does not apply at all. Those therefore that manumit by *vindicta*, or *census*, or among friends (*inter amicos*), may free their whole household if there is no other ground to bar their freedom. (G. 1, 44.)

The *lex Fufia Caninia* set fixed limits to the manumission of slaves by will. As this was a bar to freedom, and somewhat invidious in its distinctions, we have resolved on its abolition. For it was inhuman enough that during his life a man might give freedom to all his household (unless there was some other ground to bar their freedom), but on his deathbed should be deprived of all such power. (J. 1, 7, pr.)

Second, Involuntary Divestitive Facts. Freedom given to

the slave by way of forfeiture to the master or reward to the slave.

I. When a sick slave was abandoned by his master and recovered, Claudius declared that the slave should be free. (D. 40, 8, 2.)

II. Justinian applied the same remedy when the master exposed an infant slave. (C. 1, 4, 23 ; Nov. 153.)

III. When a female slave, sold under a condition that she should not be made a prostitute, was let out by her master for that purpose, her former master could demand her freedom. (D. 40, 8, 7.) Theodosius and Valentinian (A.D. 428) extended this relief to every case where the slave was made a prostitute against her will. (C. 1, 4, 12 ; C. 1, 4, 14.)

IV. A master who maliciously allowed a freeman to marry his female slave under mistake forfeited his slave. (Nov. 22, 11.)

V. Slaves of heretics, or pagans, or Jews, by accepting Christianity, were released from slavery ; and even if the masters followed them, and were admitted into the Church, they were not allowed to take back their slaves. (C. 1, 3, 56, 3.)

VI. A slave who disclosed the assassin of his master was regarded as a freedman of his master (*libertus orcinus*). (D. 40, 8, 5 ; C. 7, 13, 1.)

VII. Constantine enacted that a slave who procured the conviction of coiners of bad money should be free, and that the imperial exchequer should compensate their masters. (C. 7, 13, 2.)

VIII. He also gave a slave liberty who disclosed a rape that had been concealed or compromised. (C. 7, 13, 3.)

Remedies.

A. Remedies in respect of Rights and Duties. (a.) Rights of the Master.—As between the slave and master there were no actions ; but the Prefect of the city heard complaints made by slaves against their master when they were left without sufficient food, or ill-used. (D. 1, 12, 1, 1 ; D. 5, 1, 53.) In some cases of misconduct the master was obliged to sell the slave ; in others, the slave was forfeited and acquired his freedom.

As against third parties, in addition to the usual actions for delicts (*actio furti, vi bonorum raptorum, damni injuria, injuriarum*), two remedies are specially applicable to slaves.

1. *Actio de servo corrupto.*

1°. By whom could the *actio de servo corrupto* be brought ?

The owner, at the time the wrong was done, had the action, even when the slave was in pledge (D. 11, 3, 14, 4), and it was not extinguished by the manumission of the slave. (D. 11, 3, 5, 4.)

2°. The measure of damage. The damages are double the amount of the depreciation in the value of the slave (D. 11, 3, 5, 2), and of what the slave carried off. (D. 11, 3, 10.) It was the duty of the judge who heard the cause to estimate how much that was. (D. 11, 3, 14, 8.) Thus the compensation or penalty paid by a master for a wrong done by a slave may be recovered from the person who has corrupted the slave—that is, induced him to do the wrong—whether such person has benefited by it or not. (D. 11, 3, 14, 7 ; D. 11, 3, 10.)

3°. Although of Prætorian origin, the action is perpetual, not temporary. (D. 11, 3, 13. pr.)

4°. It may be brought by the heirs of the owner, but not against the heirs of the wrongdoer, because a penal action never lies against the heirs of a wrongdoer. (D. 11, 3, 13 pr.)

Special procedure in regard to fugitive slaves. Besides the edict of the Prætor

(*de servo corrupto*), a Senatus Consultum imposed a fine for harbouring fugitive slaves (D. 11, 4, 1, 1); and Constantine enacted that he who did so must return the slave with another of equal value, or 20 *solidi*. Masters in search of fugitive slaves must obtain written authority from the Emperor to the magistrates, who thereupon were liable to a penalty of 100 *solidi* if they did not give their help. (D. 11, 4, 1, 2.) Whoever apprehended a fugitive slave was bound to deliver him up to the municipal magistrates, or other public officer. (D. 11, 4, 1, 3; D. 11, 4, 1, 6.) Mere fugitation was not treated by the law as a crime, unless the slave passed himself off as free (D. 11, 4, 2), or was caught trying to escape to a foreign country. (C. 6, 1, 3.)

(B) Duties of the Master—*noxalis actio*.

1. Origin.

Noxales actiones have been established both by statutes and by edict. By statutes, as for theft by the XII Tables,[1] and for *damnum injuria* by the *lex Aquilia*. By the Prætor's edict as for *injuria* and robbery. (J. 4, 8, 4; G. 4, 76.)

2. Damages.

A master sued in a *noxalis actio* on account of his slave may free himself by surrendering the slave (*noxae dedendo*) to the plaintiff. Such a surrender is a final transfer of all his rights as master. If, however, the slave can find money to compensate the new master to whom he is surrendered for the damage (*damnum*) sustained, then by the Prætor's help, even against the new master's will, he gains his manumission. (J. 4, 8, 3.)

If therefore the judge is trying a *noxalis actio*, and if it shall appear that judgment must be given against the master, it is his duty to give it in the following form:—Publius Maevius I condemn to pay to Lucius Titius ten *aurei*, or to surrender the offender (*noxam dedere*). (J. 4, 17, 1.)

3. When the master affirmed that the slave was not under his control (*potestas*), the Prætor gave an election to the plaintiff, either to compel the defendant to declare upon oath that the slave was not under his control, and that he had not parted with the control to defeat the plaintiff, or to accept an action not involving the surrender of the slave (*noxae deditio*). (D. 9, 4, 21, 2.) If the defendant will not take the oath, it is the same as if the action were undefended (D. 9, 4, 21, 4); but if he swears, he is relieved until such time as the slave comes under his control. (D. 9, 4, 21, 6.)

4. If the master did not deny control over the slave, whether he produced the slave or not, the action proceeded. If the slave was absent without the fault of the master, the latter must defend the action, and give security to produce him when he returns. (D. 2, 9, 2, 1.)

B. Remedies in Respect of the Investitive Facts, or the procedure to be adopted by a master in claiming his slave.

I. The action by which a person claiming to be the owner, or to have an interest in another as a slave, demanded that he should be given up to him, was called a *liberalis causa*.

1. This action might be brought not only by a person claiming as owner, but by any one who had an interest in the work of the alleged slave as a *fructuarius*. (D. 40, 12, 8, pr.; D. 40, 12, 12, 5.)

2. By the law of the XII Tables, the person claimed as a slave could not defend himself, but must be represented by a friend acting as defendant, who was called the claimant for freedom, *adsertor libertatis*. (C. Th. 4, 8, 1.) The *adsertor* took up the defence at his own risk, and was obliged to find security for the delivery of

[1] *Si servus furtum faxit noxamve nocuit.* (D. 9, 4 2, 1.)

the real defendant to his master, if the suit should be so decided. If he failed, he paid the costs. On the other hand, the person claiming the slave paid a penalty if he failed. (Paul, Sent. 5, 1, 5.) In three cases Theodosius provided that the defendant might appear without an *adsertor* when he had been in possession of freedom for twenty years, or had held a public office, or had lived openly in the same place with the person claiming him as slave. (C. Th. 4, 8, 5.) Finally, Justinian abolished the office of *adsertor*, and allowed a person, whether claimed as a slave or claiming to be free, to be sued or to sue in his own name. He provided, moreover, that a person living in freedom, whom it was sought to reduce into slavery, could act by a procurator ; but a person in slavery must appear and sue on his own behalf. (C. 7, 17, 1.)

3. An action could not be brought more than once by the same claimant against the same defendant (C. 7, 16, 4), but the judgment in favour of the defendant did not prevent a new claimant bringing an action (D. 40, 12, 42) ; for of course, although the first claimant was not his master, another might be.

4. Prescription. If the person enjoying liberty knows that he is a slave (*dolo malo in possessione libertatis est*), there is no limit to the time during which he may be claimed by his owner. But if he has for twenty years been free, without knowing that he was a slave (*bona fide in possessione libertatis*), his liberty cannot be challenged. (C. 7, 22, 2.)

5. Until the suit is decided, the defendant retains his liberty, if he enjoyed liberty when the suit was begun. (C. 7, 16, 14.) This was the principle violated by Appius Claudius, when he ordered the daughter of Virginius to be given, for interim custody, to one of his own minions.

6. Punishment for a malicious questioning of one's liberty. A claimant that has mischievously and without reason attacked the freedom of any one, is liable to an action for damages, *actio injuriarum* or *de calumnia*. (C. 7, 16, 31.) He might also be punished with exile. (D. 40, 12, 39, 1.)

7. The burden of proof. The presumption of the Roman law was not in favour of liberty nor against it, but in favour of the state in which the alleged slave was (*sine dolo malo*) at the time the action was brought. In order, therefore, to determine upon whom the burden of proof lay, it was sometimes necessary to institute a previous inquiry into the condition of the slave before the suit began. If the alleged slave had been free, but at the time of the suit had been seized by violence, and kept by the alleged master as a slave, the slave was regarded as free, and the master must prove that he was owner. If, on the other hand, the slave escaped and hid himself for some years, and, when the master found him, denied his status ; upon proof of those facts the slave would be required to prove that he was free. (D. 40, 12, 7, 5 ; D. 40, 12, 10.)

c. Remedies in Respect of the Divestitive Facts.

I. *Liberalis Causa.* This is the same action as the former, but the position of the parties is reversed ; the master of the slave is now the defendant.

1. Prior to Justinian, this action must be brought by the claimant for freedom, *adsertor libertatis ;* but Justinian gave the action directly to the person claiming freedom. It might also be brought by the father of the alleged slave, even against the wishes of the latter. (D. 40, 12, 1, pr.) Children could bring the suit in behalf of parents, also irrespective of their wishes, on the ground that it was a disgrace to the children for their parents to be in slavery. (D. 40, 12, 1, 1.) Cognates (D. 40, 12, 1, 2) and illegitimate children (D. 40, 12, 3, pr.) enjoyed the same privilege. The defendant was the person who set up any interest in the claimant as a slave.

2. If the person claiming freedom is living with the defendant as his slave, the action must be brought in the place where the master lives. (C. 3, 22, 4.)

3. The suit for freedom might be brought oftener than once (C. 7, 17, 1), but not unless some new ground had arisen in support of the claim. (D. 40, 12, 25, 1.)

4. There is no prescription against freedom (C. 7, 22, 3) ; and, therefore, however

long a person had been in slavery, he was not precluded from asserting his freedom Another rule tended to favour liberty. After a person had been dead five years, it was not permitted to challenge his status, with a view to degrade him, but it was allowed to show that his status was higher. Thus if he died a slave, it could be sworn after five years that he was really freeborn ; but if he died free, it was not allowed after that time to prove him to be a slave. This rule was introduced by Nerva. (D. 40, 15, 4, pr. ; D. 40, 15, 1, 4 ; D. 40, 15, 3.)

II. Special remedies for bequests of liberty on trust—*Fideicommissa.*

The person who was bound by will or codicils to manumit a slave, might refuse to do so, or might evade summons to be a court of law, and thereby delay or defeat the benevolence of the deceased. This inconvenience was removed by the following enactments :—1. The *Senatus Consultum Rubrianum* (*temp.* Trajan) gave the Prætor power to declare a slave free, if the person who ought to manumit him was summoned and refused to appear. (D. 40, 5, 26, 7 ; C. 7, 4, 5.)

2. The *Senatus Consultum Dasumianum* (*temp.* Trajan, or not later than Antoninus Pius) gave the same remedy when the person was summoned, but had a good excuse for non-attendance. (D. 40, 5, 51, 4.)

3. The *Senatus Consultum Vitrasianum* (*temp.* Hadrian or Antoninus rather than Vespasian) extended the remedy to the case where the delay was caused not by the person required to manumit the slave, but by the incapacity of a co-heir. (D. 40, 5, 30, 6.)

4. The *Senatus Consultum Juncianum* enabled the Prætor to decree liberty where the slaves ordered to be manumitted did not belong to the testator. (D. 40, 5, 28, 4.)

Finally, Marcus Aurelius states that no incapacity or default of the person whose duty it is to manumit the slaves shall prejudice their claim to freedom. (D. 40, 5, 30, 16.)

The INTERDICT *de libero homine exhibendo.* This interdict is enforced only when there is no question as to the status of the freeman whom it is sought to liberate from illegal detention. (D. 43, 29, 3, 7.) The word to produce (*exhibere*) signifies to bring the person asked into court, so that he may be seen and touched. (D. 43, 29, 3, 8.) The order was to produce the free person whom you wrongfully detain. (D. 43, 29, 4, pr.) *Quem liberum dolo malo retines, exhibeas.* (D. 43, 29, 1, pr.) This order is peremptory, and must be at once obeyed. (D. 43, 29, 4, 2.) If the defendant is condemned, but rather than produce the person whom he wrongfully detains, pays the sum named as damages, the plaintiff or anyone else can at once bring a new interdict, carrying a repetition of the damages, and this may be repeated until the person is actually produced. (D. 43, 29, 3, 13.)

APPENDIX.

In this work no place is assigned to the rights of citizenship as a distinct topic in Roman law. The proper place for that subject would be a chapter preliminary to the general body of the work. But such a chapter has not been inserted, partly from reasons of convenience, and partly because, in the time of Justinian, questions regarding citizenship had practically ceased to exist (see p. 30). In the time of Gaius, however, the rules for determining questions of that kind were still of importance, and the following passages may be considered as illustrations of

the general rule stated above (p. 23), governing the determination of *status*.

Therefore if a woman that is a Roman citizen is, while pregnant, interdicted from fire and water, and so becomes an alien before childbirth, many draw a distinction, and think that if it was in lawful marriage that she conceived, then her offspring is a Roman citizen; but if not, then an alien. (G. 1, 90.)

Interdiction from fire and water was the old republican form of banishment. The object was to compel the citizen to withdraw himself, and to avoid the danger of drawing down on the city the anger of some deity, in consequence of driving a worshipper from his altars.

Again, if a woman that is a Roman citizen and pregnant is made a slave under the *Senatus Consultum Claudianum*, for having intercourse with a slave belonging to another despite the master's warnings, then in this case many draw a distinction, and hold that her offspring, if conceived in lawful marriage, is a Roman citizen; but if not, a slave, and the property of the master that now holds the mother as a slave. And again, if an alien conceives not in lawful marriage, and thereafter becomes a Roman citizen before childbirth, then her child is a Roman citizen. But if the father is an alien to whom she is united according to alien statutes and usage, it seems from the *Senatus Consultum* passed at the instance of the late Emperor Hadrian that the offspring is an alien, unless the father too has gained the Roman citizenship. (G. 1, 91, 92.)

The rule just stated, that if a female Roman citizen marries an alien the offspring is alien, is one that holds good even when there is no *conubium* between the parties. This was already accomplished by the *lex Minicia* [of uncertain date], which provides also that if a male Roman citizen marries an alien woman with whom he has no *conubium*, the offspring of their intercourse is an alien. In the former case the statute was needed, for otherwise, since there was no *conubium* between the parents, the child would, by the rule of the *Jus Gentium*, follow the mother's condition, not the father's. But the part that ordains that a child whose father is a Roman citizen and its mother an alien, is itself an alien, brings in nothing new; for even without that statute this would be so by the rule of the *Jus Gentium*. (G. 1, 78, as restored.)

Nay, even the offspring of a Latin woman and a Roman citizen follows its mother's condition; for to this case the *lex Minicia* does not refer. True, indeed, it embraces not only aliens, but also so-called Latins. But the Latins it refers to are Latins in another sense—Latins forming distinct peoples and communities, who were in fact aliens. (G. 1, 79.)

And on the same principle conversely the offspring of a Latin father and a female Roman citizen is a Roman citizen. Some, however, thought that if the marriage were contracted under the *lex Ælia Sentia* the offspring would be a Latin. Because seemingly in that case the *lex Ælia Sentia* and the *lex Junia* [*Norbana*] gave *conubium* between the parties; and the effect of *conubium* always is that the offspring follows the father's condition. If however, the marriage were otherwise contracted, then they thought the offspring would by the *Jus Gentium* follow the condition of the mother. In

our day this matters nothing. For the rule in use is declared by the *Senatus Consultum* passed at the instance of the late Emperor Hadrian, that in any case the son of a Latin father and a female Roman citizen is a Roman citizen. (G. 1. 80.)

And in agreement with this, a *Senatus Consultum* of the same reign declares that the offspring of a Latin father and an alien mother, as also, on the other hand, of an alien father and a Latin mother, is to follow the condition of the mother. (G. 1, 81.)

Statutory Exceptions.

We ought to observe, however, whether there are any cases in which the rule of the *Jus Gentium* is changed either by a statute, or by a decree having the force of a statute. (G. 1, 83.) For instance :—Under the *Senatus Consultum Claudianum* a female Roman citizen that has intercourse with the slave of another with the master's consent, can herself by covenant remain free while her issue is a slave. For the agreement between her and the master of the slave is by that *Senatus Consultum* made valid. But afterwards the late Emperor Hadrian was moved, by the injustice of the case and the anomalous nature of the law, to bring back the rule of the *Jus Gentium;* and thus, since the woman remains free, her offspring too is free. (G. 1, 84.)

And again, by the *lex Latina*, the offspring of a female slave and a freeman might be free. For that statute provides that if a man has intercourse with another's slave in the belief that she is free, then the offspring, if males, are free ; but if females, belong to the woman's master. But in this case too the late Emperor Vespasian was moved by the anomalous nature of the law to bring back the rule of the *Jus Gentium.* And thus in all cases the offspring, even if males, are slaves of the mother's owner. But that part of the same statute remains untouched which provides that the offspring of a free woman by another's slave, whom she knew to be a slave, are slaves. Therefore among those that have no such statute, the offspring, by the *Jus Gentium*, follow the mother's condition, and are therefore free. (G. 1, 85, 86.)

II.—PATRIA POTESTAS.

Definition.

The *Patria Potestas* is the name for the rights enjoyed by the head of a Roman family over his legitimate children. (D. 50, 16, 215.)

The *potestas* could be enjoyed only by Roman citizens, and thus the loss of citizenship involved the loss of the *potestas.* Slaves who, on being manumitted, became Roman citizens, and were married, acquired the *potestas* over their children born after the manumission.

We have *potestas* over our children by a regular marriage begotten. The *jus potestatis* that we have over our children is peculiar to Roman citizens. For no other people have such power over their children as we have. This was pointed out by the late Emperor Hadrian in an edict he put forth regarding those that asked from him Roman citizenship for themselves and their children. Nor am I unmindful that the people called Galatae believe that children are in the *potestas* of their parents. (J. 1, 9, pr. 2; G. 1, 55.)

The statement of Gaius that such a power as the *patria potestas* was unknown except among the Romans and Galatians, correctly represents the belief of the Roman jurists, but does not correctly represent the fact. A similar power is found among many other nations of antiquity. Maine's *Ancient Law*, 135. "The heir, as long as he is a child, differeth nothing from a servant though he be lord of all." Galatians iv. 1.

The powers enjoyed by a father over his children were identical with those that a master possessed over his slave. But this statement is subject to a very important qualification. Within the domain of private law, a son was scarcely to be distinguished from a slave; but in the sphere of public rights and duties the son was free and independent. The State had the first claim on its citizens, and where its demands intervened the paternal despotism was excluded. (D. 1, 6, 9.) Thus a son could be elected magistrate, although he could not marry without his father's consent; and he could act as *tutor* even against his father's wishes, because the office of *tutor* was a public duty. (D. 36, 1, 13, 5; D. 36, 1, 14, pr.) In the same way a son could act as *judex* or judicial referee even to his own father. (D. 5, 1, 77; D. 5, 1, 78.) Again a son elected Consul could himself superintend the ceremony of his own emancipation from the *potestas*. (D. 1, 7, 3.)

Within the sphere of private law, however, the position of a son is strictly to be compared with that of a slave. To what extent the comparison is in favour of the son, will appear by a consideration of the essential characteristics of the *potestas*.

1. During the Republic, a son was as incapable of possessing property as a slave. All his labour, all that he acquired, became the property of his father. The steps by which this rigorous incapacity was modified, will be enumerated in their place under the law of Property. (See *Peculium*.) It may, however, be here mentioned that the Roman father seems to the last to have enjoyed the right of selling the labour of those under his *potestas*. (Paul, Sent. 5, 1, 1.)

2. The supreme power of life and death is specially mentioned in the laws of the XII Tables as belonging to the *paterfamilias*. We may regard this power as an aspect of the general right of property,—the right, as it is expressed, of doing what one likes with one's own; and such was, to some extent at least, the aspect in which it presented itself in the earlier periods of legal history. But another view mingled with this debased conception of paternal authority—the view, namely, that the despotic authority of the *paterfamilias* bore the character of patriarchal jurisdiction rather than ownership. Seneca calls the *paterfamilias* a domestic judge (*judex domesticus*), (Controvers. 2, 3), and domestic magistrate (*magistratus domesticus*) (De Benef. 3, 2). Be that as it may, the right to kill his offspring undoubtedly belonged to the Roman father during the Republic.

The power of life and death included all minor inflictions of pain. The *paterfamilias* could imprison a refractory son for days or months or years, according to his sole arbitrary pleasure, even although the son had enjoyed the highest honours of the State. The *paterfamilias* could flog his children with any degree of severity, and could bind them in chains and send them to work like convicts in the fields. (Dion. Hal., *Antiq. Rom.* 2, 27.)

To these harsh rights there was, according to Dionysius Halicarnassus (*Antiq. Rom.* 2, 51), a humane and interesting exception. Romulus, he says, made a law to the effect that his subjects should not expose any male children, or their firstborn female child, unless such children were, in the opinion of five neighbours, so deformed that they ought to be killed. An offender against this law was subject, in addition to other penalties, to the forfeiture of half his property to the State. Heineccius refers to this passage without comprehending its significance. It has been pointed out to me by Mr John M'Lennan (the author of that ingenious and admirable work on the earlier stages of social development, *Primitive Marriage*) as "a fine example of good old savage law." Infanticide is an almost universal practice among savages, and receives its first customary check by the rule that forbids the destruction of the males and eldest female. The reason why only the eldest female enjoyed the benefit of the exception, is to be sought in the small value of women to a savage community. As a rule, savages prefer to steal their wives instead of rearing them.

This law, then, ascribed to Romulus, is an indication, and not the only one, that the customary law of the Romans, as embodied and fixed in the laws of the XII Tables, was not really the beginning of Roman law. It gives us a glimpse of an earlier and forgotten stage of development leading back to a far-off state of savagery. According to Cicero (*De Leg.* 38) this law of Romulus was transferred to the XII Tables; but in spite of that, it remained as a tradition among a people that had forgotten its origin and meaning, and we are assured by various writers that the practice of infanticide was common even down to the Empire.

The exercise of the extreme power of killing is not unknown to the readers of Roman history, and it was not until the time of Constantine that an exercise of the ancient right of slaying was declared to be murder. Before his time, however, the cruelty of *patresfamilias* had been rebuked and restrained.

In the time of Trajan, a father having been guilty of gross cruelty to his son was compelled by that Emperor to emancipate him, and was deprived of all share in his inheritance. (D. 37, 12, 5.) A similar case occurred under Hadrian. A father, while hunting, killed his son, and was punished by deportation to an island. He was stigmatised as exercising the right of a robber rather than the right of a father, and yet he had received what must be considered severe provocation, the son having committed adultery with his stepmother. (D. 48, 9, 5.) In the year A.D. 228, the Emperor Alexander treats the right of life and death as obsolete, and states that if the father wished to impose more severe punishment on a child than simple flogging, he must apply to the highest judicial authority, the President of the Province, for his sanction. (D. 48, 8, 2.) Finally, in A.D. 318, Constantine enacted that if a *paterfamilias* slew his son, he should suffer the death of a parricide; *i.e.*, be tied up in a sack with a cock, a viper, and an ape, and be thrown into the sea or a river to be drowned. (C. 9, 17, 1.) In A.D. 374 an enactment of Valentinian, Valens, and Gratian made the exposure of infant children a crime, thus imposing upon parents an obligation to rear their offspring. (C. 8, 52, 2.)

3. The right of selling their children belonged to the father who had the *potestas*. "Over his lawful children let him have the power of life and death and of sale. If the father thrice

sells the son, let the son be free from the father."[1] The child who was sold did not, however, become a slave. (C. 8. 47, 10; Paul, Sent. 5, 1, 1.) He was held *in mancipio.* (See *Mancipium.*) From this state, a son voluntarily sold by his father, was released by enrolment on the *census*, even without the consent of the person who had him *in mancipio.* (G. 1, 140.) A son thus relieved from *mancipium* fell back into the *potestas* of his father, and but for the restriction of the XII Tables to three sales, the process might have been repeated indefinitely.

Tradition ascribed to Numa Pompilius a restriction on the power of sale, to the effect that if a *paterfamilias* sanctioned the marriage of his son, he could not afterwards sell him. (Dion. Halicar. *Antiq. Rom.* 2, 28.) By the XII Tables a repetition of the sale of a son for the third time operated as a forfeiture of the *potestas.* By what steps we know not, but almost at the earliest period of legal writing, the power of sale was obsolete, and made use of only in fictitious legal proceedings. Diocletian and Maximian state as clear law, that a sale, gift, or pledge of a son by his *paterfamilias* was wholly void; and even although the purchaser honestly believed that the child was a slave, still he took nothing by the purchase. (C. 4, 43, 1.) Paul (Sent. 5, 1, 1) tells us that if a creditor knowingly accepted a free person as a security for a debt, he was liable to deportation. Afterwards Constantine permitted parents suffering from extreme poverty to dispose of their newborn children (*sanguinolenti*), and the purchaser was entitled to the benefit of their services; but he reserved the right to the father, or any other person to redeem the child by payment of money, or giving a slave in exchange. (C. 4, 43, 2.)

These details illustrate the gradual progress of a rational conception of the position of parent and child. At first, the father is despot or owner; he has all the essential rights of ownership, the right to use the son's services, the right to part with them, the right to destroy; but gradually those rights are limited; the father ceases to be the proprietor, he becomes the natural protector and guardian of his children. Such was the tendency of Roman law, although, as appears from the latest law, it never went so far in the direction of giving indepen-

[1] The words of the XII Tables are, "*Endo liberis justis jus vitæ necis venumdandique potestas ei esto. Si pater filium ter venumdit filius a patre liber esto.*

dence to the child, as is now considered necessary in all civilised nations.

4. It followed that no action for damages could lie at the suit either of son or father against the other.

But if a son does a wrong (*noxa*) to his father, or a slave to his master, no action arises. For between me and a person in my *potestas* no obligation arises. And therefore if he passes into another's *potestas*, or becomes his own master, neither against him nor against the man in whose *potestas* he now is can there be any action. And hence this question is raised :—If another's slave or son wrongs me, and thereafter comes under my *potestas*, does the action fall through, or is it only in abeyance? The teachers of our school think that it falls through, because under the new circumstances the action cannot be sustained ; and consequently, although he passes out of my *potestas* I can bring no action. The authorities of the opposing school think that as long as he is in my *potestas* the action is in abeyance, since I can bring no action against myself, but that when he passes out of my *potestas*, then the action revives. (G. 4, 78.)

It was the existence of the *potestas* that determined the legal constitution of a Roman family, so artificial as it seems to us, as indeed it did to the jurisconsults of the Empire. The Roman family cannot be defined as consisting of parents with their children; it was composed of those persons who were subject to the *potestas* of the same individual, whether they were his children, grandchildren, great-grandchildren, or entirely unconnected with him in blood. Hence a child who had been emancipated from the *potestas* was at first, from a legal point of view, no member of the family, while a stranger introduced by adoption was regarded to all intents and purposes as the offspring of the head of the family. So far was this view carried that the conception of blood relationship was submerged in that of persons living under the same *potestas*. A sister who was married into another family, and placed under a different *potestas*, was looked on as no longer related to her brothers for any legal purpose. The history of Roman law discloses a series of changes by which the Roman family was brought nearer and nearer to the modern point of view.

Next comes another division of the law of persons. For some persons are *sui juris*, others *alieni juris*. And again, of those *alieni juris*, some are in the *potestas* of parents, others in the *potestas* of masters. Let us look then to those that are *alieni juris;* for if we know who they are, we shall at the same time understand what persons are *sui juris*. And first, let us treat of those that are in the *potestas* of masters. (J. 1, 8, pr.)

Sui juris. A person not subject to any of the three forms of authority already described, or to be described, *potestas, manus, mancipium,* was said to be *sui juris.*

The phrase *sui juris* does not signify that a person had arrived at any age of legal majority. A child just born, if not under the *potestas* of the father, was *sui juris*.

Alieni juris. A person under any one's *potestas*, *manus*, or *mancipium*, was said to be *alieni juris*.

Paterfamilias. This word is sometimes employed in a wide sense as equivalent to *sui juris*. A person *sui juris* is called *paterfamilias*, even when under the age of puberty. (D. 1, 6, 4.) In the narrower and more common use, a *paterfamilias* is anyone invested with *potestas* over any person. It is thus as applicable to a grandfather as to a father. (D. 50, 16, 201.) In this sense the word *paterfamilias* is used throughout this chapter.

Filiusfamilias (son), *filiafamilias* (daughter). These are the co-relative terms to *paterfamilias*, and signify any person, male or female, who is under the *patria potestas* of another. A grandson may therefore be properly designated *filiusfamilias*, and his grandfather, under whose power he is, his *paterfamilias*. (D. 50, 16, 201.)

Materfamilias. At first, probably, *materfamilias* signified a wife under the *manus* of her husband, and was thus the equivalent of *filiafamilias* rather than of *paterfamilias*. A married woman not under the *manus* of her husband was distinguished as *matrona*. (Aul. Gell. 18, 6.) At a later period, *materfamilias* was sometimes employed as equivalent to *paterfamilias* in one of its meanings, and designated any female *sui juris*. (D. 1, 6, 4.) *Materfamilias* was also applied to any respectable woman, whether married or single, freeborn or a freedwoman. Character, says Ulpian, not birth or marriage, marks the *materfamilias*. (D. 50, 16, 46, 1; D. 43, 30, 3, 6; D. 48, 5, 10, pr.)

Rights and Duties.

A. Rights of *paterfamilias*.

I. To exclusive possession of those under his *potestas*.

Sometimes, too, freemen are the objects of theft (*furtum*), as when a child in our *potestas* [a wife in our *manus*, or even a debtor assigned (*adjudicatus*) to me by a court, or a hired gladiator (*auctoratus*)] is carried off by stealth. (J. 4, 1, 9; G. 3, 199.)

II. To exclusive use.

It has been already pointed out (p. 2) that a father could bring an action for damages for injuries suffered by his son through the negligence of a defendant.

III. An *injuria* to a child in the power of his father is an injury to the father.

A man may suffer an *injuria*, not only in his own person, but also in those of his children *in potestate*, and of his wife [although not held *in manu*]; for this opinion has on the whole prevailed. And therefore, if you wrong my daughter, Titius' wife, an *actio injuriarum* lies against you, not only in my daughter's name, but also in the name of me the father, and of Titius the husband. But, on the other hand, if an *injuria* is done to a husband, the wife cannot bring an *actio injuriarum*. For wives ought to be defended by husbands, not husbands by wives. An *actio injuriarum* may also be brought by a father-in-law on behalf of his daughter-in-law, if her husband is in his *potestas*. (J. 4, 4, 2; G. 3, 221.)

The rights of children begin where the rights of slaves end. The utmost limit of legal security accorded to the slave was to give the master, not the slave, an action for serious

harm done to the slave. But a child in his father's power could suffer an *injuria* altogether apart from any disrespect intended for his father, although the latter alone could bring an action for the appropriate penalty. Whether, at some earlier period, the son was in the same position as the slave, is a matter of conjecture; but when the written records of law appear, the son is treated altogether as a freeman, although with an incapacity to enforce his rights. His father alone had the power of compelling the wrongdoer to pay compensation. But every injury to the son was regarded also as an injury to his father, and therefore two actions might be brought—one for the injury to the father, the other for the injury to the son. The damages in each action were fixed in accordance with the dignity of the persons: if the son had the higher dignity, the heaviest damages would be obtained on his account. (D. 47, 10, 30, 1; D. 47, 10, 31.)

The rights of wives are complete, and they can also bring the necessary actions to vindicate their rights, unless they are in the *manus* of their husbands; for the *manus* over wives was the equivalent of the *potestas* over children. If a woman had not passed under the *manus* of her husband, which in later times she seldom did, she continued under the *potestas* of her father; and hence, for a wrong done to her, both her husband and her father had each an action. (D. 47, 10, 18, 2.) The husband had an interest in the modesty of the wife, the father in the good name of the daughter. (C. 9, 35, 2.)

It might, indeed, happen—so distinct were the grounds of injury—that no wrong might be done to the son, and yet through him a wrong be done to his father. The son might give his consent, and therefore no wrong would be done to him; but still the son's consent did not wipe out the wrong to the father. Thus—if A sold B's son with his consent, no wrong was done to the son; but nevertheless B had his action against A for the wrong done to him as father. (D. 47, 10, 1, 5; D. 47, 10, 26.)

Under certain circumstances, however, a son, while still in his father's power, could himself bring an action for injury done to him. This was allowed under three conditions:—the father must be absent, or insane; he must have gone away without leaving any agent (*procurator*) authorised to bring the action; and the Prætor must have given his permission, after ascertaining whether the son was likely to conduct the case properly. (D. 47, 10, 17, 17; D. 47, 10, 17, 11.) The Prætor says, "If to

him that is in another's *potestas* an injury is alleged to have been done, and he that has the *potestas* is not within the jurisdiction, and no agent appears to act in his name, then, after ascertaining the facts of the case, to him that is alleged to have received the injury I will give a remedy."[1]

The son could not bring the action if the father were within the jurisdiction, and refused; for the reason why the son was allowed to bring the action at all, was the assumption that the father, if present, would sue. Occasionally, when the father was at home, but of low character, and the son was respectable, the latter was permitted to sue in his own name. (D. 47, 10, 17, 13.)

The son also could sue if his father's *procurator* neglected his duty. (D. 47, 10, 17, 15.)

Paul, however, quoting the opinion of Julian, lays it down without qualification that a son can in his own name bring the *actio injuriarum*, the Interdict *Quod vi aut clam*, and the *actiones depositi* and *commodati*. (D. 44, 7, 9.) But *quaere*, was the consent of the father necessary? Again, Tryphoninus says that a son could attack his mother's will as *inofficiosum* if the father accepted a legacy under the mother's will, and, therefore, could not impeach the will. (D. 5, 2, 22, pr.) The disposition was to permit a son, even against his father's wishes, to sue for wrongs touching his honour.

When the son sued, he proceeded in his own name, not in the name of his father; and after he had brought his action, his father could not afterwards sue on his own account. (D. 47, 10, 17, 21.) Also, after the father's death, if the son were relieved from the *potestas*, he could sue for any *injuria* done to him. (D. 47, 10, 17, 22.)

B. Duties of the *Paterfamilias*.

I. At first a *paterfamilias* was responsible for his sons exactly in the same way as a master for his slaves, and could get rid of all liability by surrendering the wrongdoer.

A curious question of form is discussed by Gaius.

When a son is given up to be held *in mancipio* because of some wrong he has done (*noxali causa*), the authorities of the opposing school think that he ought to be thrice conveyed by mancipation; and this because of the statutory provision in the XII Tables, that no son shall pass out of his

---

[1] *Ait Prætor. Si ei qui in alterius potestate erit, injuria facta esse dicetur et neque is cujus in potestate est, praesens erit, neque procurator quisquam existat qui eo nomine agat: causa cognita ipsi qui injuriam accepisse dicetur judicium dabo.* (D. 47, 10, 17, 10.)

father's power unless by three mancipations. But Sabinus and Cassius, and the rest of the authorities of our school, think that one mancipation is enough; for they believe that the provision in the XII Tables refers only to voluntary mancipation. (G. 4, 79.)

A son surrendered *in mancipio* was not a slave. He was bound to work for his new master, but was not apparently in other respects in the status of slavery. (*Servire actori debet non fit tamen servilis conditionis.* Quintil., Inst. Orat. 7.) Also by payment of the sum due as damages, the son could at any time be released. (Collat. Leg. Mos. et Rom., 2, 3.)

II. Disuse of noxal surrender.

In old times, indeed, such surrenders were made even in the case of children, both sons and daughters. But later ways of thought have rightly judged that such harshness is abominable; and it has therefore fallen into entire disuse. For who could bear to surrender to another, for some misdeed (*noxa*) his son, and above all his daughter? Would not the father, through his son's person, risk more than the son himself? While in the case of daughters a due regard to modesty forbids the practice. And therefore it is decided that slaves alone are liable to *noxales actiones;* while we find it often said in the older commentators that *filii familias* can be sued in person for their delicts. (J. 4, 8, 7.)

Investitive Facts.

A. Acquisition of the *potestas* over a man's own issue.

I. We have *potestas* over our children by a regular marriage begotten. (J. 1, 9, pr.; G. 1, 55.)

The offspring of you and your wife is in your *potestas.* And so, too, the offspring of your son and his wife. Your grandson (that is) and granddaughter, are equally in your *potestas*, and your great-grandson and great-granddaughter, and so on. Your daughter's offspring, however, is not in your *potestas*, but in its father's. (J. 1, 9, 3.)

In order to contract regular marriages, and to have the children therein begotten under their *potestas*, Roman citizens must marry wives that are Roman citizens, or, at all events, Latins or aliens with whom they have *conubium.* For the effect of *conubium* is to make the children follow the father's condition, and thus the sons become Roman citizens, and are in the father's *potestas.* (G. 1, 56.)

All that we have said of the son must be understood of the daughter also. (G. 1, 72.)

It is at this point—as an investitive fact in regard to the *potestas*—that Gaius and Justinian treat of the conditions necessary to a legal marriage. The subject will be examined fully in treating of the relation of husband and wife. (Book II. Divis. II.)

It sometimes happens that children not in their parents' *potestas* at birth, are yet afterwards brought under *potestas*. (G. 1, 65.)

II. A Latin freedman that has a child a year old may, by petition, obtain a grant of the *potestas* over his child (*anniculi probatio*).

Therefore if a Latin, in accordance with the *lex Ælia Sentia*, marries a wife and begets a son, whether that son is a Latin by a Latin wife, or a Roman citizen by a wife that is a Roman citizen, the father will have no *potestas* over him. But afterwards, by showing good grounds, he gains Roman citizenship, and his son as well. And from that instant the father's *potestas* over the son begins. (G. 1, 66.)

It is different with those that by the *jus Latii* obtain the Roman citizenship not only for themselves but for their children. For their children pass under their *potestas*. And this right is enjoyed by some alien states, if only they have the *Majus Latium*. For *Latium* is either *majus* or *minus*. It is called *majus* when by holding a magistracy or post of honour in their own state men win the Roman citizenship, not only for themselves, but for their parents and children and wives. It is called *minus* when those only that actually hold the magistracy or post of honour attain to the Roman citizenship. And this distinction is set forth in many letters of the Emperors. (G. 1, 95, as restored.)

The defects of the MS. leave the distinction between *majus* and *minus Latium* somewhat uncertain.

Jus Latii. In tracing the development of Roman Law, we are at every point confronted with the fact, that it was a system confined exclusively to Roman citizens. Citizens alone had civil rights or duties; citizens alone could sue or be sued. But by treaty with their neighbours, the Romans admitted aliens born to a share, greater or less, of their civic rights. A distinction commonly made was between the privilege of intermarriage (*conubium*), which was the basis of the domestic or family law, and the privilege of acquiring property and making contracts (*commercium*), which was the basis of commercial intercourse. It was upon this distinction that the privileges accorded to the inhabitants of *Latium* were determined. To them was granted *commercium*, but not *conubium*; with special facilities, however, for enabling them to acquire the full status of Roman citizens. By the *lex Julia et Plautia de civitate* (B.C. 89) the rights of citizens were extended to the whole of Latium, and henceforth the expression *jus Latii* ceased to have any territorial signification, and was conferred upon remote districts, as on Sicily by Julius Cæsar, and on the whole of Spain by Vespasian.

The exact position of a *Latinus* may be determined by the information given us regarding *Latini Juniani*, who were manumitted slaves not allowed any greater rights than the old *Latini*. (See Book III. Div. II., *Latini Juniani*.)

As far as regards making good a case of mistake, the age of the son or daughter matters nothing; for on that point the *Senatus Consultum* makes no provision, unless indeed the case put forward is that of a Latin man or woman married under the *lex Ælia Sentia*. For no doubt then, if the son or daughter is less than a year old, the case cannot be made good. Nor am I unmindful that in a rescript of the late Emperor Hadrian it seems to be settled that to make good any case of mistake the son must be a year old. But we ought not always to regard a letter by the Emperor to a particular person as bringing in a general rule of law. (G. 1, 73, as restored.)

III. When a marriage is illegal in consequence of a mistake as to the status of one of the parties, upon proof of the error the *potestas* in certain cases could be obtained.

In those cases in which the mother's not the father's condition is followed by the offspring, it is abundantly plain that the father, even if a Roman citizen, can have no *potestas* over it. And therefore we specially mentioned above that in certain cases where, through some mistake, the marriage was not duly contracted, the Senate steps in to remedy the defect in the marriage; and in that way often the son is brought under the father's *potestas*. But if a female slave conceives by a Roman citizen, and thereafter by manumission becomes herself a Roman citizen before child-birth, although the offspring is a Roman citizen like his father, yet he is not in his father's *potestas*. For the intercourse in which he was conceived was not regular (*justus*); nor is there any *Senatus Consultum* to make it quasi-regular. (G. 1, 87, 88.)

1. The husband is a citizen; the wife is, at the time of marriage, supposed also to be a citizen, but is really a Latin (*Latina*), or alien (*peregrina*), or one of the *dedititii*. (For *dedititii*, see Book II. Div. II.)

And again, if a Roman citizen marries a Latin or an alien wife through ignorance, believing her to be a Roman citizen, and begets a son, that son is not in his *potestas*. For indeed he is not even a Roman citizen, but either a Latin or an alien—that is, of his mother's condition. For no one follows his father's condition, unless between his father and his mother there is *conubium*. But a *Senatus Consultum* allows him to make a good case of mistake; and then both the wife and the son come to be Roman citizens, and thenceforward the son is in his father's *potestas*. And the rule of law is the same if through ignorance he marries a wife that is one of the *dedititii*; except that the wife does not become a Roman citizen. (G. 1, 67.)

2. Converse case. The wife is a citizen, but the husband is a Latin, an alien, or one of the *dedititii*.

And again, if a female Roman citizen by mistake marries an alien, taking him for a Roman citizen, she is allowed to make good a case of mistake; and so her son too and her husband come to be Roman citizens, and the son of course instantly passes under the father's *potestas*. The rule of law is the same if it is an alien she marries, taking him for a Latin coming under the *lex Ælia Sentia*; for this case is specially provided for by a *Senatus Consultum*. And so up to a certain point if she marries a *dedititius*, taking him for a Roman citizen or a Latin coming under the *lex Ælia Sentia*, except indeed that the *dedititius* remains in his own condition, and therefore the son, although he becomes a Roman citizen, is not brought under his father's *potestas*. (G. 1, 68.)

3. Again, if a Latin woman marries an alien believing him to be a Latin coming under the *lex Ælia Sentia*, under a *Senatus Consultum* she can after the birth of a son make good a case of mistake. And so all become Roman citizens, and the son passes at once under his father's *potestas*. (G. 1, 69.)

4. The same precisely is the rule of law if a Latin in mistake marries an alien woman believing her to be a Latin or a Roman citizen coming under the *lex Ælia Sentia.* (G. 1, 70.)

5. And further, if a Roman citizen, in the belief that he is a Latin, marries a Latin woman, he is allowed, after the birth of a son, to make good a case of mistake, just as if he had married a wife under the *lex Ælia Sentia.* Those too that, although Roman citizens, believing themselves to be aliens marry aliens, after the birth of a son are allowed by a *Senatus Consultum* to make good a case of mistake. And when this is done the alien wife becomes a Roman citizen, and the son, who also is an alien, not only comes to be a Roman citizen, but also is brought under his father's *potestas.* (G. 1, 71.)

6. Nay, an alien, too, that has married by mistake, is allowed to make good his case, as is pointed out by a rescript. For a case actually occurred in which an alien married a female Roman citizen, she believing him to be a Latin coming under the *lex Ælia Sentia*, and after the birth of a son obtained on other conditions the Roman citizenship. Then when the question was raised, whether he could make good a case of mistake, the Emperor Antoninus decided by a rescript that he could, just as if he had remained an alien. And hence we gather that even an alien can make good a case of mistake. (G. 1, 74, restored.)

From what we have said it is clear—(1) That if an alien marries a female Roman citizen, whether in mistake or whether she knows his condition, the offspring of that marriage is by birth an alien. (2) That if, however, it was by mistake that the marriage with him was contracted, this case can be made good under the *Senatus Consultum*, according to what we have said above. (3) That if, on the other hand, there was no mistake from first to last, but the female Roman citizen knew the condition of her husband, in no case is the status of the husband or son changed. (G. 1, 75, restored.)

It is necessary to add that a grant of citizenship did not necessarily carry with it the *potestas* over children born before the grant. It has been observed that when a Latin freedman had a son not less than a year old, he acquired at the same time the rights of a citizen and of a *paterfamilias.* With regard to aliens, Gaius says :—

If an alien receive a grant of Roman citizenship for himself and his children, he has no *potestas* over the children unless they are expressly subjected to his *potestas* by the Emperor. And this is done only when the Emperor, after inquiring into the case, judges this best for the sons. And if they are under puberty or abroad, the inquiry is very searching and minute. All this is pointed out in an edict of the late Emperor Hadrian. Again, if a man whose wife is pregnant receives a grant of Roman citizenship both for himself and for her, although the offspring is, as we have said above, a Roman citizen, yet it is not in the *potestas* of the father. This is pointed out in a document under the hand of the late Emperor Hadrian. And therefore, if a man knows that his wife is pregnant at the time he is asking the citizenship for himself and his wife from the Emperor, he ought to ask the Emperor at the same time to allow him the *potestas* over the child that is to be born. (G. 1, 93, 94.)

IV. LEGITIMATION (*Legitimatio*). It sometimes happens that children at the moment of their birth are not in the *potestas* of their parents, but are afterwards brought under the *potestas*. For instance, a natural son afterwards presented to the Curia is subjected to the father's *potestas*. A son, moreover, begotten by a free woman, whom the father might have married, so far as the laws were concerned, but with whom he only cohabited, is afterwards brought under the father's *potestas*, if under a constitution of ours instruments of dowry are drawn up; and even to others, if they are begotten by the same marriage, our constitution makes a like concession. (J. 1, 10, 13.)

If the children were old enough to be able to object to the legitimation, their opposition was fatal. They could be brought under the *potestas* without their consent, but not against their will. Modestinus "*inviti filii naturales, vel emancipati, non rediguntur in patriam potestatem.*" (D. 1, 6, 11.) Celsus "*vel consentiendo vel non contradicendo.*" (D. 1, 7, 5.)

1. Legitimation by subsequent marriage (*legitimatio per subsequens matrimonium*).

Legitimation was the process by which children born to Roman citizens, not in a regular marriage, and therefore not under the *potestas* of their father, were brought under his *potestas*. Legitimation was confined to a single class of children (*naturales liberi*), the offspring of concubinage. (For *Concubinatus*, see Book II. Div. II., Husband and Wife, Appendix.) Concubinage was a species of left-handed marriage, the difference between which and marriage was, in law, inconsiderable. When persons exchanged the lower for the more respectable union, the act was allowed a retroactive effect, and the children born before the marriage were subjected to the *potestas*.

Legitimation by subsequent marriage was first introduced by Constantine (A.D. 335), who enacted that if free-born concubines were married by the men with whom they cohabited, their children born before the marriage should be under the husband's *potestas* (*sui ac legitimi*). Zeno abrogated the law of Constantine (A.D. 476), reserving the rights of those free-born concubines who in A.D. 476 had children. (C. 5, 27, 5.) Legitimation, after having existed for 141 years, was thus abolished, and the law continued in this state for 53 years, until Justinian (A.D. 529) revived and amplified the enactment of Constantine. Justinian pointed out that it was rather hard that the children born of a concubine after marriage should be legitimate to the exclusion of those born before, since it was the affection entertained for the offspring of the concubinage that induced the parents to marry. Putting together the laws made at different times by Justinian, the following may be stated as the conditions of legitimation by marriage:—The marriage must be

attested either by writing or by the settlement of a dowry (*dos*); it must have been preceded by concubinage as opposed to promiscuity, and during the concubinage there must have been no legal impediment to the marriage of the parties. (C. 5, 27, 10.) This last condition was necessary to prevent an evasion of the law, for otherwise persons that were prohibited from marrying could have lived in concubinage, and, when the impediment was removed, legitimated their children by marriage. The woman might be a manumitted slave (*libertina*), (Nov. 89, 8), or even a slave, if the property of the man, the marriage operating as a manumission. (Nov. 78, 3.) It was immaterial whether the father had or had not previously to the concubinage any legitimate children. (Nov. 89, 8; Nov. 12, 4.)

2. Legitimation by making a natural child a Decurio.—*Legitimatio per oblationem curiæ.* This is the first mode referred to in the text of Justinian.

The Curia was to the provincial municipalities much what the Senate was to Rome. (C. 10, 31, 36.) The dignity of the Curia was hereditary (C. 10, 31, 44), and the only way of increasing its members was by co-optation. At one time the burdens of a member of the Curia so outweighed the privileges that election to it was considered a punishment. (C. Th. 12, 1, 66; C. 10, 31, 38.) The Decurions were compelled to live in their cities (D. 50, 2, 1): they could not be soldiers or clergymen (C. 1, 3, 12); and they were forbidden to sell their lands without the concurrence of a judge as to the necessity of the sale. (C. 10, 33, 1.) As a bribe to induce men to add members to the Curia, legitimacy was given to their natural children.

The first step was taken in A.D. 442. Theodosius and Valentinian enacted that those who offered their natural children to the Curia, or who gave a daughter in marriage to a *decurio*, should be permitted to give them during life or on their death the whole of their property. (C. 5, 27, 3.) This narrow privilege was extended by Leo and Anthemius A.D. 470, who gave to those children the right of succession to their father if he died without making a will. Justinian (Nov. 89, 2, 1) empowered any one during his life or by his testament to make his natural son a *decurio*, and legitimate. But this legitimation was not thoroughgoing; it made the legitimated child for all purposes a legitimate child of its father, but gave it no claims

on any of his relatives. Its operation was therefore more restricted than the first kind of legitimation. (Nov. 89, 4.)

3. Legitimation by Rescript of the Emperor (*per rescriptum principis*) was introduced by Justinian (Nov. 89, 9) after the analogy of the *Restitutio Natalium* (see Book II. Div. I., Freedmen.) That Novel authorised the Emperor to grant on the petition of a father a rescript of legitimation, conferring on him the *potestas* over any of his natural children when he had no legitimate children, and when their mother was dead or undeserving of marriage.

4. By testament confirmed by the Emperor. In the case just stated, if the father during his life neglected to apply for a rescript, but intimated in his will his desire that his children should become legitimate, they were authorised to apply for, and obtain, the rescript of legitimation. (Nov. 89, 10.)

5. ADOPTION.—Anastasius permitted fathers to adopt their natural children, and thereby obtain the *potestas* over them; but Justin took away the privilege; and his decision was followed by Justinian, who observed that it was a cruel injustice to allow a father, by resorting to adoption, to supersede his legitimate children. (Nov. 74, 3; Nov. 89, 7.)

B. The acquisition of *potestas* over another's children.

Not only the children born to us (*naturales*) are, as we have said in our *potestas*, but those too that we adopt. (J. I, II, pr.; G. I, 97.)

Effect of Adoption.

Adopted children, as long as they are held in adoption, are in the position of children born to us. But if emancipated by their adopted father, then neither by the civil law nor as far as regards the Prætor's edict are they numbered among his children. (G. I, 136.) And the same principle (applied conversely) governs their relations to the parent to whom they were born, for as long as they are in the adopted family, they are held to be outsiders. But if emancipated by their adopted father, then forthwith their case is the same as it would have been if they had been emancipated by their father to whom they were born. (G. I, 137.)

A Roman family, from the legal standpoint, consisted of a Head or Ruler, and of the persons subject to his absolute power. The children of the Head of the family were not legally related to him unless they were in his power; while, on the other hand, persons unconnected with him in blood, were children for all legal purposes, if they had been brought under his power by the artificial tie of adoption. The family, as a legal unit, was based on the despotic authority of its head. There was doubtless a time, further back than the

earliest records of Roman Law, when the legal was also the moral basis of the family; when the only tie between man and man was subjection to a common superior. The nearer we get to the fountain-head of our civilisation, the narrower in its scope appears to be the feeling of moral obligation. At first no duty is recognised outside the circle of one's family or clan; in a higher stage, the city is the limit of social obligation; to be a stranger (*hostis*) is to be an enemy; and even the most enlightened spirits of antiquity rose little above the prejudices of their time. Thus Plato, while proposing as a humane modification of the rights of the conqueror, that Greek should not enslave Greek, did not venture to extend the indulgence to barbarians, that is, to all outside Hellas. In the more backward and primitive state of society, the one condition of safety was to be a member of an organised group. The family was such a group, and it has accordingly been suggested that the device of adoption was first introduced as a means of enabling outsiders to enter into a family, to share its sacred rites and enjoy its protection.

But a consideration of the facts concerning adoption in the Roman law points to the explanation of that form of fictitious relationship in a different direction. It would rather appear from the indications presented to us in the records of law, that the primary object of adoption was to obtain an heir to a childless man, and that fictitious relationship was resorted to only as a substitute in the absence of descendants. In the most ancient form of adoption, the object appears clearly to have been to avoid the extinction of a family by the death of its head without heirs. Thus unmarried men could not adopt, nor even married men, unless they had no hope of children of their own. (Cicero *pro Domo*, 13, 15; D. 1, 7, 15, 2.) Adoption may be ranked as an earlier invention than the Will, both having originally the same or a similar object in view—to determine the devolution of an inheritance in the absence of the natural heirs.

The oldest form of adoption was called *arrogatio*, and only persons *sui juris* could be arrogated. The later form has no other name than adoption (*adoptio*); it is the transfer of a person from the *potestas* of one man to that of another, and therefore belongs to the class of transvestitive facts.

There is this peculiarity in adoption [by the people's authority (*per populum*)] by the Emperor's divine wisdom (*per sacrum oraculum*), that if

a man has children in his *potestas* when he offers himself to be adopted by *arrogatio*, not only is he himself subjected to the *potestas* of the *arrogator*, but his children too pass under the *potestas* of the *arrogator* and stand in the place of grandsons. For this reason the Emperor Augustus adopted Tiberius only after Tiberius adopted Germanicus, in order that as soon as the adoption took place Germanicus should become Augustus's grandson. (J. I, 11, 11 ; G. I, 107.)

I. The form of arrogation.

1. The ancient form.

Adoption takes place in two ways : by the people's authority (*populi auctoritate*) and by the power (*imperium*) of the magistrate—the Prætor, for instance. (G. I, 98.)

By the people's authority we adopt persons *sui juris*. This kind of adoption is called *arrogatio ;* because, *first*, the man adopting is asked (*rogatur*), that is, questioned, whether he wishes the man he is going to adopt to be his legally recognised (*justus*) son ; and *then* the man adopted is asked whether he will suffer that to be done ; and *lastly*, the people are asked whether they order it to be done. (G. I, 99.)

The arrogation took place in the *comitia curiata* in the ordinary form of legislation.[1] To the person about to be arrogated the formula employed was—Do you formally agree that Lucius Titius shall have over you, as over a son, the power of life and death ? To the people—Is it your will, your order, Quirites, that Lucius Valerius should be to Lucius Titius by right and statute a son, as if by birth the child of Titius and his materfamilias, and that Titius should have over him the power of life and death ? This, as I have stated it, is the motion I now put to you, Quirites.

The sanction of the Pontiff (*Pontifex*) was also required ; he was the guardian of the sacred rites (*sacra privata*), and was bound to guard against the extinction of any such rites by the arrogation of the only representative of a family.[2] This mode of arrogation was in active existence during the Republic, and was resorted to by the early emperors, as by Augustus in the adoption of Agrippa and Tiberius. No

---

[1] *Auctorne esses, ut in te F. Fonteius vitae necisque potestatem haberet, uti in filio. Cic. pro Domo* 29.

" *Velitis jubeatis, Quirites, uti L. Valerius L. Titio tam jure legeque filius sibi siet, quam si ex eo patre, matre que familias ejus, natus esset ; utique ei vitae necisque in eo potestas siet ; haec ita, uti dixi, ita vos, Quirites, rogo.*"—*Aul. Gell. Noct. Att.* v. 19.

[2] A similar connection between adoption and religion may be remarked in the Hindu law. The laws of Menu expressly state that adoption is allowed only to the childless, and to prevent a failure of the funeral ceremonies. These ceremonies, according to the belief of the Hindus, are necessary for the comfort and repose of the deceased. Now, in the Hindu law, the heir is the person whose duty it is to perform the funeral sacrifices, and thus adoption comes to be a mode of appointing an heir. We find also in Athens that the primary object of adoption was to ensure that some one should make the proper sacrifices and offer the funeral cake.

other form is mentioned by Ulpian or Gaius, although the *curiae* were represented in their time probably only by thirty lictors.

2. At some period unknown, the fiction of popular legislation was dropped, and arrogation was effected directly by rescript of the Emperor.

Adoption takes place in two ways ; either by imperial rescript, or by the power of the magistrate. By the Emperor's authority we adopt men or women that are *sui juris*. This kind of adoption is called *arrogatio*. (J. 1 11, 1.)

II. Restraints on arrogation.

1. Adoption by the people's authority takes place nowhere but at Rome. But the other form is allowed in the provinces too, before the governors. (G. 1, 100.)

2. The arrogator must be married (*Cic. pro Domo*, 13, 15), and upwards of sixty years of age, unless his health is bad, or some other reason renders it probable that he may die childless. (D. 1, 7, 15. 2.) In adoption, as opposed to arrogation, there was no such restraint ; unmarried persons could adopt others who were *alieni juris*. (D. 1, 7, 30.)

3. Arrogation was regarded as a substitute for progeny, and accordingly a man could not arrogate more than one person, or any even, if he had legitimate children. (D. 1, 7, 17, 3 ; D. 1, 7, 15, 3.)

4. Women could not be present in the *Comitia*, and thus could not be arrogated ; but when arrogation was allowed by rescript they could. (Ulp. Frag. 8, 5 ; D. 1, 7, 21.)

Again, adoption by the people's authority is not in use for women, according to the better opinion. But women [*i.e.*, *alieni juris*] are usually adopted before the Prætor, or in the provinces before the Proconsul or the *Legatus*. (G. 1, 101.)

5. A tutor or curator could not arrogate any one that had been under their guardianship, otherwise a door to malversation would have been left open. (D. 1, 7, 17, pr.)

6. Although a person below or above the age of puberty could be adopted, no one under that age could be arrogated. (Ulp. Frag. 8, 5.)

Again, adoption of a boy under puberty by the people's authority has sometimes been forbidden, sometimes allowed. Now, in accordance with a letter by the most excellent Emperor Antoninus to the *pontifices*, if there seems to be a legally recognised ground of adoption, under certain conditions it is allowed. But before the Prætor, and in the provinces before the Proconsul

or *Legatus*, we can adopt a person (i.e., *alieni juris*) of any age. (G. 1, 102.)

When a boy under puberty is adopted by arrogation, the imperial rescript of authorisation is not granted until the nature of the case has been ascertained. Strict inquiry is made as to the object of the arrogation, whether it is honourable and for the good of the *pupillus*. And even then it takes place under certain conditions. (1) The arrogator must give security to a public officer (*persona publica*), a notary namely, that if the *pupillus* dies under puberty he will restore his goods to those that, if no adoption had taken place, would have been his heirs. (2) Again, the *arrogator* cannot emancipate them unless, on the nature of the case being ascertained, they prove worthy of emancipation; and then he must restore them their goods. (3) And further, if the (adopted) father on his deathbed disinherits the son, or in his lifetime emancipates him without grounds the law will recognise, he must by law leave him a fourth part of his goods, over and above the goods that are brought to him by his adopted son, either directly when adopted, or in enjoyment at a later time. (J. 1, 11, 3.)

The *persona publica* here spoken of was at first a slave, and, according to the rules of law the benefit of a promise made to a public slave was given to any one of the public in whose behalf it was made. The age of puberty was fixed at fourteen for boys and twelve for girls.

Ulpian tells us that the inquiries mentioned in the text (*causa cognita*) were directed to the motive of the arrogator—whether the person arrogated was a relative or the object of a genuine affection; to the respective fortunes of the parties—whether the person arrogated was likely to gain by the transaction, and to the general character of the arrogator. (D. 1, 7, 17, 2.) The poverty of the arrogator was not a complete barrier, if he were inspired by honourable and undoubted feelings of kindness. (D. 1, 7, 17, 4.) If security were not given, an action for damages lay against the arrogator. (D. 1, 7, 19, 1.)

Transvestitive Fact. (*Adoptio.*)

I. Adoption as a transvestitive fact.

1. Before Justinian.

A man is allowed to adopt some one as his grandson or granddaughter, or great-grandson or great-granddaughter, and so on, although he has not a son. And another's son he may adopt as his grandson, or another's grandson as his son. But if he adopts some one as a grandson, to be son, as it were, to his own adopted son, or to a son by birth in his *potestas*, in that case the son too must consent, and not have a *suus heres* brought in to him against his will. But, on the contrary, if a grandfather gives his grandson by his son to be adopted, the son's consent is not needed. In very many respects, too, the son adopted simply or by arrogation is put on the same footing as a son born in a regular marriage. And therefore, if a man adopts some one by the

imperial authority, or before the Prætor or provincial governor, and that some one is not an outsider, he may give him to another to be adopted. (J. 1, 11, 5-8.)

Effect of adoption on children *en ventre sa mere*.

You must know, too, that if your daughter-in-law conceives by your son, and you afterwards emancipate the son, or give him to be adopted during your daughter-in-law's pregnancy, none the less her offspring is born in your *potestas*. But if conception took place after emancipation or adoption, it is to the emancipated father or adopted grandfather's *potestas* that the offspring is subjected. (J. 1, 12, 9.)

The grandson conceived by a son once or twice conveyed by mancipation, although born after the third conveyance of his father, is yet in his grandfather's *potestas*. It is by the grandfather, therefore, that he must be emancipated or given to be adopted. But a grandson conceived by a son now *in mancipio* by a third conveyance is not born in his grandfather's *potestas*. Labeo, indeed, thinks that he is *in mancipio* of the person to whom his father belongs. But the rule of law in use is this : that as long as his father is *in mancipio* his rights are suspended ; if his father is manumitted after conveyance, the grandson falls under his *potestas ;* but if he dies still *in mancipio*, the grandson becomes *sui juris*. (G. 1, 135.) And as regards a child conceived by a grandson, although but once conveyed by mancipation, the rule is the same as for a son conveyed for a third time. For, as we said above, what three conveyances effect in the case of a son, is effected by one in the case of a grandson. (G. 1, 135 *a*.)

2. Justinian introduced a profound alteration, doing away, in effect, with the peculiar characteristics of adoption. The purpose of adoption was to enable a man to exercise the *potestas* over one that was not his child.

But now, under our constitution, when a father by birth gives a *filius-familias* to an outsider to be adopted, the rights of *potestas* enjoyed by the father by birth are far from being lost. Nothing passes to the adopted father, nor is the son in his *potestas*, although in case of intestacy we have bestowed on him the rights of succession. But if the father by birth gives the son to be adopted not to an outsider but to his son's grandfather on the mother's side, or (if the father by birth has himself been emancipated) even to the grandfather on the father's side, or to the great-grandfather in like manner on either side,—in this case, because the rights both by birth and by adoption meet in one person, the right of the adopted father remains unshaken. For the bond is due to the ties of birth, and is drawn the closer by a lawful mode of adoption. And therefore in such a case the son comes both into the household and into the *potestas* of the adopted father. (J. 1, 11, 2.)

Justinian legislates, in this constitution, in a manner that plays havoc with the old juridical character of adoption, but was not unsuited to the circumstances of his day. Adoption had lost its primitive character; there were no sacred family

rites to maintain ; there was, in short, no reason for adoption, except merely the desire of childless persons to attach others to them by the ties of interest and affection. Like other antiquated institutions, it produced cases of occasional great hardship. A youth is given, let us suppose, by his father in adoption ; the person adopting him soon afterwards emancipates him. The result was that the youth was out of both families, and was postponed in the succession to his father's inheritance to more distant relatives. To remedy this evil was the purpose of Justinian's constitution, as summarised in the text.

Such being Justinian's object, it naturally followed that he would make a difference in the case of arrogation. A person arrogated being, as has been said, under no one's *potestas*, in no one's family, can lose nothing by giving himself in arrogation. Therefore it was enacted (C. 8, 48, 10, 5) that the old law should remain in force in the case of arrogation ; and consequently the arrogated person fell under the *potestas*, and became a member of the family of the person that arrogated him. The enactment, with the same purpose, exempts from the change those cases where a father or other ancestor adopted a child or other descendant. Such cases were necessarily rare, but they might occur.

A has a daughter B, whose son C is under the *potestas* of his father. The father gives C in adoption to A. A, being an ancestor, will acquire the *potestas*.

A has a son B whom he emancipates. After emancipation B has a daughter C, born under his *potestas*. B gives C in adoption to A. A thus acquires the *potestas* over C.

A has a son B, and B's son C, both under his *potestas*. A emancipates B, but not C. A afterwards gives C in adoption to B. B acquires the *potestas* over C.

II. The form of adoption of those *alieni juris*.

1. The ancient fictitious sale. This was a fictitious suit founded on the law of the XII Tables, which imposed a forfeiture of the *potestas* on the father who subjected a son three times to a sale.

And further, parents, when they have given their children to be adopted, cease to have them in their *potestas*. A son given to be adopted is thrice conveyed by mancipation, with two manumissions between ; just as is usually done when a father lets a son go from his *potestas*, and so makes him *sui juris*. Next, he is either reconveyed to the father, and from him before the Prætor claimed by *vindicatio* as a son by the adopted father, and in the absence of any contrary claim is made over by the Prætor to him as his son ; or he is not reconveyed to the father, but by an *in jure cessio* is given up to the claimant (*vindicanti*) by the person holding him under his third conveyance by mancipation. But undoubtedly it is more convenient to have

the reconveyance to the father. As regards other descendants, male or female, one conveyance is enough ; and they are either reconveyed to the ascendant or not. The same formalities are observed in the provinces before the governors. (G. 1, 134.)

The form of transfer by mancipation is given by Gaius. (G. 1, 119.) (See *Mancipium.*)

Adoption by sale thrice repeated involved two different stages, which ought to be kept separate. A has a son B, whom he proposes to give in adoption to C. B is in A's *potestas*, and it is desired to take him out of A's *potestas* and place him in B's *potestas*. This is a twofold operation.

(1.) How is B to be taken out of A's *potestas?* It is at this stage of the transfer that the law of the XII Tables has been forced into use. A emancipates B to C, and C manumits B by the *vindicta*, as in the manumission of a slave. The effect of this manumission is that B relapses into the *potestas* of A. Again A emancipates B to C, and again C manumits B, thus restoring him to the *potestas* of A. For the third and last time A mancipates B to C, and by this third sale forfeits the *potestas*. B is now held by C as his property (*in mancipio*), as a kind of chattel ; but it is desired not to make him a chattel, but a son of C. Then—

(2.) How is B to be converted from a chattel (*mancipium*) to a son ? In other words, how is B, who is no longer under the *potestas* of A, to be brought under the *potestas* of C ? Gaius in the text points out two ways in which this might be done. (1°) The first consists of the following steps :—After the third sale, C mancipates B back again to A, who now retains B, not as his son, but as property (*in mancipio*). C now appeals to the Prætor, and by the proper suit (*vindicatio*) claims B as his son. A makes no opposition, and therefore the Prætor adjudges B to C as his son. C now holds B under his *potestas* by a judgment of a court of law. This is the procedure recommended by Gaius in the text.

(2°) The other mode is somewhat different, and will most easily be understood by giving the steps from the very beginning :—

(*a*) A mancipates B to C or D, and C or D manumits B.

(*b*) A again mancipates B to C or D, and C or D manumits B.

(*c*) A mancipates B to D.

(*d*) C sues (*vindicat*) D, and claims B as his son.

(*e*) D makes no objection.

(*f*) The Prætor thereupon adjudges B to C as his son.

This form might be resorted to before any municipal magistrate that had jurisdiction over the ancient forms of procedure—*Legis actiones.* (Paul, Sent. 2, 25, 4.)

2. Adoption by simple declaration before a magistrate.

By the magistrate's authority we adopt those in the *potestas* of their ascendants, whether of the first degree—children, namely, as a son or daughter ; or of a lower degree, as grandson, granddaughter, great-grandson, great-granddaughter. (J. 1, 11, 1 ; G. 1, 99.)

In the time of Diocletian, it appears (C. 8, 48, 4) that adoption could not be effected by written instruments, but only by the solemn form in the presence of the Prætor. Justinian abolished the sales and manumissions, substituting a mere declaration, recorded in writing. (C. 8, 48, 11, A.D. 530.)

But if a father gives a son that he has *in potestate* to his father or grand-

father by birth to be adopted, in accordance with our constitutions on this subject—that is, if this is declared with due formalities before a qualified judge in the presence of both adopted and adopter without opposition from either,—then the *jus potestatis* is at an end as regards the father by birth. But it passes over in such a case as this to the adopted father; for in his person adoption, as we have already said, is most full. (J. 1, 12, 8.)

An informal adoption could be confirmed on petition to the Emperor (D. 1, 7, 38), but only after hearing any objectors who might offer themselves. (D. 1, 7, 39.)

III. Restraints on adoption (also on arrogation).

1. The question that has been raised, whether a younger man can adopt an older, is common to both forms of adoption. (G. 1, 106.) A younger man, it is settled, cannot adopt an older. For adoption copies nature; and it is a gross violation of nature that a son should be older than his father. He therefore that is taking to himself a son, whether by arrogation or by adoption, ought to be by the full period of puberty—by eighteen years, that is, his senior. (J. 1, 11, 4.)

So in adopting a person as a grandchild, there must be a disparity of not less than thirty-six years.

2. Women, too, cannot adopt; for not even their children by birth are in their *potestas*. But by the Emperor's goodness they are allowed to adopt, to comfort them for children they have lost. (J. 1, 11, 10; G. 1, 104.)

This permission was granted by Diocletian and Maximian, A.D. 291. The woman did not acquire the *potestas*, but only such rights as she would have had if the person adopted had been her legitimate child. (C. 8, 48, 5.)

3. It is common to both forms of adoption that even those that cannot beget (as *spadones*) can adopt, but those that have been made eunuchs cannot. (J. 1, 11, 9; G. 1, 103.)

4. Adoption could not be repeated. One that has adopted a person, and given him in adoption, or emancipated him, cannot afterwards adopt him. (D. 1, 7, 37, 1.)

But a son adopted either by authority of the people or before the Prætor or a Provincial Governor, may be given over to some one else to be adopted. (G. 1, 105.)

ADOPTION BY TESTAMENT never existed. Julius Cæsar did indeed name C. Octavius as his son, but the direction had no validity except as an injunction to the people to sanction the act. It required to be consummated by a *lex curiata*. Another case is mentioned in the Digest. (D. 37, 14, 12.) Seius died, leaving a will, in which he named his freedman Julius his son, and named him heir along with his other children. The nomination was void.

c. Forfeiture of independence for ingratitude.

Sons or daughters who had been emancipated from the *potestas* were not absolved from all ties, and, as in the case of slavery, might forfeit their independence. This forfeiture was the penalty for grossly insulting the *paterfamilias* who had emancipated them, or doing him some grave injury. (C. 8, 50, 1; C. Th. 8, 14, 1.)

Divestitive Facts.

a. Voluntary divestitive facts by the act of the parties [*Emancipatio*].

Emancipation was a voluntary act on both sides; the *paterfamilias* could not (ordinarily) be compelled to emancipate his *filiusfamilias*, and the *filiusfamilias* could not be emancipated against his will. (D. 1, 7, 31; C. 8, 49, 4; Nov. 89, 11.)

Children, whether by birth or by adoption, have almost no way of forcing a parent to let them go free from his *potestas*. (J. 1, 12, 10.)

An exception was made when a person under the age of puberty had been arrogated; on reaching that age he was allowed to prove that the arrogation was injurious to his interests, and the arrogating *paterfamilias* was obliged to emancipate him. (D. 1, 7, 32; D. 1, 7, 33.)

We ought to note further that a man's discretion in choosing whom he will free from his *potestas* is altogether unrestrained. If, for instance, he has a son and a grandson or granddaughter by him in his *potestas*, he may let the son go free from the *potestas*, but keep the grandson or granddaughter. Conversely he may keep the son in his *potestas*, but manumit the grandson or granddaughter; and of course this must be understood of a great-grandson also, or a great-granddaughter. Or finally, he may make all *sui juris*. (J. 1, 12, 7; G. 1, 133.)

Forms of Emancipation.

1. The most ancient form, based on the triple sale.

By emancipation, too, children cease to be in the *potestas* of their parents. A son must be thrice conveyed by mancipation before he goes out from the parental *potestas;* all other children, whether male or female, once only. For the law of the XII Tables refers to the person of a son alone, when it speaks of three conveyances, in these words :—"If a father sells a son thrice, let the son be free from the father." It is done thus :—The father conveys the son by *mancipatio* to a third person; that third person manumits the son by *vindicta*, and thereupon the son returns into his father's *potestas*. The father a second time conveys the son either to the same third person or to some one else (usually to the same); he again in like manner manumits the son by *vindicta*, and thereupon the son once more returns into his father's *potestas*. Then a third time the father conveys him either to the same third person or to some one else (but usually to the same); and by that third con-

veyance the son ceases to be in the father's *potestas*, even although he is not yet manumitted, but is still *in causa mancipii*. (G. 1, 132.)

So far the account in the text exactly agrees with the first part of the ancient form of adoption, and there the text ends. The rest may be supplied from Gaii Epit. 1, 6, § 3, 4. The person to whom the son is mancipated is called fiduciary father (*paterfiduciarius*), because of the duty he has to perform. If the fiduciary father were to manumit the son, whom he holds *in mancipio*, he would become in law the patron of the son, and acquire a patron's rights of succession to the emancipated son's property. The ancient law was strict and formal; it looked only to the persons that figured in its ceremonial observances. Thus it was the individual manumitting a slave or son that became the patron, even although he had no interest in the slave or son, but acted in the fictitious proceedings the part of a mere lay figure. Such a result it was usually an object to avoid. A father emancipating a son would naturally wish to retain the rights of a patron, and not to cut himself off from the inheritance of his son. This object was accomplished very simply. After the third sale, the fiduciary father mancipated the son to the natural father, who thereupon, holding his son *in mancipio*, himself performed the ceremony of manumission by the *vindicta*, and became his son's patron.

At some period the Prætor intervened to prevent the fiduciary father from fraudulently acquiring the rights of patronage by manumitting the son, and made the natural father in every instance the patron. (J. 1, 12, 6.)

The steps in a formal emancipation were as follows :—A desires to emancipate his son B. C is the *paterfiduciarius*, the fictitious purchaser. (1) A mancipates B to C, and C manumits B by the *vindicta*. (2) A again mancipates B to C, and C manumits B as before. (3) A again mancipates B to C. (4) C now mancipates B to A. (5) A manumits B, and acquires the rights of patronage.

2. The Anastasian Rescript, A.D. 503.—The old formal emancipation necessarily required the presence of the parties to go through the fictitious sale. Anastasius made provision whereby a *paterfamilias* away from home might emancipate his children. He did not abolish the old forms, but introduced this novelty as an additional means of releasing children from the *potestas*. A petition must be sent to the Emperor, and his favourable answer obtained. The answer must be registered, produced in a court having jurisdiction over emancipation, and deposited along with the petition to the Emperor; and if

the persons emancipated were not infants, their consent must be given. The act was perfected by the formal consent of the Emperor. (C. 8, 49, 5.)

3. Change by Justinian.

Formerly emancipation was effected either according to the old usage of law (by imaginary sales, that is, with manumissions between), or by imperial rescript. But our forethought has by a constitution made a change in this for the better. And now the fiction of early times is done away with; parents go direct before a qualified judge or magistrate, and let their sons or daughters, or grandsons or granddaughters, and so on, go free from their power [*manus*]. And then, under the Prætor's edict, over the goods of such a son or daughter, grandson or granddaughter, manumitted by the parent, precisely the same rights are guaranteed to the parent as are given to a *patronus* over the goods of his freedman. And further, if the child, son, daughter, or whatever it may be, is still under puberty, the parent by the manumission becomes its tutor. (J. 1, 12, 6.)

B. Divestitive facts by operation of law.

Under this head are grouped the various facts that dissolved the *potestas*, irrespective of the wishes of the *paterfamilias*. These facts are either not acts of the *paterfamilias* or *filiusfamilias*, or acts not done with a view to dissolve the *potestas*.

I. The death of a person subject to any *potestas* is a divestitive fact with reference to that person; but the death of the *paterfamilias* does not always release a *filiusfamilias* from the *potestas*.

Let us see now how persons *alieni juris* are freed from those rights over them. As for slaves, how they are freed from *potestas* may be understood from what we have said above in regard to their manumission. Those again in an ascendant's *potestas*, on his death become *sui juris*. But here a distinction is taken. For on the death of a father, undoubtedly in every case his sons or daughters become *sui juris*. But on the death of a grandfather it cannot be said that in every case his grandsons and granddaughters become *sui juris*, but only if after the death of the grandfather they are not to fall under the *potestas* of their father. Therefore, if on the death of the grandfather, their father is both alive and in the *potestas* of his father, then after the decease of the grandfather they come to be in the *potestas* of their father. If, however, their father, at the time the grandfather dies, is either already dead or out of his father's *potestas*, then the grandchildren, because they cannot fall under their father's *potestas*, become *sui juris*. (J. 1, 12, pr.; G. 1, 125-127.)

II. Any change of a capital status (*capitis deminutio*) suffered by a *filiusfamilias* takes away the *potestas* of his *paterfamilias*; and the same result is produced by any change of a capital status of the *paterfamilias*.

A slave on manumission suffers no *minutio capitis*, because he had no *caput*. (J. 1, 16, 4.)

Where the change is one of dignity rather than of status, there is no *minutio capitis*. And therefore it is agreed that when a man is removed from the Senate he undergoes no *minutio capitis*. (J. 1, 16, 5.)

Captis deminutio is a change from one's former status. It is found in three forms, *maxima*, *minor* (which some call *media*), and *minima*. (J. 1, 16, pr.; G. 1, 159.)

As *caput* includes the three principal heads of status,—liberty, citizenship, and family rights,—it may suffer a reduction according as one or more of these elements are taken away. The withdrawal of liberty necessarily involves the loss both of citizenship and of family rights. This is, in fact, the entire destruction of *caput*, and is called the greatest reduction of status (*maxima deminutio capitis*). The loss of the second element, citizenship, carries with it the loss of family rights, but not of liberty. It is called the intermediate reduction of status, *media minutio capitis*. The third element, family rights, may be changed or modified without affecting the two others. This is called the least reduction of status (*minima deminutio capitis*).

The changes of status that operated as divestitive facts of the *potestas* may be arranged under those three heads.

1. The loss of liberty—*Maxima deminutio capitis*. This list includes the investitive facts of slavery. (See Slavery, Inv. Facts.)

Maxima capitis deminutio occurs when a man loses at once his citizenship and his freedom. This happens in the case of those that are made *servi poenae* by a harsh sentence; freedmen, for instance, condemned for ingratitude toward their patrons, or freemen that have suffered themselves to be sold in order to share the price. (J. 1, 16, 1; G. 1, 160.) A man made *poenae servus* ceases to have his sons in his *potestas*. They are made *servi poenae* that are condemned to the mines or exposed to wild beasts. (J. 1, 12, 3.) This happens, for instance, in the case of those that quit their fatherland and go abroad, either not giving in their names at the census, or shirking service as soldiers. Those, too, that stay, but suffer themselves to be sold as slaves, become under a *Senatus Consultum* the slaves of those they meant to defraud (and thus undergo *maxima capitis deminutio*). And so do the freeborn women that under the *Senatus Consultum Claudianum* become slaves to those masters whose refusals and warnings they have defied by having intercourse with their slaves. (G. 1, 160, as restored.)

Exception.—If an ascendant is taken by the enemy, although he becomes the enemies' slave, yet his descendants' rights remain in suspense because of the *jus postliminii*. For those taken by the enemy, if they return, regain all their early rights. The ascendant, therefore, if he returns, will have the descendant in his *potestas;* for the fiction of *postliminium* is that the captive has always been in the state. But if he dies there, the son becomes *sui juris* [whether this dates from the death of the ascendant among the enemy, or from the time he was taken, may be doubted]; and this dates from the time

his father was taken. And in like manner, if the son himself or grandson is taken by the enemy, we say that, because of the *jus postliminii*, the *jus potestatis*, too, of the ascendant is in suspense. The word *postliminium* comes from *limen* (a threshold), and *post* (afterwards). And the man that is taken by the enemy, and afterwards comes within our bounds, returns, as we rightly say, by *postliminium*. For as the thresholds in houses form a bound to the houses, so the bound of the Empire is looked on by the ancients as a threshold. Hence also comes the word *limes*, a sort of bound and end. And from it comes the word *postliminium*, because the man returned within the same threshold whence he had been lost. A captive, too, recovered when the enemy is conquered, is held to return by *postliminium*. (J. 1, 12, 5; G. 1, 129.)

Jus postliminii.—The rights of a person who by the hard fortune of war was made a captive remained in suspense. By the fiction of *postliminium*, introduced doubtless by the jurisconsults (*naturalis aequitas*, D. 49, 15, 19, pr.), if the captive returned, he was placed, as far as might be, in the same position as if he had never left his native country; but if he died in captivity, this fiction had no place, and he was therefore held to have died a slave.

If only the interests of the captive had been at stake, probably no effort would have been made to modify the law; but the death of a freeborn citizen as a slave had an injurious effect upon his family. If a slave, how could his children inherit from him? (D. 50, 16, 3, 1.) To stretch the fiction of *postliminium* to this case seems to have been too bold a course for the jurisconsults, and accordingly the knot was left to be cut by statute. In B.C. 81 the *lex Cornelia* created a fiction analagous to, but extending further than, *postliminium*. It provided that if a captive died in captivity his death should be held to date, not from the actual moment of his decease, but from the time he was captured; so that, although he lived a prisoner, he died free. (D. 49, 15, 18.) This convenient fiction prevented the ill consequences that would have resulted from striking out in a family a link in the chain of hereditary succession.

The fiction of *postliminium* applied when persons or property were taken by an enemy or a foreign power, and afterwards returned or were recovered. It was not essential that there should be a state of war: it was sufficient if a foreign state, bound by no treaty of friendship with Rome, seized the person or property of any Roman citizen. (D. 49, 15, 12, pr.) But capture by robbers or pirates, or by one of two parties in a civil war, did not change the legal position of the persons or property seized: the persons in law continued free, the property in law still belonged to its rightful owners, and consequently no occasion arose for the fiction of *postliminium*. (D. 49, 15, 21, 1.) The necessity for such a fiction arose from the fact that ancient law regarded capture in war as a lawful title to the person as well as the property of the enemy. A Roman taken prisoner was regarded by his own law as a slave, as well as by the law of the state that made him prisoner. Consequently, while in a state of captivity or slavery, he could acquire no rights, and the period of his captivity was a period of civil death. But if the capture were not lawful, the legal capacity of the person remained unimpaired, and he was not debarred from the acquisition of rights, although he was prevented from the exercise of them.

The fiction of *postliminium* applied both to persons and property taken by the enemy, but there is convenience in taking the two cases separately. As applied to free persons made captives and slaves, *postliminium* has by modern writers been called *activum;* applied to slaves or other property taken by an enemy, *passivum*.

1. *Postliminium* in case of free persons taken prisoners and made slaves. Such persons do not get the benefit of the fiction unless their capture has been against their will. (C. 8, 51, 19.)

Soldiers who surrendered with arms in their hands were held to be made captive by their own will. (D. 49, 15, 17.) So, of course, deserters. (D. 49, 15, 19, 4.)

A treaty of peace stipulated for the return of all prisoners of war. Whoever remained with the enemy after the return of peace was held to be in voluntary captivity. (D. 49, 15, 20.)

A son under *potestas* deserts to the enemy. Although in regard to his *paterfamilias* he may be looked on as property (D. 49, 15, 14), still the law preferred to view him simply as a citizen, and therefore his return did not again bring him under the *potestas*. The reason assigned is quaint: that if the father loses him, it is no more than his fatherland has done; and that with the Romans from of old discipline held the first place, parental affection the second. The decision is sound enough without the aid of these somewhat ponderous fictions. (D. 49, 15, 19, 7.)

A person is entitled to the benefit of *postliminium* when he has returned, by whatever means, within the frontier of his own country, or of a friendly power (D. 49, 15, 19, 3), provided he has no intention of returning to the enemy. (D. 49, 15, 26.) Thus Regulus was sent from Carthage to beg for favourable terms of peace to the Carthaginians. With the full intention of returning, he gave advice to continue hostilities, and returned. His status as a captive was not for a moment affected by his absence from Carthage, since he had the intention of returning. (D. 49, 15, 5, 3.)

The effect of *postliminium* is that the returned captive enjoys all the rights that have accrued to him during the period of his captivity.

A woman is made captive and enslaved. During her captivity her mother dies. On returning from captivity she can claim her mother's property as hers. (C. 8, 51, 14.)

A is taken captive while his wife is with child. She gives birth to a son (B), who grows up, marries, and has a child (C). After the birth of C, A returns. C is under the *potestas* of A. (D. 49, 15, 23.)

A husband and his wife are taken captive. In captivity she gives birth to a child. On their return this child falls under its father's *potestas*, although it was born of captive parents, and therefore a slave. (D. 49, 15, 25.)

A husband is made a prisoner. On his return he finds his wife married to another He cannot claim his wife, because marriage rested solely upon the consent of both parties; but his wife is liable to the penalties attached to improper repudiation. (D. 49, 15, 8; D. 49, 15, 14, 1.)

2. *Postliminium*, as applied to property, had a somewhat different shade of meaning. The capture of goods or land by an enemy operates as a divestitive fact of the ownership. After capture the former owner has no longer in law any right. If, however, the property is recovered from the enemy, such recovery is made a re-investitive fact to the former owner. When the enemy was expelled from land occupied by them, the land reverted to its former owners, and was not confiscated or given as prize of war. That land only was to be confiscated which was taken from the enemy. (D. 49, 15, 20, 1.) In like manner, slaves were restored to their former owners. (C. 8, 51, 10; D. 49, 15, 19, 5.) Property thus restored was accompanied with all burdens and limitations. Thus, if it was subject to usufruct, the usufruct revives. (D. 7, 4, 26.)

Postliminium was admitted in favour of land, slaves, ships of war or merchant ships—not, however, fishing vessels or pleasure yachts (D. 49, 15, 2, pr.); and horses (D. 49, 15, 2, 1); but not armour, which could not be lost without disgrace (D. 49, 15, 2, 2), nor clothes. (D. 49, 15, 3.) A prisoner taken from the mines was sent back to his punishment. (D. 49, 15, 12, 17.)

2. Liberty is retained, but citizenship lost. *Media capitis deminutio.*

1°. Latin colonists.

In the old times, when the Roman people were still planting colonies in the Latin districts, a man that by a father's command had gone to join a Latin colony went out in that way from under the *potestas*. For they that thus withdrew from the citizenship of Rome were received as citizens of the new state. (G. 1, 131.)

2°. Outlawry (*aquae et ignis interdictio*), at first excommunication of persons going into exile to avoid a criminal prosecution.

The *deminutio capitis* is *minor* (lesser) or *media* (intermediate) when citizenship is lost, but freedom retained; as in the case of a man shut out from the use of fire and water, or transported to an island (used as a penal settlement). (J. 1, 16, 2; G. 1, 161.)

Since a man, that for some crime is shut out under the *lex Cornelia* from the use of fire and water, loses thereby his citizenship, it follows that because he is in that way removed from the number of Roman citizens just as if he were dead, his children cease to be in his *potestas*. For reason will not suffer a man in the condition of an alien to have a Roman citizen in his *potestas*. And by parity of reasoning, if a man in his father's *potestas* is shut out from the use of fire and water, he ceases to be in his father's *potestas*. For equally reason will not suffer a man in the condition of an alien to be in a Roman father's *potestas*. (G. 1, 128.)

3°. Deportation. *Deportatio insulae.*

Callistratus included both deportation and simple banishment among the punishments that involved the loss of liberty. (D. 50, 13, 5, 3.) But Justinian holds a milder view.

Since a man that for some crime is transported to an island loses his citizenship, it follows that because he is in that way removed from the number of Roman citizens just as if he were dead, his children cease to be in his *potestas*. And by parity of reasoning, if a man in his father's *potestas* is transported to an island, he ceases to be in that *potestas*. But if by the Emperor's goodness they are restored, they regain in every respect their early status. (J. 1, 12, 1.)

Deportation to an island was introduced by Augustus to avoid the ill consequences of allowing a crowd of banished men to meet wherever they pleased. It was banishment for life. (D. 48, 22, 18, 1.) The deported prisoner could buy and sell, and enter into all the contracts that were considered to arise from the *Jus Gentium*. (D. 48, 22, 15, pr.)

Fathers that are banished (*relegati*) to an island, keep their children in their *potestas*. And conversely, children that are banished remain in their parent's *potestas*. (J. 1, 12, 2.)

Relegation or exile (*exilium*) is a prohibition against entering one's province or Rome, or any particular district, either for life or for a limited term. (D. 48, 22, 14.)

It may also be restriction to an island or to any particular place (*lata fuga*). (D. 48, 22, 7 ; D. 48, 22, 5.) It involved no forfeiture of property or loss of *status*, and was simply a restriction of locomotion. (D. 48, 22, 4 ; D. 48, 22, 18.)

4°. Desertion to the enemy. (D. 4, 5, 5, 1.)

3. *Capitis deminutio minima.*

Capitis deminutio is *minima* (least) when both citizenship and freedom are kept, but the man's *status* undergoes a change. For instance, when persons *sui juris* come to be *alieni juris*, or *vice versa ;* [in the case of persons adopted, of women that make a *coemptio*, and of persons given by mancipation, or manumitted therefrom. So far does this go, that every time a man is conveyed by mancipation, or manumitted, he undergoes a *capitis deminutio*]. (J. 1, 16, 3 ; G. 1, 162.)

Capitis deminutio.—The meaning of this expression, like that of the cognate term, *status*, has given rise to much controversial writing. The difficulty in the word *status* is that it is undoubtedly used in various senses, with a narrower or wider extension of meaning, and can hardly be restricted to any precise technical signification. *Caput* is of narrower import, and relates specifically to three things—liberty, citizenship, and position in a family. To these three elements corresponds each of certain possible alterations, and hence there are three degrees in which *caput* may be *lessened*.

1. The first question to be determined is, whether the phrase, *capitis deminutio*, represented a real, or only a verbal, generalisation ; in other words, whether a change of *status* entailed any legal consequences on account of its being a *capitis deminutio*. Thus, arrogation had certain specific legal effects ; it subjected a person who was *sui juris* to the *potestas* of another ; but had it any consequences, not as arrogation, but as a *capitis deminutio ?* Obviously, if this question be answered in the negative, and if the same answer must be given in regard to every other change of *status*, it follows that there is no legal importance whether to be attached to the phrase *capitis deminutio*. As a phrase, it may once have been elegant and serviceable, although now obscure ; but the question whether a particular change of status is a *capitis deminutio* would not be of the smallest consequence ; and a controversy on the subject would be a mere logomachy. The language of Gaius rather encourages the belief that the Roman jurists did attribute some effect to a *capitis deminutio* (G. 3, 83 ; G. 4, 38) ; but in the time of Justinian (J. 3, 10, 1) there was apparently only one case (the *obligatio operarum* of a manumitted slave) where the slightest importance attached to a question of *deminutio capitis*. The legal consequences, if any, of a *capitis deminutio*, were so insignificant as scarcely to call for notice. This helps, therefore, to reduce the importance, if it does not remove the difficulty, of the second question.

2. What was meant by *capitis deminutio ?* According to Gaius, it was simply a change of *status* (*capitis minutio est status permutatio*). (D. 4, 5, 1 ; G. 1, 159.) Savigny proposes to amend this definition by adding—a change *for the worse*. In a general view, this addition corresponds to the facts. Thus a change from liberty to slavery is undoubtedly a change for the worse ; so is it to lose the rights of citizenship. When a *paterfamilias* gave himself in arrogation, the change may be described as a descent in legal capacity ; so if a woman *sui juris* fell under the *manus* of her husband. Again, a son under *potestas* given by his father, even if only for form's sake *in mancipio*, falls into a lower class. We can thus understand how the transvestitive fact of adoption and the divestitive fact of emancipation should equally be considered a *capitis deminutio*, because the process required that the children should remain for a time *in mancipio*. (D. 4, 5, 3, 1.) On the other hand, a son that became *sui juris* by the death of his father, inasmuch as he obtained his independence without passing through the lower stage of *mancipium*, did not suffer a *capitis deminutio*. (D. 14, 6,

3, 4.) In like manner, a vestal virgin or *Flamen Dialis*, who was released from the *potestas* by elevation to office without going through any form of emancipation, was held not to suffer a *capitis deminutio*. So far these examples go to prove that *capitis deminutio* means a descent from a higher to a lower *status*,—from liberty to slavery, from independence to subjection (*potestas* or *manus*), or from a higher to a lower form of subjection *potestas* or *manus* to *mancipium*. On the other hand, elevation to independence, provided it was not achieved by passing through the state of *mancipium*, was not a *deminutio capitis*. But these cases do not exhaust the possibilities of descent in legal capacity. A woman *sui juris* passing into the *manus* of her husband, undoubtedly changed her legal capacity for the worse; but a woman that passed directly from the *potestas* of her father to the *manus* of her husband, suffered a change of *status*, but not a descent in *status*. But the texts (G. 1, 162; G. 4, 38) seem to refer equally to both cases as examples of *capitis deminutio*. Savigny endeavours to remove the objection from these passages,—not altogether without success; but he does not get over the absence of a link of evidence that cannot well be spared. The great objection to Savigny's theory is found in a passage from Paul (D. 4, 5, 3, pr.), which states that the children of a person arrogated suffer a *capitis deminutio* by the arrogation of the father, although it makes no change to them, but is merely a transfer from the *potestas* of one person to the *potestas* of another. Savigny admits that this passage is wholly irreconcilable with his views, and argues at great length that Paul made a mistake, and was wrong in holding that case to be an example of *capitis deminutio*. The point would have been of the smallest practical importance to a Roman lawyer practising in the time of Justinian; and it scarcely seems necessary to force ourselves to a judgment one way or the other.

III. A *paterfamilias* forfeited his *potestas* by gross misconduct.

1. A father that compelled his daughter to prostitute herself, forfeited his *potestas*. (C. 1. 4, 12; C. 11, 40, 6.)

2. Exposure of free children carried with it a forfeiture of the *potestas*. (C. 8, 52, 2; C. 1, 4, 24; Nov. 153, 1.)

3. The legitimate children of a man that contracts an incestuous marriage, are not only released from his *potestas*, but gain all his property, subject to affording him maintenance. (Nov. 12, 2, 2.)

IV. Certain public dignities released persons from the *potestas*.

1. And further, sons go out from the parental power when they are installed as priests of *Jupiter Dialis*; girls when they are taken for vestal virgins. (G. 1, 130.)

2. A *filiusfamilias*, although he has served as a soldier, or become a senator or consul, remains in his father's *potestas*. For service or the dignity of consul does not free a son from a father's *potestas*. But under a constitution of ours, the crowning dignity of the patriciate, the moment the imperial patent is issued, sets a man free from his father's *potestas*. For who could bear that a father might by emancipation release his son from the bonds of his *potestas*, but that the Emperor's highness should not be able to exempt the man whom he has chosen as father from another person's *potestas*? (J. 1, 12, 4.)

The dignity of the patriciate was created by Constantine. These fathers (*patres*)

were councillors to the Emperor, but had no jurisdiction of their own. The rank was conferred only on those who had filled the office of Consul, Pretorian Prefect, or Master of Offices (*Magister Officiorum*). (C. 12, 3, 3.)

3. Justinian, however, subsequently extended the liberation from the *potestas* to bishops (Nov. 81, 3), consuls, prefects, masters of soldiers (*magistri militum*), and generally to all the officials that were excused from serving in the *curia* (Nov. 81). This privilege was accompanied with another. These dignitaries, although released from the *potestas*, were suffered to enjoy all the rights accruing to children living under the *potestas*. They were to enjoy the sweets of liberty together with the consolations of servitude.

Remedies.

A. Remedies in respect of the rights of the *paterfamilias*. Under this head nothing has to be added to the observations made in the case of slavery. The *paterfamilias* has the usual remedies against theft, robbery, damage, or injury.

B. Remedies in respect of the investitive and transvestitive facts.

These may be divided into two groups; the object of the first group being to establish the *potestas;* and the object of the second group being subsidiary—to remove doubts, in certain cases, in regard to the fact of paternity.

I. Proceedings to establish the *potestas*.

1. *Vindicatio*.—This was the usual real action by which a title to any property could be made out. It was employed in the fictitious form of adoption, and may, if we may guess from a passage in the Digest (D. 6, 1, 1, 2), have been resorted to occasionally as a mode of recovering a lost *potestas*.

2. Procedure by interdict, *de liberis exhibendis et ducendis*.—This was analogous to the exhibitory interdict by which the production of a freeman in court could be secured. It was open to the defendant to dispute the existence of the *potestas*. (C. 8, 8, 1.) No interdict was granted if the son wished to remain with the person in whose possession he was. (D. 43, 30, 5.) The remedy of the father in such a case is given under the next head.

The interdict could not be brought against a husband to produce his wife to her *paterfamilias* (D. 43, 30, 1, 5); nor against a mother, according to a rescript of the Emperor Antoninus, when it was judged best that the child should remain with her. Her custody of the child did not, however, deprive the husband of his other paternal rights. (D. 43, 30, 1, 3; D. 43, 30, 3, 5.)

The interdict *de liberis ducendis* enabled the *paterfamilias*, when his *filiusfamilias* was produced, to carry him off without resistance. (D. 43, 30, 3, 1.)

3. Extraordinary Procedure—*Cognitio Extraordinaria* or *Notio Prætoris*.

When it was not a third party, but the *filiusfamilias* himself that resisted the claim of his *paterfamilias*, the remedy was by application to the Prætor, who examined whether the alleged *paterfamilias* had any *potestas;* and if so, gave him the *filiusfamilias*. (D. 43, 30, 3, 3.)

II. Proceedings in regard to the fact of Paternity.

The general rule was that the children of a lawful marriage were regarded as the offspring of the husband. This rule seems to have been at one time absolute; but a *Senatus Consultum* was passed in the time of Hadrian, enabling a father to dispute the legitimacy of his wife's child born during the marriage. (D. 25, 3, 3, 1.) Thus, if he were away from home ten years, and on his return found that his wife had a child

a year old, the presumption in favour of his paternity would be destroyed. But where the husband had access to his wife, he was not permitted to dispute the paternity unless through illness the cohabitation had been interrupted, or his health had been such as to render paternity impossible. (D. 1, 6, 6.) In several cases, special precautions were taken to remove doubts as to paternity.

1. After Divorce. *Senatus Consultum Plancianum de agnoscendis liberis.*

The wife affirms the paternity. A woman, pregnant when divorced, ought within thirty consecutive days (D. 25, 3, 1, 9) to notify the fact to her divorced husband or his father (if he is under his father's *potestas*), to give an opportunity of sending five skilful midwives to examine and watch her (*ventris inspiciendi; custodes mittendi*). (Paul, Sent. 2, 24, 5.) Should the husband neglect this opportunity, he cannot afterwards dispute the paternity. (D. 25, 3, 1, 4.) If the woman did not give notice, or refused to admit the midwives, she could not claim a maintenance for the child; but its rights were not in any other respect prejudiced. (D. 25, 3, 1, 8; Paul, Sent. 2, 24, 6.)

2. After Divorce. The husband affirms, and the wife denies, her pregnancy.

This case seems not to have been provided for by the *Senatus Consultum Plancianum*. It is dealt with by a rescript (D. 25, 4, 1, pr.), which states that the husband ought to choose respectable women and three skilful and trustworthy midwives to inspect the divorced wife. If the majority think that she is pregnant, she is to be persuaded to admit watchers (*custodes*). If she were recalcitrant, the Prætor could fine her, or apply other modes of compulsion. (D. 25, 4, 1, 3; D. 25, 4, 1, 7.)

3. The Husband is Dead, and his widow asserts that she is pregnant.

She is bound to notify the fact to the persons interested in her husband's estate twice a month. They may send five women to inspect her, and, at the proper time, watchers. (D. 25, 4, 1, 10.)

III.—MANUS.

Definition.

In the course of Roman history the relation of husband and wife is presented under two aspects. In the first and earliest the position of the wife was nearly identical with the position of a slave or child under the *potestas*.

Now let us see about the persons in our *manus*—a right peculiar to Roman citizens. (G. 1, 108.) *Potestas* applies to both males and females; *manus* to females only. (G. 1, 109.)

Manus was the name for the rights that a husband possessed over his wife; but no husband had the *manus* in consequence merely of his marriage; he could acquire it only in the ways presently to be described. A wife, if under her husband's *manus*, was called *materfamilias;* if not, simply *uxor* or *matrona* (wife or matron). (Cic. Top. 3.)

The effect of the *manus* is best described in the words of Gaius.

Nay, even if a woman makes a *Coemptio* with her husband *fiduciæ causa*,

none the less she at once takes the position of a daughter. For if a wife in any case, and for any reason, no matter what, is in her husband's *manus*, it is decided that she obtains the rights of a daughter. (G. 1, 115, *ib.*)

From the number of phrases into which the word *manus* enters, it was probably, as has been conjectured, the original name for the powers of the head of a family, whatever the objects—cattle, slaves or children—over which they were exercised. By a process of differentiation the ownership of slaves and other property came to be designated by "*dominium*," the nearest equivalent of "property." The rights over children were named "*potestas;*" over free persons, not as children, *mancipium;* while the original word "*manus*" was retained only for the rights of husbands over wives. *Mancipium* comes from *manus* and *capio*—literally what is taken with the hand; *manumissio*, from *manus* and *mittere*, shows the word as applied to slaves and children.

In its general characteristics the *manus* resembles the *potestas:* a wife was in law in no better position than a daughter. But just as slavery falls short of the complete attributes of ownership, while the *potestas* exhibits a like advance from slavery, so the *manus* lies still further away from the characters of ownership than the *potestas.*

I. A husband acquired all his wife's property, and was responsible for her obligations to the extent of that property. (G. 2, 98, G. 3, 83; G. 3, 84.) While she was *in manu* she could not acquire any property for herself, but only for her husband. She could, however, enjoy that modified and permissive form of ownership granted to slaves and children; namely, the *peculium.* As to husband's liability for debts of wife, see Book III., Universal Succession, sub-head II., "*arrogatio, coemptio in manum.*"

The *manus* was, therefore, incompatible with the *potestas:* a woman that passed into the *manus* of her husband necessarily ceased to be under the *potestas* of her father. But in the time of Tiberius (Tac. Ann., 4, 16) so few persons were found to submit to the inconvenience of the *manus*, that there was a danger of an insufficient number of children being born to provide candidates for the office of Priest to Jupiter (*Flamen Dialis*), only those being eligible whose mothers were under the *manus* of their husbands; and an act was passed abrogating all the disabilities of the *manus* where the marriage was contracted by confarreation.

A woman that merely passes *in manum* without making a *coemptio* does not thereby go out from her father's *potestas.* For in the case of the wife of the *Flamen Dialis*, a Senatus Consult passed at the instance of Cornelius Maximus and Tubero, provided that she was *in manu* of her husband in regard to sacred things alone, but in regard to all else was precisely the

same as if she had never passed *in manum*. But women are freed from the parent's *potestas* if it is by *coemptio* that they pass *in manum*, no matter whether of a husband or of an outsider. But those only are held to stand in the position of daughters that are in a husband's *manus*. (G. 1, 136.)

II. The husband does not seem to have possessed over his wife *in manu*, within any period reached by historical documents, the same powers of chastisement and killing that he had over slaves and children. He appears, however, to have had the right of punishing his wife, with, in serious cases, an appeal to her relatives. The two crimes, in the punishment of which a wife's relatives had a voice, were those regarded as least venial in ancient Rome—a violation of the nuptial bed, and drinking wine. This intervention of relatives may have been the means by which the absolute authority of the husband over his wife's life was first effectually checked. (Dion. Halic., Ant. Rom., 2, 25.)

III. There is no trace of the actual sale of a wife by a husband, but a fictitious sale (*mancipatio*) was the recognised means of relieving the wife from the *manus* of her husband. Whether this fiction represents a more ancient fact, must be left to be determined by the evidence of legal institutions similar to the *manus* in other countries, for no conclusive testimony on this point is forthcoming from Roman sources.

Rights and Duties.

A. Rights of Husband.

I. The husband had a right to the possession of his wife, a right that might be violated by theft. (G. 3, 199.)

II. He could sue any person causing an *injuria* to his wife, but this did not depend on the existence of the *manus*. (G. 3, 221.)

B. Duties of the husband.

Gaius does not say whether a wife *in manu* was subject to noxal surrender.

Investitive Facts.

I Purchase. *Coemptio in manum.*

In *coemptio* women pass *in manum* by *mancipatio;* that is, by a fictitious sale. At this there must be present not less than five witnesses, Roman

citizens over the age of puberty, and also a balance-holder; and the woman is bought for an *as* by the man into whose *manus* she passes. (G. I. 113.)

If we may believe Boethius, marriage was formed by mutual interrogations: the man asked the woman whether she was willing to be his *materfamilias;* she expressed her willingness, and asked in turn whether he was willing to be her *paterfamilias*. This may have been the form when the *manus* was dying out before marriage by simple contract; but when the coemption was more of a reality, we may infer that the husband used words more distinctive of his proprietary claim—as "I declare this woman to be mine"—*Hanc ego mulierem meam esse aio.* (Boeth. on Cic., Top. 3. 14.)

II. Prescription. *Usus.*

Formerly there were three ways of passing *in manum—usus, farreum, coemptio.* (G. I, 110.) By *usus* a woman passed *in manum* by living with a man as his wife throughout the whole year. For the possession of her for a year gave him, as it were, a prescriptive right by *usus;* and so she passed into her husband's household, and came to hold a daughter's place. The law of the XII Tables, therefore, provided that if a woman wished not to pass in that way into the *manus* of her husband, she should stay away for three nights each year in order to break off the *usus* for that year. But all this branch of law is now gone, being partly taken away by statutes and partly effaced my mere disuse. (G. I, 111.)

This *usus* was simply the ordinary prescription. When a Roman citizen had possession of anything (except land) for a year, he obtained the full rights of ownership. A wife was capable of being thus held as property in her husband's "*manus.*"

III. A religious rite—confarreation. *Confarreatio.*

In *farreum* women pass *in manum* by a kind of sacrifice made to Jupiter Farreus, in which a *farreum*, that is a wheaten cake (*farreus panis*) is used; from which the ceremony is named *confarreatio*. But, besides, in order to establish this right, many other acts and things are done, and a set form of words used in the presence of ten witnesses. Nor is this rite disused even in our time, for the greater *Flamines*—namely, the *Dialis*, the *Martialis*, the *Quirinalis*, and also the *Rex Sacrorum*—must be begotten in marriage celebrated by *confarreatio*. And a *Flamen* too, if he marries, must do so by *confarreatio*. (G. I, 112).

It has been already stated that after the time of Tiberius *confarreation* ceased to invest the husband with the *manus*, but gave the wife a right to participate in the family sacred rights.

The ceremony of confarreation took place before the chief Pontiff. (*Pontifex Maximus*) and the Priest of Jupiter (*Flamen Dialis*).

Upon the relative antiquity of these modes of acquiring the

manus Mr M'Lennan makes the following interesting observations (*Primitive Marriage*, 1st edit., p. 13) :—

"Apart from the tests of truth afforded by the minute knowledge of primitive modes of life and their classification as more or less archaic, nothing could be more delusive than written history itself. In Roman law, to take a convenient example, *confarreatio* has the foremost place among the modes of constituting marriage [rather say the *manus*]. *Usus* is just mentioned in the XII Tables, which contain a provision against a wife coming into the *manus* of her husband through *usus*. *Coemptio* does not appear in the old law of Rome at all, nor is there any mention of it earlier than that by Gaius.[1] But it can easily be shown that *usus* and *coemptio* come first in order of age, and *confarreatio* later: that is to say, the two former are more archaic than the latter. Yet have recent learned writers, overlooking this fact and the meaning of legal symbolism, represented *usus* and *coemptio* as forms invented and introduced by the legislators of Rome, whereby the Plebeians might have their wives *in manu*, and enjoy the other advantages of *justae nuptiae; usus* as an invention, and the fictitious sale in *coemptio* as merely a device of legislative ingenuity. The true explanation of the late appearance of both *usus* and the fictitious sale in the Roman law is this, that the law at first was not that of the whole people, but of a limited aristocracy, who, with a Sabine king and priesthood, adopted the Sabine religious ceremony of marriage; that the law totally ignored the life and usages of the mass, and that *their* modes of marrying and giving in marriage began to appear, and to make their mark in the law, only on the popular element in the city becoming of importance. Instead of marriage *per coemptionem* being the invention of legislators, it was of spontaneous popular growth, and must have been as old as the establishment of peaceful relations between tribes and families. All fictions, or nearly all, have had their germs in facts; became fictions or merely symbolical forms afterwards. And that the fictitious sale was originally an actual sale and purchase, cannot be doubted by any one who knows that marriage, by the form of actual sale, has prevailed almost universally among rude populations." In the opinion of Mr M'Lennan, the legend of the "Rape of the

[1] This is a mistake. Both *usus* and *coemptio* are mentioned by Cicero, *Pro Flacco*, 34.

Sabine Women" refers to a still earlier and ruder form of marriage, in which the bride was not peacefully bought, but stolen by treachery or carried off by violence.

Divestitive Facts.

A. Voluntary, by the act of the piartes.

I. Re-purchase. *Remancipatio.*

By re-conveyance (*remancipatio*) also women cease to be *in manu;* and manumission after the re-conveyance makes them *sui juris.* And if a woman has made a *coemptio fiduciae causa* with an outsider, she can compel him to reconvey her. But if a woman has made a *coemptio* with her husband, and wishes to be reconveyed by him, she can no more (directly) compel him than a daughter can a father. But while a daughter cannot in any way compel a father, even if only an adopted father, to reconvey her, a wife can by sending a divorce compel her husband to reconvey her just as if she had never been married to him. (G. 1, 136 A.)

II. Diffarreation (*Diffarreatio*). We learn from Plutarch (*Quaest. Rom.* p. 270) that the marriage of confarreation was dissolved by a sacrifice under the authority of the Pontiff, who took care that it should be infrequent and costly. The sacrifice is said to have required certain abominable rites. The wife of the *Flamen Dialis* could not be divorced.

B. Involuntary divestitive facts.

Women *in manu* are freed therefrom like daughters *in potestate;*—by the death, for instance, of him in whose *manus* they are, or by his being forbidden the use of fire and water. (G. 1, 137, restored.)

Remedies.

We have no precise information upon this head. The husband could divorce his wife when he pleased, but it seems from Gaius that the wife did not enjoy the corresponding privilege. (G. 1, 137 A.)

Any question as to the existence of *manus* was probably decided in the same manner as other questions of status; but upon this subject Gaius gives us no information.

IV.—MANCIPIUM.

Definition.

The subject of *mancipium* belongs wholly to the antiquarian side of Roman law. In the time of Gaius, from whom the substance of our information is derived, the *mancipium* was (except in the case of a noxal surrender) a purely fictitious

legal *status*, resorted to, as has been seen, in adoption and emancipation.

Those persons were said to be *in mancipio* who had been the objects of the ancient form of the conveyance called mancipation (*mancipatio*). Slaves were often called *mancipia*, although the word *mancipium* is more generally confined to free persons. (D. 1, 5, 4, 3.)

But technically there was a wide difference between a slave and a person *in mancipio*. Slavery was an institution of the *jus gentium; mancipium*, like *potestas*, was peculiarly Roman. The person *in mancipio* remained free and a citizen, although some of his rights, such as *potestas*, were in abeyance. (G. 1, 135 A.) When released, he was subject to the rights of patronage (G. 1, 195), but was *ingenuus*, not *libertinus*. Another distinction existed. A slave was the object of rights scarcely to be distinguished from ownership, and he might be the object of possession; but *mancipium* partook more of the character of a personal relation, and a person *in mancipio* could not be the subject of the possessory Interdicts. (G. 2, 90.) Lastly, by enrolment on the census, even without the consent of his master, a person was released from *mancipium*. (G. 1, 140.)

We have still to tell further what persons may be *in mancipio*. (G. 1, 116.)

The persons, then, of all children, whether male or female, in the parent's *potestas*, can be conveyed by *mancipatio* just as slaves can. (G. 1, 117.)

The same right is enjoyed over the persons of women in *manu;* for they can be conveyed by *mancipatio* by their *coemptionatores* in the same way as children by a parent. And so far is this carried, that although no one stands to the *coemptionator* in the position of a daughter unless she is married to him, yet none the less one that is not married to him, and therefore not in the position of a daughter, can be conveyed by him by *mancipatio*. (G. 1, 118.)

But often the whole aim of *mancipatio* by parents and *coemptionatores* is to release those persons from the rights enjoyed over them, as will appear more clearly below. (G. 1, 118 A.)

Rights and Duties.

Those who were *in mancipio* were said to be in the place of slaves (*servorum loco*). But the holder was not permitted to ill-use them, from which it may be inferred that *mancipium* resembled a pledge more than a sale.

And lastly, we should observe that those we hold *in mancipio* must not be treated with insult; or if we do, we shall be liable to an *actio injuriarum*. For no long time indeed are men kept in that condition; but

usually *mancipatio* is merely for form's sake, and is over in an instant,—unless, indeed, when it is the consequence of some wrong (*ex noxali causa*). (G. I, 141.)

Investitive Facts.

A. Mancipation (*Mancipatio*).

Mancipatio is, as we have said above, a fictitious sale; and the right is peculiar to Roman citizens. The process is this:—There are summoned as witnesses not less than five Roman citizens above the age of puberty, and another besides, of the same condition, to hold a balance of bronze, who is called the *libripens*. This last, who receives the object *in mancipio*, holding a piece of bronze (*aes*), speaks thus:—"I say this man is mine *ex jure Quiritium*, and he has been bought by me with this piece of bronze and balance of bronze." Then with the piece of bronze he strikes the balance, and gives the piece of bronze, as if the price to be paid, to him from whom he receives the object *in mancipio*. (G. I, 119.)

The *aes* of the Roman coins was bronze, a mixture of copper, tin and lead. Brass (*orichalcum*) was a mixture of copper and calamine or zinc.

The reason for using a piece of bronze and a balance is this:—That of old the only money in use was of bronze—the *as*, namely, the double *as*, the half *as*, and the quarter; but no gold or silver coin, as may be seen by the XII Tables. And the worth and (purchasing) power of those coins depended not on number, but on the weight of bronze. The *as*, for instance, weighed one pound, the double *as* (*dipondius*) two—whence its name, a name still in use. The half *as*, too, and the quarter, had a fixed weight in proportion to their amount as fractions of a pound. And the money, too, of old, when paid, was not counted, but weighed. And hence slaves entrusted with the management of money were called, and are still called, *dispensatores* (weighers). (G. I, 122.)

If, however, any one should ask wherein a woman that has made a *coemptio* differs from one conveyed by *mancipatio*, the answer is this:—A woman that has made a *coemptio* is not dragged down to the condition of a slave. But men or women conveyed by *mancipatio* by parents or *coemptionatores* are placed in the position of slaves; and so fully is this the case that from him that holds them *in mancipio* they can take neither an inheritance nor legacies unless the same will at the same time ordain that they shall be free,—the very law that applies to the condition (*persona*) of slaves. And the reason of the difference is plain; for parents and *coemptionatores* receive them *in mancipio* with the very same words with which they receive slaves; and this is not the case in *coemptio*. (G. I, 123.)

Divestitive Facts.

A. Modes of Release.

Persons *in causa mancipii* since they are looked on as standing in the position of slaves, are manumitted by *vindicta*, by entry in the census, or by will, in order to make them *sui juris*. (G. I, 138.)

B. Restraints.

But to this case the *lex Aelia Sentia* does not apply; therefore no limit of age is required from either the manumitter or the manumitted. Nor is it even asked whether the manumitter has a patron or a creditor. And the number limited by the *lex Fufia Caninia* does not apply to these persons. (G. 1, 139.)

Nay, more: Even against the will of him that holds them *in mancipio* they may be entered in the census, and so gain their freedom. But with one exception,—when the father has conveyed a son by *mancipatio* on the express condition that he shall be reconveyed to him; for then the father is held to reserve in a measure his own *potestas* in the very fact that he recovers by *mancipatio*. And again, a son cannot gain his freedom by being entered in the census against the will of the holder *in mancipio*, if his father has surrendered him on the ground of some wrong-doing (*ex noxali causa*); if, for instance, the father has been condemned on the score of a theft by the son, and has surrendered the son by *mancipatio* to the pursuer; for the pursuer has him instead of money. (G. 1, 140.)

Remedies.

A. In respect of rights and duties. For injury done to the *mancipium* an action lay for damages against the person that held the *mancipium* by the person that had given the *mancipium* (*actio injuriarum*). (G. 1, 141.)

B. In respect of investitive facts the remedy was doubtless the *vindicatio*, or real action; but Gaius is silent on the subject.

Third Division.

RIGHTS *IN REM* TO THINGS.

FIRST SUBDIVISION.

INDEPENDENT RIGHTS—*i.e.*, CREATED FOR THEIR OWN SAKE.

I.—OWNERSHIP. *DOMINIUM.*

DEFINITION.

IN the Roman Law, *dominium* is used sometimes with a narrower, and sometimes with a wider, signification. In the wider signification, the law of ownership includes everything that is brought under the third division of rights *in rem*—namely, all rights *in rem* over things. In this sense, ownership is contrasted with *obligatio*, which is nearly equivalent to rights *in personam*. (D. 44, 7, 3.) But *dominium* is generally used with a more restricted application, as the name for the largest interest in things, as opposed to the lesser interests. It "denotes a right—indefinite in point of user, unrestricted in power of disposition, and unlimited in point of duration—over a determinate thing." (Austin's *Jurisprudence*, 817.) Such is the correct notion to start with, but we shall find cases where a person is called owner, whose rights are not so unlimited as the definition requires.

RIGHTS AND DUTIES.

The rights of an owner may be briefly comprised under two heads—a right to the exclusive use of the thing belonging to him, and a right to alienate it. These two rights do not necessarily go together, but they are generally united in the Roman law.

The chief instances of incapacity of owners to alienate will be examined elsewhere; at this stage they need only be enumerated.

1. Persons of unsound mind, or prohibited by order of a court from the management of their property (*cui bonis interdicitur*).

2. Now we must note that a pupil can alienate nothing without the authority (*auctoritas*) of the tutor. (G. 2, 8, 2.)

Now we must note that a woman or a pupil can alienate no *res mancipi* without the authority of the tutor. A *res nec mancipi* a woman can alienate, but a pupil cannot. (G. 2, 80.)

Pupil, tutor are explained in (Book II. Div. II., *Tutela*). *Res mancipi* will be explained presently. (*Dominium.* Investitive Facts.)

3. A husband (see *Dos*) cannot alienate the immoveables brought by a wife as part of her dowry.

On the other hand, the agnate that is curator of a madman may alienate his property under the statute of the XII Tables. And a *procurator*, too, may alienate the perishable property of the principal that has entrusted him with its management. (G. 2, 64.)

These exceptions serve to illustrate the generality of the rule that every owner had unrestricted power of alienation; and we need not at present further consider this element of ownership.

The next question is, What is the nature of that exclusive use that constitutes ownership, and in what manner may the owner's rights be violated? The answer embraces necessarily an account of the wrongs that may be done to an owner in respect of his property. In enumerating these it is convenient to adapt our arrangement to the distinction between moveable and immoveable things. Immoveable things are such as land, and whatever is fixed in or to it; moveable things cannot be more clearly explained than by their name. They are such things as may be moved from place to place, as furniture, horses, cattle, slaves, garments, wine, corn, etc.

First, Rights to Moveables.

A. Rights of the owner (*dominus*).

A right to a moveable may be violated in two ways: (1) It may be taken away from the owner; and (2) without being taken away, its usefulness may be impaired. A wrong to an owner of a moveable may be, therefore, an offence against possession, or an offence against the usefulness of the moveable.

(A.) Deprivation of Possession.

In two ways an owner may be deprived of his moveable—by force or by fraud, against his will or without his consent. The former is robbery; the latter, theft. We shall first state the law regarding theft.

I. Theft (*furtum*). A doubt was at one time entertained

whether theft was not an offence applicable also to immoveables. (D. 41, 3, 38.) Sabinus thought it was, but the Proculians, whose opinion is sanctioned by Justinian, relying upon the etymology of the word (from *fero*, to carry off), held that theft was an offence against moveables only. (D. 47, 2, 25.) The Roman jurists did not, however, fall into the error made by Lord Coke and his successors in England, of treating things attached to immoveables as partaking of the same character, and of holding that stealing them was a mere trespass, not theft. It was held that trees or growing fruit might be the object of theft (D. 47, 2, 25, 2), and so, likewise, stones, sand, or chalk dug up and carried away. (D. 47, 2, 57.)

The term (*furtum*) comes either from *furvus* (black), because theft is done in secret, and in the dark, and often by night; or from *fraus* (fraud); or from *ferre*, that is, to carry off; or from the Greek, φώρ,—their name for thieves, which comes itself from φέρω (I carry off). (J. 4, 1. 2.)

Theft (*furtum*) is the dealing with an object, or with its use or possession, with intent to defraud,—an act forbidden by the law of nature. (J. 4, 1, 1.)

In the corresponding part of the Digest, it is added that the appropriation must be for the sake of gain (*lucri faciendi causa*); (D. 47, 2, 1, 3), and, in some instances, pains were taken to show that although there was an apparent absence of personal gain, as when the thief stole a thing with the intention of making a present of it to another, yet there was a real benefit to the thief in the credit he obtained for generosity. (D. 47, 2, 54, 1.) The desire of gain is almost necessarily the motive to steal; but even if such desire were absent, the act ought apparently still to be considered theft. The definition of theft given in the Institutes may be accepted as it stands, for the essential elements of theft are (1) an actual handling or dealing with the thing (*i.e.*, an overt act as distinguished from mere intention); (2) that it should be done without the consent of the owner; (3) and the knowledge of the thief that he has no such consent.

α. The constituent elements of Theft.

1. Theft of a moveable (*furtum rei*).

1°. There must be an actual handling or exercise of physical power over the thing (*contrectatio*). A mere intention to steal, whether uttered in words (D. 47, 2, 52, 19) or not (D. 47, 2, 1, 1), is not theft.

A by telling a lie induces B to make a promise to C. This is not theft, because there is a mere promise to perform, not anything capable of being touched or dealt with. (D. 47, 2, 75.)

A sells B's slave without B's knowledge or consent, but the slave continues in B's possession. This is fraud, but not theft. If, however, A detained B's slave and sold him, it would be theft. (C. 6, 2, 6.)

A, pretending to be B's creditor, requests B to make payment of the debt to C. If the payment is made by B to C in A's presence, it was the same as if the money were given by B to A, and by A to C, and the offence was theft; but if the payment was made in A's absence, it was not theft, inasmuch as the money was never handled by A at all. (D. 47, 2, 43, 2.)

A deposits with B a box for safety during his absence. On his return, B falsely denies the receipt of the box with the intention of cheating. This is not theft, for a mere intention is not enough to constitute theft; but if B deals with the box, as by concealing it, then B is guilty of theft. (D. 47, 2, 1, 2; D. 47, 2, 67, pr.; D. 16, 3, 29, pr.)

2°. The *contrectatio* must be without the consent of the owner (*invito domino*). The owner is understood to forbid if he does not consent. (D. 47, 2, 48, 3.) This, of course, is merely an aspect of the rule, that no wrong can be done to a man with his consent.

A intends to make B a present of a walking-stick. B, without knowing A's intention, desires to appropriate it, and carries it away. Although B was guilty of a fraudulent appropriation, his act was not theft, on account of the consent of A, although such consent was unknown to B. (D. 47, 2, 46, 8.)

A ship is in danger of being wrecked, and amongst other things a cask of wine is thrown overboard near the shore. Titius, who sees the vessel in distress, watches the cask, and when it is driven ashore, carries it home and consumes the wine. This is theft. There may have been no concealment in the manner of carrying off the cask, but it was against the wishes of the owners, and therefore theft. (D. 47, 2, 43, 11.)

And even though a man believes that it is against the owner's will that he is dealing with property lent him free, still if the owner is in fact willing, it is said there is no case of theft. And hence this question has been raised [and decided]. If Titius solicits Maevius' slave to steal certain property of his master's, and to bring it to him; and the slave reports this to Maevius; and Maevius, wishing to arrest Titius in the very act of wrong-doing, allows the slave to take certain property to him, then is it to an *actio* for theft or for corrupting the slave (*servi corrupti*) that Titius is liable, or to neither? [And the answer is, to neither; not for theft, because it was not against the owner's will that the property was dealt with; and not for corrupting the slave, because the slave is none the worse.] (J. 4, 1, 8; G. 3, 198.)

This doubtful point was referred to us, and we looked through the discussions on it by the old jurists; some of whom allowed neither action, some that of theft only. But we set our face against such subtlety, and by our decision formally settled that both actions are to be given. For although the slave is not one whit the worse for the solicitations, and therefore the rules under which the *actio servi corrupti* is brought in do not altogether meet the case; yet the design of the corruptor to ruin the slave's uprightness is brought in so that he is exposed to a penal action, just as if the slave had in fact been corrupted. For a criminal attempt of this sort must not go unpunished, lest it be repeated by some one on another slave that can be corrupted. (J. 4, 1, 8.)

Closely akin to those cases are the instances where an owner parts with his property voluntarily, but under a false pretence. When the false pretence was the personation of a person that had a legal claim, the rule seems to have been applied, that he that is deceived does not consent. But other false pretences

could only be dealt with as fraud, giving rise to an action on that ground (*actio de dolo*), and did not fall under the head of theft.

A, a slave, goes to a money-lender, and procures an advance of money on the representation that he is free. This is not theft, but simple fraud (*dolus*). (D. 47, 2, 52, 15.)

A obtains a loan by falsely pretending (1) that he is rich, or (2) that he will spend the money on merchandise, or (3) that he will give good securities, or (4) that he will immediately repay it. This is not theft, but would support an action for fraud (D. 47, 2, 43, 3.)

Seius arranges to give a loan to Titius, a respectable citizen. Pomponius, knowing that Seius is not personally acquainted with Titius, takes to him another Titius, a man without character or means, and succeeds in obtaining the loan, the proceeds of which he shares with the spurious Titius. Titius commits theft, and Pomponius is an accomplice. (D. 47, 2, 52, 21.)

A slave accustomed to collect money due to his master is manumitted, and, concealing the fact, recovers sums from the debtors of his master. This is theft, because it is a personation of one entitled to collect money. (D. 47, 2, 66, 3.)

Gaius appoints Sempronius his procurator to collect his debts, and notifies the fact to his debtors. Titius goes round, and, pretending to be Sempronius, obtains payment to himself. This is theft. (D. 47, 2, 80, 6.)

3°. To constitute theft, the thief must know that he has not the consent of the owner (*fraudulosa contrectatio*).

There is no theft without an intention to deprive a person of his property, or of the enjoyment of it. In this respect theft corresponds to *injuria*. Theft is an intentional violation of a man's right to his moveable property; *injuria* is a wilful infraction of a man's right to his own person, safety, or reputation.

A picks up in the street a ring that he knows to be B's, intending to return it to B. This is not theft. (D. 47, 2, 43, 7.)

A thief breaks a casket and carries off the jewels. He is not guilty of stealing the casket, but he is of stealing the jewels. (D. 47, 2, 22, pr.)

A gives B some money to carry to C. B carries it, gives a portion to C, and keeps the rest for his own use. This is theft. (C. 6, 2, 7.) But if B was not bound to deliver the identical coins, it was merely breach of contract. (D. 17, 1, 22, 7; D. 47, 2, 43, 1.)

A lent B weights that were too heavy for the purpose of weighing articles bought by B. The vendor can sue B for theft, and also A, if A knew B's intention to cheat. The reason is that the vendor did not intend to part with the possession of his property beyond the just weight; and the excess beyond that was therefore stolen. (D. 47, 2, 52, 22.)

2. Theft of the use of a thing (*furtum usus*).

Theft, in its general sense, includes not only the taking away of what is another's in order to deprive him of it and keep it, but all dealing with what is another's against the owner's will. Thus it is theft for a creditor to make use of a pledge (*pignus*); for a man with whom anything is deposited, to make use of that thing; for a borrower that has received something to use, to put it to

any use any other than that for which it was given. It is theft, for instance, if a man receives plate, to be used at a dinner he is going to give his friends, and then carries it off to the country with him; or if he has a horse lent him free (*commodatum*) for a ride, and takes it beyond a certain distance—as in the case mentioned in the old writers, where the man took the horse into battle. (J. 4, 1, 6; G. 3, 195-196.)

It is decided, however, that those that put things lent them free for one use to another use, are not to be held guilty of theft unless they know that they are acting against the owner's will, and that he, if he knew it, would not allow them; and if they believe that he would allow them, they are clear of the charge. And the distinction is certainly an excellent one; for where there is no intention to steal (*affectus furandi*) [wrongful intent (*dolus malus*)], there is no theft. (J. 4, 1, 7; G. 3, 197.)

1°. Contract of Deposit.—It was the essence of this contract that the person with whom anything was deposited should not use it; his sole duty was to keep it. The question is, what use of it amounts to theft, and what only to breach of contract? The difficulty is that every use implied an absence of authority, and therefore a prohibition (*prohibet qui non consentit*). Suppose a ring were left in deposit, and the receiver wore it, there can be no doubt that this breach of contract would throw on the receiver the risk of the thing; and if it were lost by accident, he would be obliged to pay for it; whereas if he had not worn it, he would not have been liable without being guilty of fraud. But would it be theft? It all depends, says Justinian, on the intention. If the receiver knew that the depositor would never have allowed him to wear it, then he is simply taking advantage of his position to cheat the owner of the use of the thing. (D. 13, 1, 16; D. 47, 2, 76, pr.)

2°. Contract of Loan.—This differs from deposit, inasmuch as it implies a limited or prescribed use granted to the borrower, who takes advantage of the possession given him to use the thing for a different purpose. The case in the text where A, on the pretence of giving a supper, borrows plate and carries it on a journey, illustrates the idea of a theft. If A had borrowed the plate *bona fide*, having no ulterior purpose, but afterwards, being suddenly called away, presumed that the lender would allow him to take the plate with him, he committed no theft; but as he exceeded the limits prescribed, he rendered himself liable for all loss by accident.

3. Theft of possession.

Sometimes, too, a man may commit a theft even of his own property; as when a debtor removes by stealth what he gave a creditor as a pledge [or when I carry off by stealth property of mine of which some one else is possessor in good faith. And hence it is held that if a man hides his own slave that comes back to him, while possessed by some one else in good faith, he commits a theft]. (J. 4, 1, 10; G. 3, 200.)

1. Theft from creditor. The equity of this case is manifest. The creditor has a right to the pledge in his possession until the debt is discharged, and to permit the owner to carry the thing off by stealth would be to allow him by fraud to deprive his creditor of his security. But the provisions of the Roman law went much further. Even if the thing pledged remained in the possession of the debtor, and the debtor fraudulently disposed of it, he committed theft. (D. 47, 2, 66, pr.) The contract of pledge gave the creditor a right *in rem* to the thing pledged, and a wilful violation of this right was, as in other cases, treated as a theft.

Titius let to Sempronius a farm, and, according to the usual custom, an agreement

was made that the crops (*fructus*) should be a security for the rent. Sempronius secretly carries away his crop to deprive Titius of his security. This was theft. (D. 47, 2, 61, 8.)

2. Bona Fide Possessor.—A *bona fide* possessor is one that has received a thing belonging to another in such a manner as to justify him in believing himself to be owner. The owner had a remedy against him for the recovery of the thing, but, as decided by Gaius, if he fraudulently carried it off, it was theft.

A thief or other person that possessed what he believed to belong to another (*mala fide possessor*) could not bring an action for theft, although he had sufficient right to the possession to support an action for the recovery of the thing itself (*condictio furtiva*). (D. 47, 2, 12, 1; D. 47, 2, 76, 1.)

β. Persons (not owners) that could bring an action for Theft.

1. Persons having rights *in rem* to things.

1°. One that had a usufruct—*i.e.*, the right to the use and produce of any property for life or a definite period—could bring the action of theft even against the owner. If the owner was not the thief, both he and the usufructuary could bring the action. (D. 47, 2, 46, 1.)

2°. The person that was entitled to the use only, not the produce (*usuarius*), had the same rights in this respect. (D. 47, 2, 46, 3.)

3°. The *bona fide* possessor, and

4°. The creditor.

The *actio furti* is open to any one that has an interest in the safety of the thing stolen, even though he is not the owner. And therefore it is open to the owner only if it is to his interest that the thing should not be lost. (J. 4, 1, 13; G. 3, 203.)

Hence it is agreed that a creditor can bring the *actio furti* for a pledge that has been stolen, even although he has a debtor able to pay; for it is his interest rather to rest his claim on the pledge, than to bring an *actio in personam*. And so entirely does this hold, that although it is the [owner, *i.e.*, the] debtor himself that has stolen the thing in pledge, none the less the creditor may avail himself of the *actio furti*. (J. 4, 1, 14; G. 3, 204.)

Thus several persons may have an action for theft when a thing is stolen.

A gives his slave to B in security for a debt, but retains possession. Afterwards A delivers the slave to C in usufruct. The slave is stolen. C has an action for damages for what he loses by the theft. (D. 47, 2, 46, 1.) B has also an action for theft for the value of the slave, not of the debt (D. 47, 2, 87); and if there remains anything over, A has an action for the amount by which the value of the slave exceeds that of the debt. (D. 47, 2, 46, 4.)

2. Persons having an interest in a moveable in consequence of a contract.

1°. Letting to hire (*Locatio-conductio*).

And again if a fuller or tailor takes clothes to be cleaned and done up or to be mended for a fixed price, and they are stolen from him, it is he, and not the owner, that has the *actio furti*. For the owner has no interest in seeing that the property is not lost, since he can recover in court by an *actio locati* from the fuller or tailor all that is his. And a purchaser in good faith too, if the thing he bought is made away with, may (although he is not its owner) avail himself in any case of the *actio furti* just as a creditor might. But the fuller and tailor, it is held, can avail themselves of the *actio furti* only if they are solvent; that is, able to pay the value of the property to the owner. For if not, then the owner, since he cannot recover from them what is his, may himself bring the *actio furti;* for in this case the safety of the property is his interest. And it is the same if the fuller or the tailor is only partly solvent. (J. 4, 1, 15; G. 3, 205.)

Theft created a presumption of negligence. (D. 47, 2, 14, 12; D. 47, 2, 14, 10; D. 17, 2, 52, 3.)

2°. Loan (*Commodatum*).

All that we have said of the fuller and the tailor ought to be applied also, the ancients thought, to the borrower (*cui commodata res est*). For as they take pay, and therefore are answerable for the safe-keeping of the thing; so he, by enjoying the advantage of its use, necessarily makes himself answerable in like manner. But our wisdom has amended this, among our other decisions. And now the owner has the option of bringing an *actio commodati* against the borrower if he wishes, or an *actio furti* against the man that stole his property. But after choosing one of these two, the owner cannot change his mind and have recourse to the other. If he has chosen to proceed against the thief, then he that received the thing to use is entirely freed. But if, again, the lender proceeds against him that received the thing to use, then in no way can he avail himself of the *actio furti* against the thief. The borrower, however, when sued for the thing lent him, may have this action against the thief, if only the owner knew that the thing was stolen, and yet proceeded against him to whom it was lent. But if he was ignorant and in doubt whether the property was not with the borrower when he brought the *actio commodati*, and afterwards, on ascertaining the fact, wished to give up that action, and to have recourse to the *actio furti*, then full leave is granted him to do so, and to proceed against the thief without let or hindrance. For he was still in a position of uncertainty when he brought the *actio commodati* against him that received the thing to use. If, however, the borrower has already compensated the owner, then in any case the thief is free from an *actio furti* on the part of the owner; and in the owner's room comes the borrower that has made compensation to the owner for the thing lent him. And it is plain, further, beyond all doubt, that if at first the owner brings the *actio commodati* in ignorance that the thing has been stolen, and afterwards, when he knows this, proceeds against the thief instead, that in any case he is freed that received the thing to use, no matter what the issue of the owner's action against the thief. And the same rules hold whether the man that received the thing on loan is partly or entirely solvent. (J. 4, 1, 16; G. 3, 206.)

When the owner secretly carried off the thing lent from the borrower, it was not theft, unless the borrower had a balance of claim against him for expenses, in which case he had an interest in the retention of the thing, and could sue the owner for theft. (D. 47, 2, 15, 2; D. 47, 2, 59.)

3°. Deposit.

He with whom a thing is deposited is not answerable for its safe-keeping, but is liable only for his own acts of wilful wrong-doing (*dolo malo*). And therefore, if the thing is stolen from him, since he is not liable to an *actio depositi* for its restoration, and thus has no interest in its safety, *he* cannot bring an *actio furti*, but the owner can. (J. 4, 1, 17; G. 3, 207.)

These cases, where a person whose interest in a thing is based wholly on a relation of contract can bring an action for theft, seem to be opposed to the general conception of theft; namely, as an offence against a right *in rem*. The hirer or borrower, however, has certainly a right *in rem* to the thing hired or borrowed, derived from the consent of the letter or lender, and limited thereby. The hirer enjoys by a species of delegation the owner's right to the possession of the thing. Hence, a person in the absence of the owner, and therefore without his authority, undertaking the custody of his property (*negotiorum gestor*), although responsible for everything that was stolen through his fault, could not sue the thief. (D. 47, 2, 85.) In like manner a tutor, whose powers were conferred on him by law, and were not derived from the consent of the pupil, could not sue for theft of the pupil's property, although he was bound to make good the loss. It could not be said that the pupil had delegated to the tutor the right of possession, and with it the right to sue the thief that deprived him of the possession. But in these cases the owner could not require the tutor or agent to make good the loss, without first giving up his rights of action against the thief. (D. 47, 2, 53, 3.)

3. A person having only a right *in personam* in respect of a thing, could not bring the action for theft.

A bequeaths Stichus to B. Before Stichus is delivered to B he is stolen. B has no action for theft. (D. 47, 2, 85.)

A sells Stichus to B, but before delivery Stichus is stolen. B, inasmuch as he does not become owner until Stichus is delivered to him, cannot sue the thief. He can, however, under the contract, require A to allow him to sue the thief in A's name. (D. 47, 2, 14, 1.) This opinion was not held by Paul, who argued that both purchaser and vendor could sue the thief, inasmuch as each had an interest in the safe delivery of the slave. (Paul, Sent. 2, 31, 17.)

A sells Stichus to B, and B carries off Stichus furtively, without paying the price. B commits theft. (D. 47, 2, 14, 1; D. 47, 2, 80, pr.)

γ. Abettors of Theft.

1. What is abetting?

Sometimes a man is liable to an *actio furti* that has not in person committed a theft; as, for instance, he that has aided and advised a theft. But, certainly, he that has lent no aid (*ope*) to the commission of a theft, but only advised and encouraged (*consilio*) the thief, is not liable to the *actio furti*.

Among these are to be reckoned the man that knocks money out of your hand in order that another may make off with it; or that stands in your way in order that another may steal what is yours; or that puts your sheep or oxen to flight that another may take them as they flee—as in the case in the old writers of the man that put a herd to flight by means of a red cloth. But if any such act is done wantonly, and not to aid in the commission of a theft [we shall see whether the *utilis actio* under the *lex Aquilia* ought to be given—for the *lex Aquilia de damno* punishes even carelessness], an *actio in factum* ought to be given.

He too aids and advises the commission of a theft that places ladders under the windows, or breaks open the windows or a door in order that another may commit a theft; or that lends iron tools to break open a house, or ladders to put under windows knowing for what purpose they are lent. (J. 4, 1, 11; G. 3, 202.)

A tame peacock has escaped, and A pursues it until the bird is exhausted and is caught by B. A is liable for theft. (D. 47, 2, 37.)

A persuades B's slave to run away. This is not theft; but if the slave carries with him any of his master's property, A is said to abet the theft. (D. 47, 2, 36, 2.)

2. Responsibility of abetting.

But when Maevius aids Titius in committing a theft, both are liable to the *actio furti*. (J. 4, 1, 11.)

Each person abetting or aiding a theft is responsible as if he alone had done it; so that payment by the others of the penalties they have incurred does not exonerate him. This rule, which was adopted from a feeling of hostility to thieves, pressed with great hardship on a man when several of his slaves were concerned in the theft, of a single article. (*Si familia furtum fecisse dicetur*, D. 47, 6.) The Prætor, therefore, gave an option to the master, either to surrender all the slaves that had been concerned in the theft, or to pay the amount that a single freeman would have had to pay if he alone had committed the theft. (D. 47, 6, 1.) Every master got the benefit of this option, if the theft had been committed without his knowledge or against his orders. It may be added that the same option was given to the master when several of his slaves had committed damage (*damnum injuria*), (D. 9, 2, 32), or robbery (D. 47, 8, 2, 15), but not when the offence was against the person of a freeman (*injuria*). (D. 47,

10, 34.) In this latter case the responsibility of the master was estimated as if each slave were free.

It is to be noted also that a person might be responsible for abetting a thief when the principal was not.

Persons in the *potestas* of parents or masters, if they steal from them, commit a theft, and the thing taken becomes stolen property; and no one, therefore, can acquire it by *usucapio* before it returns into the owner's power. But the *actio furti* does not arise, because on no ground can an action arise between them. If, however, some one else has aided and advised the theft, since a theft is actually committed, he is accordingly liable to the *actio furti*; because, in truth, the theft was accomplished by his aid and advice. (J. 4, 1, 12.)

3. Vicarious responsibility.

And, again, the master of a ship, or an innkeeper, or a livery-stable keeper, is liable to an *actio quasi ex maleficio* for any loss suffered by wilful wrong or theft committed in his ship, or inn, or stable: provided always that the wrong-doing (*maleficium*) is not his personal act, but that of some one employed by him in the management of the ship, or inn, or stable. For since in this case there is no action against him *ex contractu*, and since he is to some extent in fault for employing wicked servants, he is liable to an *actio quasi ex maleficio*. In these cases it is an *actio in factum* that is open,—a remedy given to an heir, but not against an heir. (J. 4, 5, 3.)

4. And finally, we must observe, the question has been raised whether a person under puberty, that takes away what is another's, commits a theft. It is held [by most] that as theft essentially implies a theftuous aim, a person under puberty incurs an *obligatio* on such a charge only if very near the age of puberty, and well aware, therefore, of the wrongful nature of his acts. (J. 4, 1, 18; G. 3, 208.)

II. Robbery. *Vi bonorum raptorum.* Like *furtum*, this offence is confined to moveables. (C. 9, 33, 1.)

A robber is liable also to an *actio furti*. For who deals with what is another's more against the will of the owner than he that robs by force? And therefore he is rightly called a shameless thief. There is, however, a special action grounded on that offence which the Prætor brought in, called *vi bonorum raptorum*.[1] (J. 4, 2, pr.; G. 3, 209.)

This action, however, is open only against him that forcibly carries off goods with the intention to do a wilful wrong (*dolo malo*.). He, therefore, that is led by some mistake to think a thing his own, and in his ignorance of law carries it off by force in that spirit, supposing that an owner may take away what is his even by violence from its possessors, ought to be acquitted.

[1] The edict referred to is in the following terms:—"Si cui dolo malo, hominibus coactis damni quid factum esse dicetur, sive cujus bona rapta esse dicentur: in eum qui id fecisse dicetur, judicium dabo." This edict was probably introduced in the Prætorship of Lucullus, B.C. 77. According to the construction put upon it by Ulpian, a person acting alone was liable to the action: *hominibus coactis* was not essential. (D. 47, 8, 2, 7.)

And in accordance with this, he that has carried off goods by force in that same spirit is not liable to an *actio furti*. (J. 4, 2, 1.)

A tax-gatherer carries off cattle of a farmer to satisfy a claim that turns out to be unfounded. He does not commit robbery, because he believes he has a right. (D. 47, 8, 2, 20.)

In this action it is not essential that the property should be *in bonis* of the plaintiff. For whether it is *in bonis* or not, if only it is *ex bonis* (was part of his goods), the action will stand. And so, if anything has been borrowed or hired by Titius, or is even left in pledge or deposited with him on such terms that he has an interest in keeping it from being taken away—if, for instance, in the case of a deposit, he has promised to answer for negligence (*culpa*)—or if he is possessor in good faith, or has a usufruct or any other right creating an interest in preserving the goods from the robber—then we must say that to him this action is open. And by it he gains not ownership, but only what he, as victim of the robbery, claims to have had taken away from among his goods—that is, from among his substance. And generally we must say, that whatever grounds give rise to an *actio furti* in case of secret theft, those same grounds will support this *actio* for any one (if open force is used). (J. 4, 2, 2.)

But a thoughtful care for such cases as these may only open up a way for robbers to satisfy their greed and pass unpunished. And therefore a wiser provision has been made in this respect by the constitutions of our imperial predecessors. For no one is allowed to take by force anything that is moveable or self-moving, even although he thinks that same thing his own. And if any one acts contrary to the statutes, if the thing is his own, then he ceases to be owner ; and if it is another's he must first restore the thing, and then make good also its value. And this applies not only to moveables that can be taken away by force, but (as the constitutions declare) to cases of forcible entry on any landed property, in order to stop men from every form of robbery on such pretexts. (J. 4, 2, 1.)

This remedy was introduced by Valentinian Theodosius and Arcadius A.D. 389. (C. 8, 4, 7.) Previous to this enactment, a person recovering his property by violence lost possession only, and thereby the position of defendant in an action for the recovery of the property.

(B.) Offences against Usefulness. (*Damnum Injuria.*)

Provision was made in the XII Tables for redressing wrongful damage to property, although there is some doubt as to the exact terms. Subsequent laws seem to have been made, but they were all abrogated by the *lex Aquilia* upon which henceforth the law of wrongs to property depends. It was a *plebiscitum* carried by Aquilius, a tribune of the Plebs (B.C. 287).

The terms of the *lex Aquilia* are given in the Digest.

Lex Aquilia capite primo cavetur : Qui servum servamve, alienum alienamve, quadrupedem vel pecudem, injuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto. (D. 9, 2, 2, pr.)

Tertio autem capite ait eadem lex Aquilia : Caeterarum rerum, praeter hominem et pecudem occisos, si quis damnum alteri fecit, quod usserit, fregerit, ruperit

injuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto. (D. 9, 2, 27, 5.)

In its terms the Aquilian Law did not apply to injuries to freemen; but, by a Prætorian extension, was made also to embrace that class of wrongs. It applied also to immoveables, as will be afterwards noticed; but in the main it was confined to damage to moveable property, whether slaves, animals, or inanimate things.

α. The constituent elements of wrongful harm.

1. The acts or defaults that constitute wrongful harm.

The *actio damni injuriæ* is established by the *lex Aquilia*. The first chapter provides that if any one wrongfully (*injuria*) kills a slave or four-footed beast reckoned among cattle belonging to another, he shall be condemned to pay to the owner the highest value that property bore within the year preceding. (J. 4, 3, pr.; G. 3, 210.)

And the aim of the statute in providing not absolutely for four-footed beasts, but only for those that are reckoned among cattle (*pecudes*), is this:—It would have us know that the provision does not apply to wild beasts or to dogs, but only to those animals that can properly be said to graze (*pasci*)—horses, for instance, mules, asses, oxen, sheep, she-goats. Swine, too, it is held, are included, for they come within the term cattle, seeing they too graze in flocks. And so Homer says in the Odyssey, in a passage cited by Aelius Marcianus in his Institutes—"Him you will find sitting near his swine; and they are grazing (νέμονται) near the rock Korax, hard by the spring Arethusa." (J. 4, 3, 1.)

Elephants and camels, because beasts of burden, are included in this chapter. (D. 9, 2, 2, 2.)

The second chapter of the *lex Aquilia* is not in use. (J. 4, 3, 12.)

This chapter referred to *adstipulatio*. (See Book II. Div. I., Accessory Contracts.)

The third provides for every other kind of damage. Therefore if a man wounds a slave, or a four-footed beast reckoned among cattle, or wounds or kills a four-footed beast not reckoned among cattle, as a dog, or wounds or kills a wild beast, as a bear or lion, this chapter establishes an action to be brought against him. And wrongful damage (*damnum injuria datum*) to all other animals, and also to anything without life, gives rise to a claim under this part of the statute. For if anything is burned or smashed (*ruptum*) or broken, an action is established by this chapter. The one term *ruptum* might indeed suffice for all those grounds of action, for it means spoiled (*corruptum*) in any way. And therefore not only burning and breaking, but cutting too, and crushing and spilling and destroying, or making worse in any way, are included under this term. Nay, an opinion has been given that if a man puts anything into another's wine or oil to spoil its natural goodness, he is liable under this part of the statute. (J. 4, 3, 13; G. 3, 217.)

According to the interpretation of this law, only those injuries were understood as included that were caused by the body to the body (*corpore corpori*). But this narrowness was removed by the Prætor.

But it has been held that under this statute there is a direct action only if the man does the damage directly with his own body. And therefore

against him that does damage in some other way *utiles actiones* are usually given. If, for instance, a man shuts up another man's slave or cattle so as to starve them to death, or drives a beast so furiously as to founder it, or terrifies cattle into rushing over a cliff, or persuades another's slave to climb a tree or go down a well, and he in climbing or going down is either killed or injured in some part of his body, then a *utilis actio* against him is given But if a man thrusts another's slave from a bridge or from the bank into a river, and the slave is drowned, then, from the very fact that he threw him in, it is easily seen that it was with his body he did the damage, and therefore he is liable under the *lex Aquilia*. But if it is not with the body that the damage is done, and no one's body is injured (*nec corpore nec corpori*), but in some other way damage has befallen some one, then as the *actio Aquilia* is not enough, whether direct or *utilis*, it is held that the guilty person is liable to an *actio in factum*. For instance, if a man, moved by pity, frees another's slave from his fetters in order that he may run away. (J. 4, 3, 16; G. 3, 219.)

Utilis Actio. An *actio* was said to be *utilis* when it was granted in cases to which it was not strictly applicable through the intervention of the Prætor. The object was accomplished by a modification of the *formula* by words wide enough to apply to the case it was intended to cover. The precise form in which this was done is not known; no example of a *formula* of the kind is to be found in the sources. But it is likely that the alteration was slight and consistent with the original terms of the action. In the case of the *lex Aquilia*, the Prætor extended the scope of the statute by giving a remedy (*utilis actio*) in case of indirect damage. The construction put upon the statute limited its application to direct damage. A curious parallel is to be found in English law, by the introduction of the action of trespass on the case, by the side of the original action for trespass. The word "*utilis*" is worthy of notice; very frequently the Prætorian innovations were said to be "*utilitatis causa.*" No more striking example could be quoted of the wide and flexible authority exercised by the Prætor.

Actio in factum. It would appear that cases arose within the mischief intended to be redressed by the *lex Aquilia*, but not covered by the statute, nor by the wider phraseology of the *actio utilis*. For these cases the Prætor introduced, says Pomponius (D. 19, 5, 11), *actiones in factum accomodatas legi Aquiliae*, elsewhere said to be *ad exemplum legis Aquiliae*. (D. 9, 2, 53.) Probably the name *actio in factum* was due to the circumstance that the Prætor did not attempt to meet the case by a variation of the terms of the statute, but stated in the *formula* that if the fact was so-and-so, then the *judex* should have power to condemn the defendant to pay compensation. Thus all reference to the authority of the statute was left out. Whether this was the case or not, cannot confidently be determined in the absence of examples of *formulae* in the *actio utilis* and the *actio in factum* respectively. Moreover, once the Prætor definitively altered the law, especially under the later Roman procedure, not much practical importance attached to mere difference of form of expression in the several actions. This may enable us to understand the conflict between the statement of the text as to the distinction between *actio utilis* and *actio in factum*, in the case of the *lex Aquilia*, and the examples cited from the Digest *infra*. The jurists keep up the distinction clearly between direct damage provided for by the statute, and damage that was not direct, but whether in the latter case it was *actio utilis* or *actio in factum* they did not take the trouble always to distinguish. But the statement in the text doubtless represents the correct theoretical distinction.

A pours B's corn into the river and destroys it. This case is covered by the terms of the statute. (D. 9, 2, 27, 19.)

A strikes B's money out of his hand, and it falls into a river and is lost. In this case there lies an *actio in factum.* (D. 9, 2, 27, 21 ; D. 19, 5, 14, 2.)

A gives B's oats to his own horse, or drinks B's wine. As no damage was done to the oats or wine, the injury is indirect. *Utilis actio.* (D. 9, 2, 30, 2.)

A midwife gives her patient poison by pouring it down her throat. This is a direct injury under the statute. (D. 9, 2, 9.) But if she merely gave it to the patient, who drank it herself, it is indirect, and there lies an *actio in factum.* (D. 9, 2, 7, 6.)

A lights a fire, which it is B's duty to watch. B falls asleep, and in consequence the house is burnt. It may be said B did nothing, and A did no wrong. The injury being indirect, there lies against B the *utilis actio.* (D. 9, 2, 27, 9.)

A smoked B's bees, and drove them away or killed them. Ulpian says, as A did not kill them, but merely created the means of their death, the remedy is not by the direct action, but by an *actio in factum.* (D. 9, 2, 49, pr.) This decision disagrees also with the distinction made by Justinian in the text, for when they are killed, the harm is done to the bodies of the bees.

A held a slave while B killed him. B committed a direct injury, A only contributed to it indirectly. Against A lies an *actio in factum.* (D. 9, 2, 11, 1.)

A scares a horse on which the slave of B is riding, and the slave is thrown off into a river and drowned. Against A lies an *actio in factum.* (D. 9, 2, 9, 3.)

A cuts a rope by which a boat is moored ; the boat drifts and is lost. Against A lies an *actio in factum.* (D. 9, 2, 29, 5.)

A drives his cattle into B's field without B's authority, and allows them to eat the grass. Against A lies an *actio in factum.* (C. 3, 35, 6.)

A sets on a dog that bites B. If A held the dog and set him on, the injury is direct ; but if he did not hold the dog, the action is *in factum.* (D. 9, 2, 11, 5.)

2. The damage must be capable of being measured in money in order to support an action on the *lex Aquilia.* But when the damage cannot be so estimated, recourse may sometimes be had to the remedy for *injuria.* Thus, if a blow or injury to a slave does not depreciate his value in the market, it is not *damnum ;* it may, however, be *injuria.* If the slave requires medical attendance, then he is considered as receiving *damnum.* (D. 9, 2, 27, 17.) It may, indeed, happen that some injuries (as castration) enhance the pecuniary value of a slave ; and in that case the remedy of the master is to sue for the wrong to the person (*injuria*). (D. 9, 2, 27, 28.)

3. The right that an owner has against men generally is not that the usefulness of his moveables shall not be impaired by any act of theirs ; that would be putting it too wide, for men are not responsible for accident ; but his right is that they shall not, by their malice or negligence, impair the usefulness of his property. This delict is accordingly wider than *injuria.* There can be no *injuria* without intention ; *damnum injuria* may result from carelessness only. Hence a noticeable difference. A mistake as to the character of the person insulted or assaulted sometimes removed the attack from the category of *injuria.* But if a man kills a slave under the belief that he is a freeman,

he does not escape paying damages to the owner of the slave for his loss. (D. 9, 2, 45, 2.)

He kills wrongfully (*injuria*) to whose malice (*dolus*) or negligence death is due; nor is there any other statute to punish damage done otherwise than wrongfully. And therefore he goes unpunished that without negligence or wilful wrong does damage by some accident. (G. 3, 211.)

And he that kills by accident is not liable under this statute, if only no negligence is shown on his part. For otherwise, under this statute, a man is liable for negligence quite as much as for malice. (J. 4, 3, 3.)

Therefore, if a man is playing with javelins, or practising, and pierces your slave as he is passing, a distinction is made. For, if the man is a soldier, and in the Campus Martius, or any other place where men usually train, the act does not imply negligence on his part; but if any one else does such a deed, then he is chargeable with negligence. And the same rule of law applies to the soldier too if he does the deed in any other place than that set apart for soldiers to practise in. (J. 4, 3, 4.)

And again, if a pruner, by breaking down a branch from a tree, kills your slave as he passes, then if this is done near a public road or one used by the neighbours, and he did not first shout out so that an accident might be avoided, he is chargeable with negligence. But if he did first shout out and the slave did not care to take heed, the pruner is free from blame. And so too if he happened to be cutting at a place quite off the road or in the middle of a field, although he did not first shout out; because there no outsider had any right to go to and fro. (J. 4, 3, 5.)

And further, if a doctor, after operating on your slave, fails to see to the healing of the wound, and therefore the slave dies, he is chargeable with negligence. (J. 4, 3, 6.)

Want of skill, too, is reckoned as negligence; if, for instance, the doctor kills your slave by bad surgery or by giving him wrong drugs. (J. 4, 3, 7.)

And if mules that the driver from want of skill cannot hold in run over your slave, the driver is chargeable with negligence. And even if it was from want of strength that he could not hold them in, though another stronger man could have, he is liable for negligence all the same. And the same decisions apply to the rider that cannot keep in his horse, whether from want of strength or from want of skill. (J. 4, 3, 8.)

A sets his stubble or thorns on fire, and the flames are carried so far as to burn B's corn or vines. Is A responsible? It depends on the circumstances of the case. If it was a windy day, and A did not take precaution against the fire spreading, or if he has not watched it, he is liable. But if he took all reasonable care, and a sudden gust of wind carried the flames, he is not. (D. 9, 2, 30, 3.)

They that place traps to catch animals in roads or pathways are responsible for all damage; but not if the traps are in places usually chosen for the purpose. (D. 9, 2, 28.) If, however, a person that has no right to place traps does so, and cattle grazing on the adjoining land have been caught in them, the person that set the traps is responsible. (D. 9, 2, 29.)

Contributory Negligence. — Even a person negligently causing an injury is relieved from blame if the damage is

accomplished only by the concurrent negligence of the sufferer. Hence there was no remedy when the sufferer had the power to escape from the danger, and did not exert himself to do so. He could only claim compensation when he either did not foresee the injury, or could not have helped himself if he had foreseen it. (D. 9, 2, 28, 1.)

4. In certain cases, when a man was so situated that he could not help inflicting some injury upon another's property in order to avoid a greater to his own, he was allowed with impunity to do that injury.

A house might be pulled down to prevent the spread of flames from a fire ; and even if the precaution proved to be unnecessary, the owner of the house had no redress, unless it had been pulled down in an irrational panic, and not from a reasonable view of the danger. (D. 9, 2, 49, 1.)

A ship is driven in a storm among the ropes anchoring another vessel, and it cannot be extricated except by cutting the ropes. The owner of the vessel in danger has a right to cut the ropes, and does not subject himself to any action for damages. The same rule applied when a vessel without any fault had got entangled among fishermen's nets. It could cut its way out. (D. 9, 2, 29, 3.)

β. What persons (besides owners) may sue for wrongful harm?

As in the case of *furtum*, the delict of *damnum injuria* might be committed against any one having a right *in rem* to a thing, although not owner (*dominus*). Under the Aquilian law, indeed, this was not so ; the only person that had a remedy under that enactment was the owner. (D. 9, 2, 11, 6.) But just as the Prætor gave a remedy for indirect as well as direct damage, so he provided a remedy to persons having an interest in the usefulness of the property, although their interest fell short of full ownership.

1. The *bona fide* possessor had, Ulpian tells us, an *actio in factum* against all that did harm to his moveable property, even if it was the owner himself. (D. 9, 2, 17.)

2. The *fructuarius* and *usuarius* also had a remedy (*utile judicium*) after the analogy of the Aquilian law (*ad exemplum legis Aquiliæ*), even against the owner. (D. 9, 2, 11, 10 ; D. 9, 2, 12.) Hence if the owner has killed a slave that he had given in usufruct to another, he must give compensation.

3. To one having a servitude.

A has an aqueduct over B's land, and it is pulled down by C. According to a rule hereafter to be more fully explained, the aqueduct, being attached to B's land, belonged in law to B. A, however, can bring an action (*actio utilis*) against C for the damage. (D. 9, 2, 27, 32.)

4. Secured creditor. The right of a creditor to the thing pledged may be as effectually impaired by injuring the thing as by stealing it. He has, therefore, the same action as a *bona fide* possessor, even against the owner. (D. 9, 2, 17.) He may sue for the amount of his interest in the debt, and the owner may sue for the balance, if any. (D. 9, 2, 30, 1.)

5. Borrower. The borrower of clothes destroyed while in his custody by another has no remedy. The action must be brought by the owner (*dominus*). (D. 9, 2, 11, 9.)

B. Duties of the owner of animals (*res se moventes*).

I. *Pauperies.*

On account of irrational animals that from wantonness or heat or their savage nature have done damage (*pauperies*), a *noxalis actio* is set forth in the statute of the XII Tables. (But if those animals are given up in satisfaction of the wrong, then the defendant is free, for so the statute expressly provides.) Suppose, for instance, that a kicking horse or an ox in the habit of goring has kicked or gored a man, then this action lies. But it applies to those animals only that are stirred up contrary to the nature of their kind; for if they are wild beasts by blood, the action is void. If, therefore, a bear escapes from his owner and then does harm, his former owner cannot be sued; for he ceased to be owner when the wild beast escaped. *Pauperies* is damage done without *injuria* on the doer's part. For indeed no animal can be said to do an *injuria*, seeing it lacks sense. So much for the *noxalis actio*. (J. 4, 9, pr.)

The XII Tables gave an action if a quadruped had done harm. (*Si quadrupes pauperiem fecisse dicetur.*) (D. 9, **1**, **1**, pr.) If any other animal than a quadruped did the injury, an action was also provided by the Prætor (*utilis actio*). (D. 9, 1, 4.) This rule applies only to tame animals, not to wild, for the reason stated in the text. The analogy with *noxa* is kept up. *Noxia* is when a slave does that which in a freeman would be wrong; *pauperies* is the damage done by an animal contrary to its usual nature, and therefore bearing a kind of resemblance to wrongs. If a tiger destroys a human being, it but acts according to its nature; but when an ox gores, the act may be regarded as a breach of the good behaviour that is its second nature. In another point, the same analogy was preserved. The responsibility for the mischief followed the animal, and fell upon the person to whom for the time it belonged (*noxa caput sequitur*). (D. 9, 1, 1, 12.)

No action lay if the animal were irritated or roused by another. (Paul, Sent. 1, 15, 3.) Thus when a horse was struck by a *dolo* or a spur, and reared and kicked a person, it did not

commit *pauperies*. The injury was not the result of an outbreak of unusual badness, but was due to the mismanagement of the horseman; and therefore the owner of the horse is not responsible, but only the person that irritated the horse. So if the fault is with the driver, or the mischief results from the beast being overloaded, or from the nature of the place where it happens, no responsibility attaches to the owner, but compensation may be demanded from the person in the wrong. (D. 9, 1, 1, 4.)

II. Edict of the Ædile in regard to animals that do not fall under the head of *pauperies*.

It must be borne in mind, too, that an edict by the Ædiles forbids us to keep a dog, a boar, a wild boar, a bear, or a lion, where there is a path in common use. And if despite this we do so, and a freeman suffers hurt, the owner will be condemned to pay such a sum as the judge shall think fair and right; while for all other damage the owner must pay double the loss. And beside these actions allowed by the Ædiles, the *actio de pauperie* too will stand. For when several actions, especially if penal, bearing on the same matter, meet, recourse to one never does away with another. (J. 4, 9, 1.)

Justinian omits the penalty of 20 *solidi* for killing a freeman.

When a dog is chained in a house, and some one stumbling on it accidentally is bitten, the owner is not liable (D. 9, 1, 2, 1); but if the owner takes it into a place where he ought not, or by not keeping it sufficiently in hand allows it to slip, he is responsible for his negligence and must pay all the damage; nor does he escape by the surrender of the dog. (D. 9, 1, 1, 5.)

Second, Rights to Immoveables.

A. Rights of owner against all men generally.

(A.) Deprivation of simple possession.

I. By Fraud. Removing landmarks (*de termino moto*).

An immoveable, from its nature, cannot be stolen. Theft, therefore, has no application to land. There is, however, an analogous offence—removing the landmarks, and stealing land by inches. We are told by Dionysius Halicarnassus (Antiq. Rom. 2. 75) that Numa made a law on the subject. Although Numa may be regarded as a myth, there can be no doubt that as soon as private property in land was recognised, the offence of removing landmarks had to be provided for. Numa, we are told, ordered every man to mark the boundary of his land, and to set up stones, which were made sacred to *Jupiter Ter-*

minalis, and that, once a-year, on a day appointed, the people should assemble and offer up sacrifices of grain and fruits at the boundaries. This is the mythical origin of the feast of the *Terminalia*. If anyone dared to remove or shift a landmark, he was devoted to the god that watched boundaries, and could be killed by anyone with impunity. The same sanction was extended to the *Ager Romanus*, and the same punishment denounced against those that took from it to increase their *ager privatus*.

The Agrarian law passed by Caius Caesar established a fine of 50 *aurei* for every landmark thrown down or shifted, and allowed anyone to bring the action. (D. 47, 21, 3, pr.) Nerva allowed a master to pay the fine, if his slave had removed a landmark without his knowledge; and if the master refused, the slave was condemned to death. (D. 47, 21, 3, 1.) Hadrian made the offence a crime. (D. 47, 21, 2.)

II. By Force. (*De vi et vi armata.*)

As there could be no theft of an immoveable, so there could be no robbery of it. Still an owner might be ejected from his lands by force, and this constituted an infraction of his rights, for which a remedy was provided, not by the usual method of actions, but by interdict. (D. 43, 16, 3, 15.)

1. The ejectment of any person from an immoveable by force, with or without weapons, was a wrong remediable by interdict. The essential characteristic of it was, however, that it was available for a mere possessor, whether he was owner (*dominus*) or not. But it may be regarded as part of the legal protection of owners, for of course an owner out of possession could not be dispossessed by violence or in any other way.

2. A distinction was drawn between force with weapons (*vis armata*) and force without weapons (*vis cottidiana*). The most important distinction between the two forms of force was this: any possessor, however unjust his possession, was entitled to protection against armed violence; but a person that had acquired possession by fraud or force, or was a mere tenant-at-will of the ejector, had no redress if he were dispossessed by force without weapons. (D. 43, 16, 14.)

An interdict for recovering possession is usually given when a man has been ejected by force from the possession of a farm or a house. He has then given him the interdict *Unde vi* [which commences, *Unde tu illum vi dejecisti*]. (J. 4, 15, 6; G. 4, 154.)

By it the ejector is compelled to restore possession, if only the ejected did

not get possession from his opponent by force, by stealth, or by leave (*nec vi nec clam nec precario*). But if he did, he can be ejected with impunity. (G. 4, 154.)

Sometimes, however, the Prætor will compel me, when I have ejected a man that got possession from me by force, by stealth, or by leave, to restore possession,—as, for instance, when I have ejected him with arms. For on account of the aggravation of the offence I must suffer punishment so far as to reinstate him in possession. (G. 4, 155.)

Thus a person forcibly dispossessed could resort to simple force, without weapons, to recover possession. This did not, however, interfere with the right of self-defence. An armed attack could be repelled by arms; and even if, in the vicissitudes of the conflict, the possessors should be turned off their own land, they still had a right to use arms, if possible, to get back. The whole fight must, however, be a single transaction; if, being turned out, the owner retired, and after recruiting his forces renewed the conflict, he would not be justified (*non ex intervallo sed ex continenti*). (D. 43, 16, 3, 9.)

But in the time of Justinian this distinction was no longer regarded.

By the interdict *Unde vi* the ejector is compelled to restore possession, even although the ejected got possession from him by force, by stealth, or by leave. But under our sacred constitutions, as we have said above (p. 242), if any man seizes on a thing by force, then if it is part of his goods he is deprived of its ownership; if it belongs to another, he is compelled first to restore and then to pay its value to the victim of his force. And further, he that ejects anyone from possession by force is liable under the *lex Julia de vi* for employing force, either private or public. Force is private if no arms are used; but if arms are used to drive a man out of possession, then the force is public. And by the name arms is to be understood not only shields and swords and helmets, but also clubs and stones. (J. 4, 15, 6; G. 4, 155.)

If there are several ejectors, and only one has a rod or sword, it gives the character of armed violence to the attack. (D. 43, 16, 3, 3.) Even if they came unarmed, but took them up in the fight (D. 43, 16, 3, 4), or brought arms and refrained from using them, it was armed force. (D. 43, 16, 3, 5.) It was essential, however, that possession should be gained by the exercise of force, and not by mere threats. (D. 43, 16, 3, 7.)

(B.) Rights to the enjoyment and use of an immoveable.

I. Secretly cutting down trees (*arborum furtim caesarum*) (D. 47, 7) was a special offence created by the XII Tables, but scarcely distinguishable from theft. When anything attached to an immoveable was removed, it was at once regarded as a moveable, and the person that took it as a thief. If the person that cut or destroyed a tree had no intention to steal, but had a simple desire for mischief, then he was responsible

for *damnum injuria.* Now, as in cutting a tree a person could be actuated only by one of those two motives, either stealing or mischief, there would seem to be no necessity for creating the special offence *arborum furtim caesarum.* The penalty fixed by the XII Tables was changed by the Prætor into a penalty of double the value of the trees. (D. 47, 7, 7, 7.)

II. Secretly or forcibly interfering with an owner in the use of his land. (Interdict *quod vi aut clam.*)[1]

1°. What acts constituted a wrong remediable by this interdict? The interdict *quod vi aut clam* applied only to immoveables (*quaecunque in solo vi aut clam fiunt*, D. 43, 24, 1, 4), and provided generally for most injurious acts done thereto. (D. 43, 24, 20, 4.)

A pours something down B's well, and spoils the water. (D. 43, 24, 11, pr.)

A has pushed B's vines on to his (A's) own land, and they have taken root, so that B has lost the right to remove them. (D. 43, 24, 22.)

A carries away the stakes supporting B's vines. (D. 43, 24, 11, 3.)

A pulls down B's house. (D. 43, 24, 7, 9.)

A carries away B's tiles lying ready to be placed on his house; this is theft. (D. 43, 24, 9, pr.) If, however, the tiles are on the house (D. 43, 24, 7, 10), whether actually fixed to the roof or simply lying thereon (D. 43, 24, 8), it is not theft, but a wrong remediable by the interdict.

A lops the branches of B's trees. (D. 43, 24, 9, pr.)

A removes from B's land or house any fixture (*aliquid aedibus adfixum*). (D. 43, 24, 9, 2.) This does not include keys, door-bars not fixed to the door, lattices or windows not fixtures. (D. 43, 24, 9, 1.)

A goes upon B's farm and scatters the dung from his dung-heap. If A scattered it over fields already manured, which might be injured from the excess, it was a violation of B's right to his immoveable. (D. 43, 24, 7, 6.)

A ploughs B's meadow, or digs a ditch in his land. (D. 43, 24, 9, 3; D. 43, 24, 22, 1.) But this was not an offence when done by a tenant in due course of cultivation, even against the wishes of the owner, unless harm was done by it. (D. 43, 24, 7, 7.)

A lops pollards (*silva caedua*) belonging to B. If they are unripe, it is an offence (D. 43, 24, 18, pr.); if mature, no harm is done to the owner, and there is no offence, unless A intends to carry them off for his own use; in which case he commits theft.

2°. To constitute a wrong, the injurious acts must be done by force or secretly; that is, as interpreted by the jurists, against the will or without the consent of the owner.

Ulpian says the definition of Quintus Mucius Scaevola satisfied him. A person does anything by force (*vi*) when he does what he is forbidden to do by the owner. (D. 43, 24, 1, 5; D. 50, 17, 73, 2.)

Three definitions are given in the Digest of secret damage.

A person does a thing secretly (*clam*) when he does that which he knows to be disputed, or likely to be made the subject of dispute (Quintus Mucius Scaevola,

[1] *Ait Prætor: Quod vi aut clam actum est, qua de re agitur, id quum experiendi potestas est, restituas.* (D. 43, 24, 1.)

D. 50, 17, 73, 2) ; or when he does something without the knowledge of his adversary, and has not informed him of it, provided he either expected, or might reasonably expect, a dispute with him (D. 43, 24, 3, 7, Cassius) ; or when he conceals an act from a person that he knows would forbid it, and either thinks, or has reason to think, that it would be forbidden. (D. 43, 24, 3, 8, Aristo.)

As in the case of theft, the remedy here described may be resorted to by anyone having an interest in the immoveable, even against the owner. (*Non solum domino praedii sed etiam his quorum interest opus non factum esse.*) (D. 43, 24, 11, 14.) Hence by the usufructuary. (D. 43, 24, 12.)

III. In certain cases the interdict *uti possidetis*, although having essentially a different scope (see *Possessio*, Appendix to *Dominium*), was admissible as a remedy for injurious acts done to land.

To prohibit a man from building on his own ground was in a sense robbing him of possession. (D. 43, 17, 3, 2; D. 41, 2, 52, 1.) So when a tenant (*inquilinus*) refuses to allow the owner to enter and repair. (D. 43, 17, 3, 3.) When a neighbour places his rafters partly on my wall and partly on his own, he may be compelled to take them off by the interdict *uti possidetis*. (D. 43, 17, 3, 9 ; D. 43, 17, 3, 6.)

IV. Damage. *Damnum injuria.*

The action founded on the Aquilian law, which has been explained in its application to moveables, was also available for similar damage done to immoveables, as setting a house or vineyard on fire (D. 9, 2, 27, 7), or pulling down a house. (D. 9, 2, 27, 31 ; C. 3, 35, 2.)

B. Rights of owners of conterminous immoveables.

I. "The Prætor says, when a tree from your house hangs over his house, if it is your own fault that you do not take it away, I forbid the use of force to hinder him then from freely taking it away and keeping it himself." (D. 43, 27, 1.)[1]

When a tree growing upon A's land overhangs the field or building of B, if A does not cut it down, he must suffer B to do so. In the case of a house, the rule is subject to no qualification, but in the case of a field it applies only to pruning trees to the height of 15 feet from the ground. (D. 43, 27, 1, 7.) The earliest law was in the XII Tables, and the object was to

[1] *Ait Prætor : Quae arbor ex aedibus tuis in aedes illius impendet, si per te stat quominus eam adimas, tunc quominus illi eam arborem adimere sibque habere, liceat vim fieri veto.*

prevent fields being injured by the shade thrown from trees. (D. 43, 27, 1, 9.)

II. A right to gather fruits falling on another's land (*de glande legenda*).

"The Prætor says, when acorns from his land fall on yours, I forbid you to use force to hinder him from freely picking them up and carrying them away every third day."[1] (D. 43, 28, 1.)

The word acorn (*glans*) used in the interdict covers all fruits. (D. 50, 16, 236, 1.)[1]

III. Protection from flooding by rain water (*aquae pluviae arcendae.* D. 39, 3.)

In the absence of a servitude no owner had a right to the rainfall from the lands of an adjoining proprietor. Every owner had a right to the water that fell on his own land (D. 39, 3, 1, 11), and to keep it back, even although he had been accustomed to let it pass on to his neighbour. (D. 39, 3, 21.) So when a man by digging on his own land dried up his neighbour's well, his conduct was not actionable. (D. 39, 3, 1, 12.)

But every landowner had a right to prevent any change in his neighbour's land by which rain water not hitherto running on to his land was made to pass on to it. (D. 39, 3, 1, 2; D. 39, 3, 1, 22; D. 39, 3, 1, 14.) There was no remedy against the overflow of water from thermal springs (D. 39, 3, 3, 1), nor when buildings were injured, for the action was given for the protection of fields. (D. 39, 3, 1, 17.)

But an owner had a right to alter the state of his land, so as to throw rain water on his neighbour when it was required for the purpose of cultivation. (D. 39, 3, 1, 15.) Thus, he could make any works for the purpose of reaping the fruits of his land (D. 39, 3, 1, 7), including under that designation the whole produce of land, such as chalk or stones, as well as grapes or corn. (D. 50, 16, 77.)

Ditches made for the purpose of drying the land were also within the exception (D. 33, 3, 1, 4); not, however, to let the water run on to his neighbour, but to sink into the ground; for, says Ulpian, no one has a right to improve his land by making his neighbour's worse. If the owner of the land that suffers from the incursion of rain water has given his consent to the opera-

---

[1] *Ait Prætor: "Glandem quae ex illius agro in tuum cadat, quominus illi tertio quoque die legere, auferre liceat, vim fieri veto."*

tion that has caused the mischief, he has no remedy. (D. 39, 3, 19.) Nor is there any remedy when the construction of the works was authorised by the State (D. 39, 3, 2, 3), or had existed from beyond the memory of persons alive. (D. 22, 3, 28; D. 39, 3, 2, 3.)

INVESTITIVE, DIVESTITIVE, AND TRANSVESTITIVE FACTS.

Having examined the rights and liabilities of an owner, we have now to inquire into the ways in which these rights may be acquired, transferred, or extinguished. Throughout this part of the exposition it is convenient to assume that the investitive or divestitive facts operate without restriction, and afterwards to point out the restrictions to which they are subject. The following is the arrangement:—

INVESTITIVE FACT.—*Occupatio.*
DIVESTITIVE FACT.—*Derelictio.*
TRANSVESTITIVE FACTS.
A. Facts belonging to the ancient law (*ex jure civili*).
I. *Mancipatio.*
II. *Cessio in jure.*
III. *Usucapio.*
IV. *Adjudicatio* (see joint-ownership).
V. *Legatum.*
B. Facts belonging to the law as expanded and settled in the time of Justinian (*ex jure gentium*).
I. *Accessio.*
II. *Traditio.*
III. *Prescriptio.*
RESTRAINTS ON INVESTITIVE AND TRANSVESTITIVE FACTS.
A. Persons that cannot be owners.
I. Slaves. The *Peculium* of slaves.
II. Persons subject to the *patria potestas. Peculium castrense, etc.*
III. Wives subject to *manus. Dos, Parapherna, Donatio propter nuptias.*
B. Things that cannot be owned.
I. *Res communes.*
II. *Res publicae.* (*Publicae Viae; Publica flumina.*)
III. *Res universitatis.*
IV. *Res divini juris; sacrae, sanctae, religiosae.*
C. Restraints on conveyance without valuable consideration. (*Donatio.*
EXTENSION OF INVESTITIVE AND TRANSVESTITIVE FACTS—AGENCY.

INVESTITIVE FACT.

I. *Occupatio* is the taking possession of what belongs to nobody (*res nullius*) with the intention of keeping it as one's property.

The phrase "thing belonging to no one" (*res nullius*) is used in two very different senses. Thus we are told that—

Things sacred, devoted, and hallowed belong to no one. For what is Heaven's by right is included in no one's goods. (J. 2, 1, 7.)

In a sense, what Justinian here states is perfectly true. Things consecrated to the Church are not private property; they do not belong to any specified individuals. But they are the objects of rights closely resembling ownership, and should not be classed with things that usually are objects of private property, but which for a time may happen to have no owner. The phrase "a thing belonging to nobody" should be restricted to things capable by appropriation of becoming the objects of private property. If the terms employed in the Institutes were correct, the maxim of Roman law, that what belongs to no one (*res nullius*) becomes the property of the first one that takes possession of it, would no longer be true.[1]

Occupatio, as a mode of acquisition, existed in the following cases :—

1. Living Things.—All creatures untamed that live in the air, on the earth, or in the water, become the property of the person that first takes or catches them. (D. 41, 1, 1, 1.)

And by natural reason we acquire not only what becomes ours by delivery, but also what we have made ours by *occupatio*. For previously such things belonged to no one; as, for instance, all that we take by land, by sea, or in the air. (G. 2, 66.)

Wild beasts, therefore, and birds and fishes—all animals, that is, that are born on sea or land or in the air—as soon as any one takes them, become at once his property by the *Jus Gentium*. For what formerly belonged to no one, is by natural reason given up to him that takes possession (*occupanti*). And it makes no difference whether one takes the wild beasts and birds on his own lands or on another's. Clearly, however, he that enters on another's land to hunt or to snare birds may be forbidden to enter by the owner, if seen in time. (J. 2, 1, 12.)

For other instances, see Acquisition of Possession.

2. Precious Stones in a state of nature.

Pebbles, precious stones, and the like, found on the sea-shore, become at once by the *jus naturale* the property of the finder. (J. 2, 1, 18.)

An island that springs up in the sea (this happens at times, though rarely) belongs to the (first) occupier, for it is believed to be no one's. (J. 2, 1, 22.)

3. Treasure-trove (*Thesaurus*).

Treasure-trove is treasure deposited in a place for so long a time that no one can tell who is the owner of it.[2] When treasure has been hid in the earth for safety, it is not treasure-trove, unless it is so ancient that the owner of it is unknown.

---

[1] *Quod enim nullius est, id ratione naturali occupanti conceditur.* (D. 41, 1, 3.)

[2] *Thesaurus est vetus quaedam depositio pecuniae, cujus non extat memoria, ut jam dominum non habeat.* (D. 41, 1, 31, 1.)

A person bought a house, and sent a workman to repair it. The workman found money hidden. If it were money that the previous owner could identify as his—as having been lost or left by mistake—it must be restored to him. (D. 6, 1, 67.)

Treasures that one finds in ground of his own, the late Emperor Hadrian, following what naturally seems fair, gave up to the finder. And his decree was the same with regard to things found by chance in a place that is sacred or devoted. If, again, a man finds treasure in another's ground when not engaged in searching for it, but by chance, he must give up half to the owner of the soil. And, similarly, if a man finds treasure in ground belonging to the Emperor, half goes to the finder, and half, as Hadrian decreed, belongs to the Emperor. And again, similarly, if a man finds treasure in ground that belongs to a city, or to the *fiscus*, half belongs to himself, and half to the *fiscus* or city. (J. 2, 1, 39.)

4. Things were *res nullius* if their owners had relinquished possession of them with the intention of abandoning the ownership.

5. The property of an enemy captured in war was said to belong to nobody, and therefore to become the property of the captors by the right of occupation.

All that is taken from the enemy becomes ours by natural reason. (G. 2, 69.) And again, all that we take from the enemy at once becomes ours by the *Jus Gentium*. So far does this rule extend that even freemen, if taken, are reduced into slavery to us. And yet they, if they escape from our power and return to their own people, regain their former status. (J. 2, 1, 17.)

Immoveables taken by the Romans from an enemy were not treated as *res nullius;* for they were not left as prize to the actual captors, but were reserved for the State. When an enemy had driven the Romans out, but was afterwards expelled, the lands were restored to their former owners, and were not appropriated by the State. (D. 49, 15, 20, 1.)

Moveables belonged to the individual captors, subject to the rules of prize. If they were the spoil of a common movement, they must be divided according to the rules of war; but when they were captured by the enterprise of the individual soldier, he was not obliged to share them with his neighbours. This seems to be the reconciliation of the apparently conflicting passages. (D. 49, 14, 31; D. 41, 1, 51, 1.)

Divestitive Fact.

I. Dereliction.

And on this principle it seems quite true to say also, that if a thing is regarded by its owner as abandoned, then any one that takes possession forthwith becomes its owner. And it is regarded as abandoned when its

owner has thrown it away with the intention that it shall no longer be part of his property; he ceases, therefore, at once to be the owner. (J. 2, 1, 47.)

But the case is quite different if goods are thrown overboard in a storm, in order to lighten the ship; for they still belong to their owners. For it is manifest that they are thrown overboard not with any intention not to keep them, but in order that both owner and ship may the better escape the dangers of the sea. And therefore, if when they are cast ashore by the waves, or are still floating about at sea, anyone takes possession and carries them off with an intention to make gain out of them, he commits a theft.

And a closely allied case is that of things that fall from a carriage in motion without the owner's knowledge. (J. 2, 1, 48.)

Could a slave be a derelict? Or did a slave abandoned by his master become free? In certain cases where a sick slave was abandoned he acquired his freedom. But apparently a slave might be treated as derelict. (D. 9, 4, 38, 1.)

Sempronius claimed Thetis as his slave, on the ground that Thetis was the child of his female slave. In defence it was proved that in a previous action brought by the nurse of Thetis for the maintenance of the child, the nurse had been told by Sempronius to deliver up the child to Lucius Titius, the father of the child. Lucius Titius, having paid the money demanded by the nurse, manumitted Thetis before the President of the province. Was this valid? Paul answered, that as Sempronius seemed to have treated Thetis, the child of the female slave, as a derelict, the manumission by Lucius Titius was perfectly valid, inasmuch as he had acquired the ownership of Thetis by *occupatio*. (D. 41, 7, 8.)

Transvestitive Facts.

The modes of conveyance in the Roman law fall into two groups, which are distinguished from each other, according to the view of Justinian, by their origin; some descending from the civil law (*ex jure civili*), others from the *Jus Gentium*. But "delivery" (*traditio*), which forms the characteristic mode of conveyance of the *Jus Gentium*, had a place, although a very restricted one, in the oldest law of Rome. The older modes of conveyance may be called formal, as contrasted with the later and non-formal.

Austin enumerates among the elements constituting ownership, the unrestricted power of disposition. Historically, this is a relatively modern part of ownership. Ancient society, and in this expression Rome is to be included at some time prior to the XII Tables, admits slowly the power of free alienation. The chief influences retarding the growth of individual ownership are three. (1) In the case of land, tribal ownership precedes ownership by households, and that in turn precedes ownership by individuals. It is only when the clan or tribe

ceases to be an effective power, and its place is taken by the higher organisation of a State, that households are permitted to deal with their share of the tribal land as separate property. (2) The joint or single family continues to be a corporate owner, long before the head of the family is allowed to act as owner instead of as manager of the household estate. The joint family exists where the natural family is not broken up on the death of the father, but continues to enjoy the property undivided, under the management generally of the eldest male. In India the joint family is still a living institution ; but our acquaintance with Roman history begins at a point where the joint family, if it ever existed among that people, as it probably did, was forgotten. (3) When alienation is allowed to the head of the family, frequently "ancestral property" is excluded from its operation.

Our acquaintance with Roman law commences at too late a period to enable us to reconstruct from Roman sources a history of the steps by which individual ownership was established. At the time of the XII Tables, the *paterfamilias* is owner and not a mere manager or trustee of the family property. The power of testation is expressly recognised both in respect of *familia* and *pecunia*. There can be little doubt that at the date of the XII Tables, these words indicate two kinds of property. *Familia* may be compared with the "ancestral estate" of Hindu law, and *Pecunia* with self-acquired property. But we have no positive information to justify any definite opinion. At all events, we can go so far as to say that "booty" was probably the first case in which the right of the warrior to free disposition was recognised. The spear was for ages the symbol of *dominium ex jure Quiritium ;* and the name *Quirites* means spearsmen. We are reminded that it was in the case of prize of war that *filiifamilias* were first allowed to hold private property, and there is nothing unlikely in the supposition that the first case where the *paterfamilias* was permitted to act as owner instead of manager, was with respect of things taken in war. Gaius says the ancients considered those things to be emphatically their own which they had taken from an enemy, and accordingly a spear was set up in the Centumviral Court, as it were to keep in mind the origin of private property. (G. 4, 16.)

One of the most ancient species of Conveyance is the Partition of an Inheritance (*judicium familiae erciscundae,* i.e., *dividundae*). When a family broke up on the death of a *pater-*

familias, if the sons could not agree as to the division, an appeal to some tribunal was necessary. The shares were allocated by a judicial decree. The transition was easy from the real to the fictitious use of a tribunal as a means of guaranteeing a person to whom property was transferred. In the Roman law, *cessio in jure* was resorted to freely as a mode of conveying property, and if a conjecture may be hazarded, property that was otherwise inalienable. Mr Poste (Gaius, 2d edit., 171) thinks this form of conveyance older than *mancipatio*, which was introduced as a less inconvenient form, and confined to certain things. It is true that *cessio in jure* could be employed not merely for the conveyance of *res mancipi*, but for *res incorporales*, such as *tutela legitima*, *ususfructus*, *hereditas* (G. 2, 153, Ulp. Frag. 19. 11; 11, 6), urban praedial servitudes (G. 2, 29), manumission of slaves (p. 174), and emancipation of children under *potestas* (p. 212). The fact that *cessio in jure* could be applied to *res mancipi* as well as in the other cases, naturally suggests that it alone was at first employed; but the information we possess hardly justifies us in accepting such a suggestion as proved. Looking to the heterogeneous character of the purposes for which *cessio in jure* was employed, the probability is that it was a device used for enabling alienation to take place where the law did not admit alienation. If *mancipatio* was introduced in the manner stated, it is rather difficult to understand why it should have been confined to rural servitudes. Moreover, there seems ground for believing that in the case of corporeal *res nec mancipi*, the ancient mode of conveyance was Delivery. (See *infra*).

A. Formal Conveyances (*Ex jure civili*).

I. Mancipation (*Mancipatio*).

Res mancipi are transferred to another by *mancipatio;* and for this reason, indeed, are called *res mancipi*. And wherever *mancipatio* holds good, *in jure cessio* also holds good. (G. 2, 22.) What the process is, has been told in an earlier part of our commentaries. (G. 2, 23.)

The form of conveyance has already been described under "*Mancipium.*"

In that way persons, both slave and free, are conveyed (*mancipantur*); and animals (including oxen, horses, mules, asses), for they are *res mancipi*. Landed property too, whether in town or country, if *res mancipi* (as Italian lands, for instance, are), is usually conveyed in the same way. (G. 1, 120.)

But if a *res mancipi* is transferred neither by *mancipatio* nor by *in jure cessio*. . . . And further, we must observe that *nexus* is peculiar to Italian soil, and is inapplicable to provincial. For *nexus* can be applied to land only when it is *res mancipi;* and provincial soil is a *res nec mancipi*. But

provincial soil that has the *jus Quiritium*, stands in the position of Italian soil, and therefore can be conveyed by *mancipatio*. (G. 2, 26. 26ᴬ, 27, as restored by Huschke.)

And again, of things moveable, or rather self-moving, the following are *res mancipi:* slaves, male and female, and those tamed animals that are broken in as beasts of draught or of burden—oxen for instance, horses, mules, asses. Rural praedial servitudes are *res mancipi;* but urban servitudes are *nec mancipi*. Stipendiary and tributary provincial lands are also *nec mancipi*. (G. 2, 15.)

Now the teachers of our school think that these are *res mancipi* from the moment of their birth. But Nerva, Proculus and the other authorities of the opposing school, think they are *res mancipi* only if broken in; or if so excessively wild that they cannot be broken in, that they become *res mancipi* on reaching the age at which such animals are usually broken in. (G. 2, 15ᴬ.)

On the other hand, wild beasts are *res nec mancipi*, as bears, lions; and also those animals reckoned with wild beasts, as elephants and camels; and this is not affected by the fact that these animals are sometimes broken in as beasts of draught or of burden. And further, some of the smaller animals,—even of tamed animals, some of which, as we have said above, are *res mancipi*,—are classed as *res nec mancipi*. (G. 2, 16.)

And, again, almost all incorporeal things are *res nec mancipi*, except servitudes over landed property in the country. These are *res mancipi*, although reckoned with things incorporeal. (G. 2, 17.)

The passages from Gaius manifestly show that the group called *res mancipi* was based upon no logical considerations, but must be ascribed to the accidents of history. It included some moveables, as it were, capriciously, and immoveables partly by a geographical and partly by an arbitrary boundary. The *res mancipi* are characterised by the circumstance that they include things known to the Romans in the earliest times, and not such as became known only when they carried their conquests out of Italy. Thus immoveables out of Italy were *res nec mancipi;* elephants and camels, although beasts of burden, are also *res nec mancipi*, because they were introduced at a late period. The circumstance that rights of way and rights to water-courses are *res mancipi*, but not rights to lights and others that arise only in crowded cities, shows that the group of *res mancipi* was formed when the Romans were in a purely agricultural stage. The costlier jewels (as to pearls, see Pliny, 9, 35, 53) were excluded, because they were unknown at the time when the distinction was made. May not gold and silver have been omitted for the same reason?

Ulpian and Gaius agree in stating that delivery (*traditio*) is the appropriate mode of conveyance of *res nec mancipi*. (Ulp. Frag. 19, 7; G. 2, 19.) "If I deliver to you a garment, or gold, or silver, whether by way of sale or gift, the thing becomes yours without any formality." (G. 2, 20.) It could hardly have been otherwise. Even at the stage when the *paterfamilias* is regarded not as owner, but as a mere manager, of the joint family property, he must have had power to receive or deliver the numerous articles required in the daily course of life. It would have been impossible to have recourse to *cessio in jure* for these innumerable little transactions. The probability is that the notorious and troublesome form of *mancipatio* was only required in the transfer of articles forming the permanent stock or capital of an agricultural community, as land, slaves, cattle, beasts of burden or draught; where the right of the *paterfamilias* to alienate might not be so fully recognised. At all events, the requirement of *mancipatio* indicates that great publicity and solemnity were necessary to assure a purchaser, and to relieve him of all dread of disturbance from those whom the *pater-*

familias represented. Once, however, the power of alienation was completely established, the cumbrousness of the *mancipatio* made it unpopular, and it was not required in the case of new articles of property introduced among the Romans; notwithstanding that in the case of urban servitudes and camels, the reason of the distinction would have classed these with *res mancipi*.

A distinction of some importance existed between moveable *res mancipi* and immoveable *res mancipi*. Moveable *res mancipi* could not be transferred unless in the presence of the parties; and so far was the origin of the word (*manu capere*) regarded, that not more could be conveyed than could be held in the hand. But immoveable *res mancipi* need not be in the presence of the parties, but might consist of parcels in different parts of the country. (Ulp. Frag. 19, 6.)

But in one point the conveyance of landed property differs from the conveyance of everything else. For persons, both slave and free, and animals too that are *res mancipi*, must be present in order to be conveyed; and not only present, but actually grasped by the receiver of what is given *mancipio*, from which comes the term for such conveyance, *mancipatio*, the thing being taken in the hand. But landed property is usually conveyed in absence. (G. 1, 121.)

The mode of conveyance that superseded *mancipatio* was "delivery." As delivery could take place only when the parties were on or near the land to be transferred, it was often less convenient than *mancipatio*. Hence there continued to be a reason for keeping alive the ancient mancipations for land in Italy.

II. *In jure cessio.* Title by a fictitious surrender in court.

1. *In jure cessio* takes place thus: Before a magistrate of the Roman people, as the Prætor, or before the president of a province, the man to whom the thing is being granted appears holding it, and makes his claim thus: "This slave, I say, is mine, *ex jure Quiritium*." Then after he has made his claim, the Prætor asks him that grants it whether he will make a counter claim. And when he says no, or remains silent, then the Prætor makes over the property to the claimant. This is called a *legis actio*, and can take place even in the provinces before their Presidents. (G. 2, 24.)

Often, however, indeed almost always, we use *mancipatio*. For when we ourselves can do it by ourselves before our friends, it is needless to seek out a harder way of doing it before the Prætor, or the President of a province. (G. 2, 25.)

Three persons were thus required; the owner who conveys (*cedens*), the purchaser (*vindicans*), and the Prætor, who gives judgment (*addicit*). (Ulp. Frag. 19, 10.) It was a mode of alienation applicable both to *res mancipi* and *res nec mancipi*, to corporeal and incorporeal things. Thus a usufruct, or inheritance, or legal tutelage of a freedwoman, can be conveyed by this mode. (p. 260.)

2. Restriction special to *in jure cessio*.

And finally, it must be observed that persons *in potestate*, *in manu*, or *in mancipio*, can acquire nothing by *in iure cessio*. For since such persons can

have nothing of their own, it follows that they can of themselves claim nothing as their own before a court of law *in jure*. (G. 2, 96)

Bonitarian Ownership.

And next, we must note that among aliens there is but one form of ownership (*dominium*). So that in each case a man either is the owner, or is in no sense an owner. And this was the law formerly among the Roman people; for in each and every case a man either was owner *ex jure Quiritium*, or was in no sense an owner. But afterwards ownership parted into two kinds; so that one man may be owner *ex jure Quiritium*, and another have the property *in bonis*. (G. 2. 40.)

For if I transfer to you a *res mancipi* neither by *mancipatio* nor by *in jure cessio*, but by simply handing it over, then the thing becomes yours *in bonis*, but will remain mine *ex jure Quiritium* until you by continued possession acquire it by *usucapio*. For as soon as the full time for *usucapio* has run, the thing is yours at once by absolute right, that is, both *in bonis* and *ex jure Quiritium*, just as if it had been transferred by *mancipatio* or *in jure cessio*. (G. 2, 41.)

The aim of the law of prescription (*usucapio*) was to heal defective titles; the conditions under which it applied will be stated presently. But a question arises, what were the rights of a purchaser, for example, that had obtained possession of a slave bought and paid for, but had not taken a conveyance by *mancipatio* or *cessio in jure*? After the period of *usucapio* had expired, he was owner (*dominus ex jure Quiritium*), and was entitled to all the remedies provided by law for owners; but suppose, before that time had expired, some one, making an adverse claim, took away the slave, what remedy had the possessor? He could not sue as owner, because he was not owner; he could not sue the adversary as a robber, because the adversary set up a *bona fide* claim to the slave. It is possible that when interdicts were introduced (see p. 372, *Possessio*), the purchaser was protected against violent dispossession; but this remedy had imperfections of its own, and was subject to this special disadvantage, that it was not available against every possessor. In justice, however, a buyer, in the case supposed, ought to have as complete a remedy as if he were actually owner; and such a remedy was finally supplied by the Prætor by the aid of a fiction.

Of the same kind is the *actio* called *Publiciana*. For it is given to a man that seeks to recover property of which he has lost possession; property delivered to him for some lawful reason, but which he has not yet acquired by *usucapio*. Now he cannot in the *intentio* claim it as his *ex jure Quiritium*. By a fiction, therefore, he is held to have acquired it by *usucapio*, and being thus made quasi-owner *ex jure Quiritium*, he puts forward an *intentio* worded as follows: "Let there be a *judex*. If the slave that Aulus Agerius

bought and had delivered to him had been in his possession for a year, if, in that case, the said slave, about whom the action is brought, would be his *ex jure Quiritium*, and so on."[1] (G. 4, 36.)

For the meaning of *intentio*, see Book IV., Proceedings *in Jure*.

Now those *actiones* of which we have spoken, and any like ones, are grounded on statute and on the *jus civile*. But there are other actions introduced by the Prætor in virtue of his jurisdiction; *actiones* both *in rem* and *in personam*. And of these we must give instances in order to show what they are. Often, for example, the Prætor allows an *actio in rem*, in which either the plaintiff affirms that he has acquired by quasi-*usucapio* what he has not acquired by *usucapio*; or, on the contrary, the possessor says that his adversary has not acquired by *usucapio* what he has so acquired. (J. 4, 6, 3.)

For suppose that another's property is handed over to a man on a lawful ground, in the case of a purchase (for instance), a gift, a dowry, or legacies, and he has not yet become its owner. If now, by accident, he loses possession of that property, he has no direct *actio in rem* to recover it. For the *actiones* set forth by the *jus civile* are open only to those that claim as owners. But because it was doubtless hard that in such a case an action should be wanting, the Prætor brought in an action in which he that has lost possession affirms that he had acquired that property by *usucapio*, and so claims it as his own. And this is called the *Actio Publiciana*, because it was first put forth in the edict by the Prætor Publicius. (J. 4, 6, 4.)

Cicero mentions a Quintus Publicius as Prætor about B.C. 66. (Pro Cluentio, 45.) Some writers think it was introduced much earlier by another Publicius.

After the *Actio Publiciana* was introduced, a buyer, without taking a title by mancipation, became, for nearly all purposes, owner. He could not, until his title was perfected, convey the property by *mancipatio* or *cessio in jure* to another; but he could practically accomplish the same object by simple delivery. Why then, it may be asked, did the cumbrous form of mancipation survive? Why did it continue to be employed until, at least, the time of Gaius, and probably many years afterwards? A reason has been already mentioned why, in the case of land, mancipation should have been maintained. A conveyance of land by mancipation could be effected at any distance from the land, but a conveyance by simple delivery required to be on the spot. In the case of slaves a different reason existed. No one but a legal owner (*dominus ex jure Quiritium*) could employ a public mode of manumission; under the Empire, the utmost that a person could do, whose title was not perfected by *usucapio*, was to make his slave a Latin (*Latinus Junianus*). (G. 1, 17; G. 1, 33-35.) In every other

[1] *Judex esto. Si quem hominem Aulus Agerius emit (et is ei traditus est, anno possedisset, tum si eum hominem, de quo agitur, ex jure Quiritium ejus esse oporteret* et reliqua.

respect, however, the imperfect was as good as the perfect title. The owner of a slave, sold and delivered, although he remained technically owner (*dominus ex jure Quiritium*), was not permitted to exercise any of the rights of an owner. (G. 1, 54.) Thus if an inheritance were left to the slave, it became the property of the buyer, not of the owner, who retained a mere naked title without any beneficial interest. (G. 2, 88; G. 3, 166.)

In the time of Gaius the *mancipatio* was still employed, and the technical difference between Quiritarian and (as it has been termed by modern writers on law) Bonitarian ownership was still maintained. But between the time of Gaius and Justinian the *mancipatio* fell into desuetude; and even the very name, so redolent of antiquity, of the old owner (*dominus ex jure Quiritium*) had become a puzzle to lawyers. Justinian tells us that the old distinction was obsolete, and he ordered the phrase *dominus ex jure Quiritium* to be expunged from the legal vocabulary, as serving no purpose but to perplex students on their first acquaintance with the law. (C. 7, 25, 1.) The old Publician Action was, however, still referred to, and the edict of the Prætor is quoted by Justinian.[1] "I will give an action to any one that demands that which has been delivered to him on some lawful ground by another than the owner, and of which he has not acquired the ownership by *usucapio*." (D. 6, 2, 1, pr.) As given by Justinian, the edict omits words that must have at one time been in it, "or by an owner without *mancipatio* or *cessio in jure*," or words to that effect. By means of the Publician Action, therefore, any one could recover property from third persons if he had all the requisites of a title by *usucapio*, except only the lapse of the necessary time.

III. *Usucapio.*

Usucapio is the acquisition of ownership by possession for the length of time required by law.[2] (Ulp. Frag. 1, 9, 8.)

The full time for *usucapio* of moveables is a year, but of lands or houses, two years. This is provided by the statute of the XII Tables. (G. 2, 42.)

And this rule was adopted lest the ownership of property should remain too long uncertain. For the space of a year or two years—the time in

---

[1] *Si quis id quod traditur ex justa causa non a domino et nondum usucaptum petet, judicium dabo.*

[2] *Usucapio est adjectio dominii per continuationem possessionis temporis Lege definita.* (D. 41, 3, 3.)

which a possessor was allowed to acquire by *usucapio*—was long enough for an owner to look after his property. (G. 2, 44.)

1. The conditions necessary to acquisition *per usucapionem*.

1°. A certain length of possession.

There is no difficulty in measuring the time, one or two years as the case may be, when the thing remains continuously in the possession of one person for the whole time; but does the time run when the thing has passed out of the possession of the first holder? The answer to this question depends upon several circumstances. When the times of possession of two holders may be counted together to make a title, there is said to be an addition of possession (*accessio possessionis*). The following passage in the Institutes has suggested a doubt whether accession of this nature was permitted in *usucapio*, or whether it was first introduced when the newer kind of prescription — called long possession—was brought in. Cujas thought that the passage implied that no accession existed in the case of *usucapio*, but it seems hardly credible that the purchaser could not count the time of the vendor; and the conjecture of Vinnius that Justinian refers to his *usucapio* of moveables in three years may be accepted as a way out of the difficulty.

Long possession that had begun to the profit of the deceased goes on without a break to his heir or *bonorum possessor*, and that though he knows the estate is another's. But if the possession by the deceased began unfairly, the heir or *bonorum possessor*, though ignorant of this, cannot profit by the possession. And a constitution of ours has settled that in *usucapio* too the like rules shall be observed, so that the time goes on, being reckoned without a break. (J. 2, 6, 12.)

(1°.) Universal succession.—In this case the rule is as stated by Justinian. The good or bad faith of the universal successor is immaterial. Hence, if the deceased bought a slave that he believed to belong to the seller, but his heir knows that it did not, his heir may nevertheless continue the *usucapio*, and become owner when the necessary time has elapsed. The reason is, that the good faith required to support *usucapio* relates to the moment at which the possession is acquired; if the possessor afterwards discovers that he is mistaken, he is not bound to give up the thing he has bought. The knowledge of the heir, who is regarded not as a new person, but as continuing the legal personality of the deceased (D. 44. 3, 11), is equivalent to

such a subsequent discovery on the part of the deceased, and therefore does not affect his title.

A thing has been bought by the deceased, but not been delivered to him in his lifetime. It is first given to the heir, and the heir knows that it does not belong to the seller. The possession of the heir is tainted with bad faith from the first, and consequently he takes no advantage from the good faith of the deceased. (D. 41, 3, 43.)

A person has kept a slave that he knew to belong to another, and dies. His heir is ignorant of the fact. The bad faith of the deceased prevents the heir acquiring it *per usucapionem*. (C. 7, 30, 3.)

(2°.) Singular succession.

Buyer and seller too reckon their times jointly, as the late Emperors Severus and Antoninus laid down in rescripts. (J. 2, 6, 13.)

When a person acquires possession from another by gift, purchase, or otherwise than by universal succession, the bad faith of one does not vitiate the title of the other. Hence, if both possessors hold in good faith, the time of each is added to make *usucapio;* but if either holds in bad faith, only the time of possession of the other is reckoned. (C. 4, 48, 3; D. 41, 4, 2, 17.)

A acquires possession of a moveable in good faith, and after six months sells it to B, who, after keeping it five months, sells it to C. If B and C are ignorant of any defect in the title, C becomes owner in a month. (D. 44, 3, 15, 1.)

2°. The possession must be uninterrupted. An interruption of possession is called *usurpatio* (D. 41, 3, 2), and is either physical interruption (*naturalis usurpatio*), or legal interruption, when a hostile claim is set up.

(1°.) Natural or physical interruption (*naturalis usurpatio*) occurs when the possessor is ejected by force, or when a moveable is carried away by force or fraud. (D. 41, 3, 5.)

A obtains a gift of a slave from one whom he believes to be owner, and within a year manumits the slave *per vindictam*. The donor of the slave was not really the owner. The manumission is not valid, because A was not owner (*dominus ex jure Quiritium*); but it interrupts the possession, as A deliberately resigned his right to the slave. (D. 41, 6, 5.)

Exceptions.—Possession was not lost when a thing was pledged. The creditor had possession both in law and in fact, but his interest was not in the possession for its own sake, but merely as security for his claim, and for the purpose of *usucapio* the possession of the owner was not regarded as interrupted. (D. 41, 3, 16.)

The same rule was observed when an immoveable was let to a tenant-at-will (*precarium*). The tenant had, as will be shown

afterwards, legal possession, but still it was not an interruption to break the *usucapio*. (D. 41, 2, 36.)

But if the creditor parts with the possession to another, by selling the thing pledged or otherwise, the *usucapio* is broken. The same rule applies when the possession of a moveable is parted with on loan or for deposit; the *usucapio* is not broken unless the borrower or depositee delivers the moveable to another. (D. 41, 3, 33, 4.)

(2°.) Legal interruption (*civilis usurpatio*). *Usucapio*, properly speaking, was not interrupted by legal proceedings. (D. 41, 4, 2, 21; D. 41, 6, 2.) But in consequence of the general rule that judgment in an action proceeded on the facts as they existed at the time of the commencement of the action (*litis contestatio*), (Book IV., *Litis Contest.*), if the period of *usucapio* had not then expired, the owner could recover his property, although it had expired before judgment was given.

3°. The possessor, to become owner by *usucapio*, must believe at the time he obtains possession that he has a legal power of disposition (*bona fides*). (D. 41, 4, 2, pr.; D. 18, 1, 27.)

We may acquire by *usucapio* even things delivered to us by one that was not their owner, and that whether they are *res mancipi* or *res nec mancipi*, if only we received them in good faith, believing that he that delivered them was the owner. (G. 2, 43.)

The belief, if erroneous, must have reference to a fact; if it arose from a mistake in law, it profits the possessor nothing. (D. 41, 3, 31.)

Seius buys a thing from a person that he knows has been interdicted by the Prætor from disposing of his property. He cannot gain by *usucapio*. (D. 41, 3, 12.)

Titius purchases a slave from a boy that he knows is a pupil, under the mistake in law that a pupil can sell without the consent of his tutor. Titius is not a *bona fide* possessor, and does not acquire by *usucapio*. (D. 41, 4, 2, 15.)

At what moment must the good faith (*bona fides*) exist? Upon this question a controversy existed between the two schools of the Sabinians and Proculians. The difference of opinion came out most distinctly in the case of sale. When the price was agreed upon by the buyer and seller, the buyer at once acquired a right to the delivery of the thing; but until it was delivered, he had no right, as against the world, to the thing itself. Which point, then, ought to be selected as the moment at which good faith should be required?—the moment of sale, when the right to delivery was acquired, or the moment when, by delivery, possession was actually obtained? The

Proculians urged that the time of sale ought to be looked to; the Sabinians, the time of delivery; and this opinion, Ulpian tells us, was adopted. Hence if between the time of sale and delivery the buyer came to learn that the seller was not owner, he obtained a possession tainted with a knowledge of illegality, and therefore failed to acquire by *usucapio*. (D. 41, 3, 10; D. 41, 3, 15, 3.)

In the case of moveables, the good faith of the possessor seldom availed him anything, because moveables, if disposed of unlawfully, were generally regarded as stolen, and, as will be seen presently, stolen goods could not be acquired by *usucapio*.

But sometimes it is otherwise. For if an heir, in the belief that a thing lent or hired out to the deceased or deposited in his hands forms part of the inheritance, sells that thing to some one that receives it in good faith, or gives it away as a present or as a dowry, there is no doubt that the receiver may acquire it by *usucapio*, since the thing is no way tainted by theft; seeing especially that the heir that alienates in good faith, believing it to be his own, commits no theft. (J. 2, 6, 4; G. 2, 50.)

And again, if the man that has the usufruct of a female slave believes her offspring is his, and sells or gives it away, he does not commit theft. For there is no theft where there is no theftuous aim. (J. 2, 6, 5; G. 2, 50.)

And in other ways it may happen that a man may transfer to some one what is a third person's, yet without any taint of theft; and so the possessor may acquire it by *usucapio*. (J. 2, 6, 6; G. 2, 50.)

A farm that belongs to another anyone may obtain possession of without force, if it is lying neglected by the carelessness of its owner, or by his death without leaving a successor, or by his long absence. If, then, such a possessor transfers it to another that receives it in good faith, this new possessor will be able to acquire it by *usucapio*. And even although he that obtained possession of the farm while it was unoccupied knew that it belonged to some one else, yet this does not impair the claim to *usucapio* of the possessor in good faith. For the opinion is now quite set aside, that a farm can be the object of theft. (G. 2, 51.)

EXCEPTIONS.—In some cases *bona fides* was not required.

(1°.) On the other hand, again, it happens that a man that knows he is in possession of another's property may acquire it by *usucapio*. An object, for instance, forming part of an inheritance, if the heir has not yet obtained possession, anyone may possess. For he is allowed to acquire it by *usucapio*, if the object is such as to admit of *usucapio*. And this kind of possession and *usucapio* is called *pro herede* (in room of the heir). (G. 2, 52.)

And so far is this allowance carried, that even landed property may be acquired by *usucapio* in a year. (G. 2, 53.) And the reason why even in the case of landed property the one year's *usucapio* obtains is, that formerly inheritances themselves were believed to be acquired as it were by *usucapio*, by possession of the inherited effects. (And that of course in a year; for the statute of the XII Tables ordained that landed property should require

two years for *usucapio*, all other property one year. An inheritance, then, seemed to fall under the "all other property;" for it is not landed, seeing it is not even corporeal). And though the later belief was that inheritances could not be acquired by *usucapio*, yet in regard to all property forming part of an inheritance, even landed property, the period of a year for *usucapio* remained. (G. 2, 54.)

And the reason why so unscrupulous a possession and consequent acquisition were allowed at all was this:—the ancients wished heirs to enter on inheritances with all speed, that there might be persons to perform the sacred rites then observed with the utmost care, and that the creditors might have some one from whom they could obtain what was theirs. (G. 2, 55.)

This kind of possession and of *usucapio* also is called *lucrativa* (gainful). For in it a man knowing that something is another's, yet makes gain therefrom. (G. 2, 56.)

But in our day it is no longer gainful. For at the instance of the late Emperor Hadrian, a *Senatus Consultum* was passed declaring that such acquisitions might be recalled. The heir, therefore, by laying claim to the inheritance, may recover the property from him that has acquired it by *usucapio*, just as if it had never been so acquired. (G. 2, 57.)

But if there were a *heres necessarius* in existence, by the strict rule of law no one else could acquire the property by *usucapio pro herede*. (G. 2, 58.)

These passages anticipate some observations that fall to made in regard to the history of Inheritance. (See Book III.)

(2°.) Again, if property is mortgaged to the people, and is sold by them, and the owner comes into possession, in this case *usureceptio* is allowed. For land, however, it requires two years. This is the meaning of the common saying, that after a public sale of lands (*praediatura*), possession is regained by use (*usurecipi*). For he that buys from the people is called *praediator*. (G. 2, 61.)

The meaning of this appears to be, that if the buyer does not turn out the owner within two years after the sale, he forfeits his purchase.

4°. *Justus Titulus.*

Possession by mistake, on some untenable ground (*error falsae causae*), does not give rise to *usucapio*. As, for instance, when the possessor has not bought a thing, but thinks he has bought it; or has not been given it, but thinks he has been given it. (J. 2, 6, 11.)

The most usual case where this mistake arose was when a thing was conveyed to a man in a way that would have made him owner, but for the fact that the person executing the conveyance had no right to alienate the thing. This was not an *error falsae causae*. If there was no intention to transfer the ownership, as when possession was given to a mortgagee, there could not be a *justus titulus*, and the mortgagee did not acquire by *usucapio*. (D. 41, 3, 13.)

2. Special restrictions on acquisition by *usucapio*.

A. As to persons.

1°. Certain persons could not be deprived of their property by adverse possession, on the ground that they were not in a position to assert their rights. The theory upon which *usucapio* was

based, was the presumed neglect of the owner. If an owner, after being allowed a reasonable time to discover and claim his property, made no claim, it was but fair that the innocent possessor should obtain a perfect title. If, however, the true owner were in a position where he could not protect his interests, it was reasonable that the adverse operation of *usucapio* should be suspended until such time as his disability was removed. The suspension ought not, however, to go beyond that limit. (D. 4, 6, 37.) Hence the following persons were allowed to rescind a title acquired by *usucapio*, if they applied within one year from the time their disability ceased. (C. 2, 50, 3.)

(1°.) Persons under the age of twenty-five years could rescind a title, even if their interests were looked after by tutors or curators, if the Prætor thought the application was made on good grounds. But if they were not defended, they were entitled absolutely to rescind the acquisition. (D. 4, 1, 8.)

(2°.) Persons absent on the service of the State. This includes soldiers on actual service (D. 4, 6, 45), (not on furlough, D. 4, 6, 35, 9), army doctors (D. 4, 6, 33, 2), Governors of Provinces, and other officials (D. 4, 6, 35, 3), and the wives of such persons. (C. 2, 52, 1.) Their privilege lasted from the time they left home until they returned.

(3°.) Persons in custody (*in vinculis*), or captured by brigands or pirates. (D. 4, 6, 9.)

(4°.) Persons living in slavery (D. 4, 6, 11) until an action is brought claiming freedom. (D. 4, 6, 12.)

(5°.) Captives taken in war. (D. 4, 6, 1, 1.)

2°. Certain persons cannot acquire by *usucapio*.

On the contrary, again, if a man away in the service of the commonwealth or in the enemy's power acquires by *usucapio* the property of a citizen at home, then the owner is allowed, when once the possessor has ceased to be away in the service of the commonwealth, to lay claim to the property within a year, and rescind the *usucapio*. And the form of the claim is this ; the owner affirms that the possessor has not got the property by use, and that it is therefore his. And this sort of action, the Prætor, moved by a like desire for fairness, puts within the reach of certain others also, as one may learn from the larger volume of the Digest or Pandects. (J. 4, 6, 5.)

This is the converse case. In the former, an absent owner was allowed to rescind a title acquired by *usucapio*, because he was not in a position to prevent the acquisition; in this case, an owner at home was allowed to rescind a title acquired by a person that, being absent, could not be sued. In the second case, the ground of relief was that, owing to his being beyond the jurisdiction, or from some other cause, an action could not sooner be brought. (D. 4, 6, 21, pr.) Thus rescission was granted against Consuls or Prætors after their year of office, because previous to that time they could not be sued ; but not against patrons at the instance of freedmen, or parents at the instance of children, because the Prætor in those cases could allow an action if he thought fit. (D. 4, 6, 26, 2.) In like manner, insane persons, or children that acquired by *usucapio*, could be sued after their disability was removed, and the acquisition rescinded. (D. 4, 6, 22, 2.) Again, the same remedy availed against those that by craft had prevented an action being brought against them. (D. 4, 6, 24.)

The action employed in these cases, and introduced by some Prætor, was called *Actio Publiciana rescissoria*. It must be brought within a year from the removal of the disability (C. 2, 50, 3), and it could be brought against the heirs of the persons that acquired by *usucapio*. (D. 4, 6, 30; D. 50, 17, 120.)

B. As to things.

As *usucapio* was a mode of acquiring ownership (*dominium ex jure Quiritium*), it follows that whatever things were incapable of being held in such ownership, were not susceptible of *usucapio*.

1°. But sometimes, notwithstanding the utmost good faith in the possessor of a thing, *usucapio* never begins to run. As, for instance, when he is in possession of a freeman, of something that is sacred or devoted, or of a runaway slave. (J. 2, 6, 1; G. 2, 48.)

2°. Estates in the provinces, too, do not admit of *usucapio*. (G. 2, 46.)

3°. And formerly the *res mancipi* belonging to a woman in the *tutela* of her agnates could not be acquired by *usucapio* unless she had delivered them by authority of the *tutor;* for so the statute of the XII Tables provided. (G. 2, 47.)

4°. Property belonging to our *fiscus* cannot be acquired by *usucapio*. But Papinianus gave a written opinion, that if unclaimed property has not yet been reported to the *fiscus*, any portion of it delivered to a purchaser in good faith may be acquired by him by *usucapio*. And so the late Emperors Pius Severus and Antoninus have declared in rescripts. (J. 2, 6, 9.)

An edict of the late Emperor Marcus provides that the purchaser of another's property from the *fiscus* may, when once five years have passed since the sale, successfully resist the owner of the property by an *exceptio*. And a constitution of Zeno too, of blessed memory, has provided well for those that receive anything from the *fiscus* by sale or gift, or any other title. For it provides that they are at once free from all concern, and must come out successful, whether they are sued or themselves go to law; while against the sacred majesty of the Treasury an action may be brought at any time within four years by those that think that in virtue of their rights as owners, or as mortgagees of the property alienated, some actions are open to them. Our own imperial constitution too, lately published, makes the same regulations with regard to those that receive anything from our palace or that of the Empress (*venerabilis Augustae*), as are contained with regard to alienations by the *fiscus* in the constitution of Zeno just mentioned. (J. 2, 6, 14.)

And last of all, it must be observed that the thing ought to be free from any taint in order that the purchaser in good faith, or other possessor on lawful grounds, may acquire it by *usucapio*. (J. 2, 6, 10.)

5°. Sometimes, however, notwithstanding the utmost good faith in the possessor of another's property, the time for *usucapio* never begins to run. (G. 2, 45.) For things stolen or possessed by force cannot be acquired by *usucapio*, not even if possessed in good faith during the long time of which we have spoken. For in the former case it is restrained by the statute of the XII Tables and the *lex Atinia*, in the latter by the *lex Julia et Plautia*. (J. 2, 6, 2; G. 2, 45.)

And the bearing of the saying that in the case of things stolen or pos-

sessed by force *usucapio* is forbidden by law [by the law of the XII Tables], is, not that the thief or possessor by force cannot in person acquire by *usucapio* (for, on another ground, *usucapio* is not open to them, because, namely, they are possessors in bad faith); but this—that no one else, although in good faith he buys or on other grounds receives from them, can have any right to acquire by *usucapio*. And hence, in regard to moveables, *usucapio* by a possessor in good faith must be rare. For he that sells, or on any other ground delivers what is another's, therein commits a theft. (J. 2, 6, 3; G. 2, 49-50.)

The *lex Atinia* seems to have extended the law of the XII Tables to the case of *bona fide* possessors. It was passed about B.C. 198.

A tutor fraudulently sells part of the property of his pupil. A tutor had a power of sale only so long as he acted in good faith in the administration of his pupil's property. The moment he attempted to cheat his pupil he was regarded as a thief, and the thing parted with was stolen goods (*res furtiva*). Hence it could not be acquired by a possessor even if ignorant of the fraud. (D. 41, 4, 7, 3.)

A tutor, in disregard of the express order of the Will by which he was appointed, sold some slaves that on account of their skill the testator ordered to be kept for his heirs, to a purchaser ignorant of the prohibition: there can be no *usucapio* of the slaves. (C. 7, 26, 2.)

A slave, to defraud his master, carries off some of his separate estate (*peculium*), and delivers it to Gaius. As soon as it is delivered it becomes stolen property, not susceptible of *usucapio*. This is the more noteworthy, because as between the master and the slave such malversation did not constitute theft. (D. 47, 2, 56, 3.)

A has stolen and carried off wool, and has made it into a garment. The owner of the wool can recover the garment, because there is no *usucapio*. (D. 41, 3, 4, 20.)

A female slave is stolen by Balbus, and while in his possession gives birth to a child. Balbus sells the child to Titius, who is ignorant of the theft of the mother. The owner of the female slave can recover the child from Titius, because on account of the theft there is no *usucapio*. (C. 6, 2, 12.)

A mare is stolen, and sold by the thief to a purchaser ignorant of the theft. The mare gives birth to a foal. The foal belongs to the purchaser (as soon as born), because it is considered part of the produce (*fructus*) of the mare. But the child of a female slave was not regarded in that light (as *fructus*), and hence the difference in the result. (D. 41, 3, 4, 18; D. 47, 2, 48, 6.)

A female slave is stolen, and sold by the thief to a purchaser ignorant of the theft. She gives birth to a child. The purchaser has no right to either, and acquires none by *usucapio*. But if the slave had not conceived until she was in the possession of the buyer, her child would belong to him by *usucapio* (D. 47, 2, 48, 5); unless he discovered the theft before the birth. (D. 41, 3, 4, 18.)

A sheep is stolen, and its wool clipped by the thief. The wool is not susceptible of *usucapio*. But if the sheep is shorn by a purchaser ignorant of the theft, the wool, as part of the produce (*fructus*), becomes his property at once without any *usucapio*. (D. 41, 3, 4, 19.)

Sometimes even a thing stolen or possessed by force may be the object of *usucapio*. If, for instance, it comes back under the power of the owner, the taint attaching to the property is cleared away, and *usucapio* goes on. (J. 2, 6, 8.)

It was necessary that the owner should not merely regain possession of the thing stolen, but also know that it had been stolen. (D. 41, 3, 4, 12.) This was provided for by the *lex Atinia*. (D. 41, 3, 4, 6.) If the owner knew where the

stolen goods were, so that he could bring an action to recover them, he was considered to have possession of them within the meaning of that enactment. (D. 50, 16, 215.)

6°. Immoveables taken by force. (*Res immobiles vi possessae.*) The sections above quoted refer to immoveables taken by force, as regulated by the *lex Plautia* (the date of which is supposed to be B.C. 89), and the *lex Julia*, supposed to belong to the reign of Augustus.

As regards landed property, *usucapio* goes on more easily. A man may, for instance, without force, obtain possession of a spot left unoccupied by reason of its owner's absence or neglect, or because he has died and left no successor. The man, personally, no doubt, is a possessor in bad faith, for he knows that he has seized on land belonging to another. If, however, he delivers it to a third person that receives it in good faith, then that third person can acquire the property by length of possession, for he received it neither stolen nor possessed by force. For the opinion of some of the old writers, who thought a farm or a piece of land might be the object of theft, is now extinct. And the imperial constitutions provide that possessors of landed property ought in no case to be deprived of a long and undoubted possession. (J. 2, 6, 7.)

A drives B out of possession, but does not himself enter. C, finding the land vacant, enters and takes possession. C is not a *bona fide* possessor, and therefore cannot acquire by *usucapio*. He knows he is not owner. Before B returns, C sells to D, who is not aware of the nature of his possession. D can acquire by *usucapio*. (D. 41, 3, 4, 22.)

The purgation is the same as in the case of stolen property. (D. 41, 3, 4, 26.) (See pp. 273-274.)

B. Transvestitive Facts ascribed to the *Jus Gentium*.

I. Accession (*Accessio.*)

The doctrine of accession is the counterpart of occupation. By occupation, what belongs to nobody is acquired; by accession, what belongs to somebody is given to a new owner. This occurs when that which belongs to one person is so intermixed with the property of another, that either it cannot be separated at all, or cannot be separated without inflicting damage out of proportion to the gain. Upon this state of facts two questions arise—(1) Who is owner of the joint whole? and (2) What compensation, if any, must be made to the loser? The answer to the first question is to be found in the idea of Principal and Accessory. This idea is very simple in many cases; thus, dress exists for men, not men for dress; buttons exist for coats, not coats for buttons. That

which can exist without another, but that other cannot exist without it, or that for whose sake another exists, is the principal to which the other is the accessory. It was laid down that the owner of the principal became the owner of the accessory. This technical rule sufficed to determine the technical question—which of the two is owner? but it leaves untouched the important practical question, what compensation ought to be given to the loser? As a general rule, it would be inequitable to deprive an owner of his property without compensation, merely from the accident of its becoming attached to, or mixed up inseparably with, the property of another. In considering the cases stated in the Roman law, these two questions must be kept broadly separate.

1. Accession of land to land.

1°. And further, what a river adds to your field by *alluvio* is by the *Jus Gentium* acquired by you. And by *alluvio* is meant a latent increase: and an addition by *alluvio* is an addition so gradual as to be at each moment imperceptible. (J. 2, 1, 20; G. 2, 70.)

But if the violence of the river sweeps away a part of your land and bears it over to your neighbour's land, where it rests, then plainly it still continues yours. (J. 2, 1, 21; G. 2, 71.)

But it is evident that if it sticks to your neighbour's land for a long time, so that the trees carried away with it strike root into his land, then from that time those trees are acquired for your neighbour's land. (J. 2, 1, 21.)

2°. If an island rises in a river, as often happens, its ownership depends on its position. If it lies in mid stream, it is common to the landowners on both banks of the river, in shares proportioned to the extent of each owner's lands, as measured along the bank. But if it is nearer one side than the other, it belongs solely to the landowners along the bank on that side. (J. 2, 1, 22; G. 2, 72.)

And if a river forks at any point, and the branches meet lower down, so as to make some one's land an island, then that land continues to belong to its former owner. (J. 2, 1, 22.)

An island floating on reeds or shrubbery belongs to the public, and not to either of the riparian proprietors; because it is not connected with the land, and the water in the river is public. (D. 41, 1, 65, 2.)

Proprietors on the same side of the stream share an island according to the extent of their lands, measured by a straight line across the river from their boundary. (D. 41, 1, 29.)

If an island rises in a stream so that it belongs wholly to the owner on one side of the bank, and then another in the middle, is the line from which the measure is to be taken the bank or the island? It was held to be the island. (D. 41, 1, 65, 3.)

3°. But if a river altogether abandons its natural bed and begins to flow elsewhere, then that former bed belongs to the landowners on both banks of the river, in shares proportioned to the extent of each owner's lands as

measured along the bank. And as for the new bed, it becomes subject to the same rights to which the river itself is subject; that is, it becomes public property. But if, after some time, the river returns to its former bed, the new bed in turn comes to belong to the landowners on the bank. (J. 2, 1, 23.)

Clearly the case is different when any one's land is entirely flooded. For flooding does not change the nature of the lands; and therefore, if the water falls, it is plain that the lands belong to their former owner. (J. 2, 1, 24.)

An island rises in a river so as to belong wholly to A, the owner of one of the banks. Then the river deserts its old channel, and runs entirely between the island and A's bank. A retains the island and his share of the deserted channel. (D. 41, 1, 56, 1.)

EXCEPTION.—These rules, relating to the accession of land to land, apply only to those lands whose boundaries are natural objects (*arcifinii agri*), such as a river, wood, or mountain. When land was held in specified quantities (*agri assignati* or *limitati*), the accessions belonged to the State, and not to the owners of the lands. These lands, apportioned in quantities, were generally obtained by conquest, and given away by the State, which reserved its right to accessions. (D. 41, 1, 16.) In one passage it is stated, however, that such accessions were regarded as nobody's land (*res nullius*), and belonged to the first occupant. (D. 43, 12, 1, 6.)

It is manifest also that in accessions of land to land there was no room for compensation. Thus alluvial deposits come from the lands of many people, nobody could tell where.

2. Accession of moveables to land.

1°. Buildings to land.

(1°.) The question of ownership.

Besides, what anyone builds on our soil, although he builds it in his own name, by the *Jus Naturale* becomes ours. For all that is on the soil goes with the soil (*superficies solo cedit*). (G. 2, 73.)

When a man builds on his own soil with materials that belong to another, then he is regarded as the owner of the building. For all that is built on the soil goes with the soil (*omne quod inaedificatur solo cedit*). And yet he that was owner of the materials does not cease to be their owner. But, meanwhile, he can neither reclaim them (*vindicare*), nor bring an action for their production, because the statute of the XII Tables provides that no one can be forced to take out of his house a timber (*tignum*), though belonging to another, that has once been built into it. The statute gives, however, an action for double its value, called *actio de tigno injuncto;* and under the term *tignum* all building materials are included. Now the aim of this provision was to avoid the necessity of having the buildings pulled down. But if for any reason the building comes down, then the owner of the

materials, if he has not already obtained the double value, may reclaim his own or bring an action for its production. (J. 2, 1, 29.)

A contractor that builds with his own material for the owner of the land, as soon as the stones are fixed with mortar, loses his ownership in the material, which now becomes attached to the ownership of the land. (D. 6, 1, 39.)

Titius places a new barn, made of wood, on the land of Seius. It is not fixed but moveable. It does not become the property of Seius. (D. 41, 1, 60.)

(2°.) Compensation to the owner of the materials.

(α) When the owner of the land takes material belonging to another without his consent, he is liable to a penalty of double the value of the things taken.

(β) When the material is fixed on the land by a person in possession, who believes himself to be owner, but against whom an action is brought by the true owner, the possessor can resist the action, unless compensation is given him.

On the contrary, if a man builds a house with his own materials on another man's soil, then the house belongs to the owner of the soil. But in this case the owner of the materials loses his rights as such, because it is understood that they were alienated by his own will, supposing, that is, that he was not ignorant that he was building on another man's soil. And therefore, although the house comes down, he will not be able to reclaim the materials. But of course it is agreed that if the man that builds has been put in possession, and the owner of the soil claims the house [or farm] as his, but will not pay the price of the materials and the workmen's wages [or other expenses on the building, the plantations, or the cornfields], then he may be repelled by the plea (*exceptio*) of fraud (*dolus malus*), seeing the builder was a possessor in good faith. (J. 2, 1, 30; G. 2, 76.)

A *bona fide* purchaser that, after notice of the insufficiency of his title, builds on the land, cannot resist an action by the owner, who refuses to give compensation: only he is allowed to take down the building at his own cost and carry it away. (D. 6, 1, 37.)

(γ) When a *bona fide* possessor has given up or lost possession he has no remedy, and cannot obtain compensation unless his expenditure has been made with the knowledge of the owner.

A person is in possession as heir, and repairs the family mansion; he cannot recover his expenses except by keeping possession. (D. 12, 6, 33.)

A husband or wife builds on ground received from the other as a gift. The gift of the ground is void (see *Donations between Husband and Wife*), but the house could be preserved by pleading fraud. (D. 44, 4, 10.)

If I have given anyone property, but have not yet delivered it, and he to whom I have given it, although possession has not been delivered, builds on that spot with my knowledge, and if after he has built I have obtained possession, and he claims from me the property given him, and I plead in bar that the gift was void as exceeding the limits fixed by the *lex Cincia*, then can he plead fraud in answer to my plea? Cer-

tainly, for I acted fraudulently in suffering him to build and now withholding his expenses. (D. 44, 4, 5, 2.)

(δ) For if he knew that the soil was another's, his own negligence in rashly building on a soil that he was well aware was another's may be brought up against him. (J. 2, 1, 30.)

It is stated, however, by Antoninus (A.D. 214), that if the building has fallen into ruin, the material, even in this case, returns to the former owner, provided that the original intention of the builder was not to make a present of the material to the owner of the land. (C. 3, 32, 2.) See, however, D. 41, 1, 7, 12.

A constitution of Gordian (A.D. 240) makes a distinction between *necessariae* and *utiles impensae*. Necessary expense is to prevent deterioration; beneficial expense is to promote improvement. A *mala fide* possessor can claim for necessary expenditure; but in regard to beneficial expenditure, he is permitted to carry away the improvements only, if he can do so without damaging the property. (C. 3, 32, 5; D. 5, 3, 38.)

One of two joint owners of a piece of land builds upon it. Although, in a sense, this is building on another's land, yet the other owner could not reclaim the land without paying the cost. (C. 3, 32, 16.)

These rules as to compensation apply only where the parties claim under hostile titles; they have no application to such a relation as Landlord and Tenant.

If a tenant has made a door or anything else joined to a building, he has a right to take it away, although it be a fixture, provided he gives security not to damage the house, but leave it as he found it. (D. 19, 2, 19, 4.)

Whatever a farmer does to the land for its improvement, either by building or otherwise, gives him a title to compensation if such improvements have not been part of his bargain. (D. 19, 2, 55, 1.)

A farmer that was not compelled by his agreement to plant vines did so, and increased the letting value more than 10 *aurei* yearly. The farmer in an action for rent brought against him can set off this improvement. (D. 19, 2, 61, pr.)

2°. Trees and plants to land.

(1°.) Ownership.

If Titius places in his soil a plant belonging to another, it will become his. If, on the contrary, Titius places a plant of his in Maevius' soil, the plant will belong to Maevius, provided that in both these cases the plant has taken root; for until it takes root it continues to belong to its former owner. (J. 2, 1, 31; G. 2, 74.)

So completely, however, is its ownership changed from the moment it takes root, that if a neighbour's tree so presses the earth belonging to Titius as to take root in his field, we say that it is thereby made Titius' tree. For reason refuses to regard the tree as belonging to anyone except the owner of the field in which it has taken root. And, therefore, if a tree placed close to a boundary strikes its roots into a neighbour's field, it becomes common property. (J. 2, 1, 31.)

And on the same principle as plants that unite with the earth go with the soil, so corn too that is sown is understood to go with the soil. (J. 2, 1, 32; G. 2, 75.)

A difference existed between the case of buildings and plants. Even if the tree was afterwards torn up, it did not revert to its former owner. After it had fed on the soil, it was not exactly the same thing that was planted ; and it would be absurd to allow a man to recover, after thirty or forty years, a full-grown tree, because the sapling from which it grew had been his property. (D. 41, 1, 26, 2.)

The assertion in the text seems to be opposed to D. 47, 7, 6, 2, which states that although a tree near a boundary sends its roots into the neighbour's soil, it nevertheless remains the property of the owner of the soil in which it first grew. The text is therefore explained as referring to those cases only where the tree is on the land of one man, and the roots wholly, or nearly so, in the land of his neighbour.

(2°.) Compensation.

(α) The owner of the land has sown or planted with what belongs to another. If he knew that the seeds or plants belonged to another, he commits theft ; if he did not, he must simply pay the owner their value. (D. 6, 1, 5, 3.)

(β) But as he that has built on another's soil can defend himself against a claim for the building on the part of the owner of the soil by means of the plea of fraud, as we have said, so by the aid of the same plea he can protect himself that has sown another's farm in good faith at his own expense. (J. 2, 1, 32.)

(γ) A *bona fide* possessor, after eviction, and (δ) a *mala fide* possessor, were subject to the same rules as in the case of buildings fixed on land.

3. Accession of moveables to moveables.

1°. Writing on paper.

(1°.) Ownership.

Writing, too, although of gold, goes with the paper or parchment in like manner ; just as all goes with the soil that is built on it or sown therein. And, therefore, if on your paper or parchment Titius has written a poem, a history, or a speech, the owner of this work is not Titius but you. (J. 2, 1, 33 ; G. 2, 77.)

(2°.) Compensation.

But if you claim your books or parchments from Titius, and are not ready to pay the expense of the writing, Titius will be able to defend himself by the plea of fraud ; if, that is, it was in good faith that he obtained possession of those papers or parchments. (J. 2, 1, 33 ; G. 2, 77.)

This is the same principle as in the previous cases. A man writes on paper that he believes to belong to himself ; it does not. He can resist the action of the owner, unless payment is made for the writing. It would seem, however, that if the owner had obtained possession there was no remedy. If the writer knew the paper did not belong to himself, then he could not complain of forfeiting his labour.

2°. Pictures.

If any one paints on a surface (*tabula*) that belongs to another, some think the surface goes with the picture ; others that the picture, whatever it be, goes with the surface. But to us it seems better that the surface should go

with the picture [an inversion of the usual rule, for which it is hard to give an adequate ground]; for it is absurd that a picture by Apelles or Parrhasius should go as a mere accessory to a most worthless surface. And hence, when the owner of the surface is in possession of the picture, if the painter claims it without paying the price of the surface, he can be repelled by the plea of fraud. If, again, the painter is in possession, it follows that a *utilis actio* against him will be given to the owner of the surface; and in that case, if the owner does not pay the expense of painting, he can be repelled by the plea of fraud—if, that is, the painter was a possessor in good faith. For it is manifest that, if the surface was stolen, whether by the painter or by some one else, the owner of the surface may bring an action for theft. (J. 2, 1, 34; G. 2, 78.)

It is at this point—pictures—that the doctrine of accession breaks down. Canvas can exist without the picture, but not the painting without the canvas; and therefore, logically, the canvas is the principal, and the colouring the accessory. But this result was too absurd. The value of the picture was in general so much greater than the worth of the canvas, that to have adhered to logical consistency would have involved a sacrifice of real justice. Gaius is at a loss to give a reason for the exception of pictures; and his only fault is, that he was not bold enough to disregard the merely logical distinction of principal and accessory in the case of writings also.

4. Accession of labour to moveables. (*Specificatio.*)

Hitherto the examples of accession have been instances of mere mechanical adhesion; but the same idea was applied where, by means of labour, raw material had been made to change its character, and become a new manufactured article. This is specification, or making a new article.

1°. Ownership.

When any finished article is made by one man out of material belonging to another, it is a common question which is the owner by natural reason? is it the maker, or rather the owner, of the material? If, for example, a man makes out of my grapes, or olives, or ears of grain, wine or oil or flour; or out of my gold or silver or bronze, some vessel; or mixes my wine and honey into mead, or uses my drugs to make up a plaster or eye-salve, or my wool to make a garment; or out of my timber frames a ship, a chest, or a seat;—[then is the product made out of my property his or mine? Some think we ought to look to the materials or substance; that is, that the owner of the materials is owner of the product. Such was the opinion of Sabinus and Cassius. Others hold that the product belongs to the maker; and this is the view taken by the authorities of the opposing school.] After the many doubts raised on both sides by the schools of Sabinus and Proculus, a middle opinion has been adopted. For it is held that if the finished product can be resolved into its materials, then the former owner of the materials is to be its owner; if it cannot be so resolved, then the maker rather is to be its owner. For instance, a vessel can be melted down and resolved into the original shapeless mass of bronze or silver or gold; while wine or oil or wheat cannot return to the earlier form of grapes or olives or ears of grain. But if a man makes any article partly out of his own materials, partly out of another's—out of his own wine, for instance, and

another man's honey makes mead, or out of drugs partly his own and partly another's makes a plaster or eye-salve ; or out of wool partly his own and partly another's makes a garment—there can be no doubt in this case that the maker is to be the owner ; for he has not only given his work, but also supplied part of the materials. (J. 2, 1, 25 ; G. 2, 79.)

Merely disengaging the grains from the ear does not, however, constitute a new species. (D. 41, 1, 7, 7.)

2°. Compensation.

If, however, a man weaves purple belonging to another into a garment of his own, then, although the purple is the most costly, it goes with the garment as an accessory. But the former owner has an action for theft against the man that stole it ; and also can bring a *condictio*, no matter whether he, or some one else, was the actual maker of the garment. For though things that have perished cannot be reclaimed (*vindicari*), yet a *condictio* may be brought against thieves, and against certain other possessors. (J. 2, 1, 26 ; G. 2, 79.)

If the specificator believed that the material belonged to him, he could not be sued for theft, but must give compensation.

Confusion or mixture. *Confusio, commixtio.* This is the case when things are mixed up without forming a new article.

If two different owners choose to mix their materials—if they mingle their wines, for instance, or melt down lumps of gold and silver together—then the whole product is owned by both in common. And if the materials differ in kind, and therefore a distinct sort of thing is made—as mead, for instance, from wine and honey, or electrum from gold and silver—still the rule of law is the same ; for in that case, too, it is undoubted that the finished product is owned in common. And if it was by chance, and not by the owner's choice, that the materials, whether different or of the same kind, were mixed, the rule is still held to be the same. (J. 2, 1, 27.)

If, now, Titius' wheat is mixed up with your wheat by your choice, the whole will be owned in common ; for the separate bodies—that is, grains—that belonged distinctively to each, have been brought into union by your choice. But if the mixture takes place by accident, or is Titius' doing without your choice, then the whole is not regarded as owned in common ; for the separate bodies retain their own nature. And by accidents such as those the wheat is no more made common than a flock would be if Titius' sheep were mixed up with yours. But if either of you two keeps the whole of the wheat, an *actio in rem* for his due share of the wheat is open to the other. And it falls within the province of the judge to determine, at his discretion, the quality of the wheat belonging to each of you. (J. 2, 1, 28.)

Confusio is generally used with reference to the mixture of liquids ; *commixtio*, of solids. The distinction taken is this : if the things are mixed by the consent of owners, the product belongs to them in common ; in other words, there is no room for accession. It is only when the consent of one of the owners

does not exist, that a question of accession really arises. Then if the things are inseparable, the ownership is in common; if not, each retains his property in the things, and can sue by the ordinary action for the recovery of property—the *vindicatio*. (D. 6, 1, 5, 1; D. 6, 1, 3, 2.)

II.—Delivery (*Traditio*).

From what we have said it appears that alienation takes place sometimes by the *Jus Naturale*—as, for instance, by delivery: sometimes by the *Jus Civile*, as in *mancipatio*, *in jure cessio*, and *usucapio*, the right to which is peculiar to Roman citizens. (G. 2, 65.)

By delivery also, according to the *Jus Naturale*, we acquire property. For nothing is so agreeable to natural fairness as that the wish of the owner that wishes to transfer what is his to another, should be held valid. Corporeal things, therefore, of whatever kind, can be delivered, and by delivery be alienated from the owner. (J. 2, 1, 40.)

1. The conditions necessary to acquisition by delivery.

(1.) Transfer of possession. The transferrer must put the transferee in a position to deal with the thing to the exclusion of everybody else. This might be accomplished in the various ways, enumerated *postea* "Acquisition of Possession."

Delivery by transfer of title-deeds.—It is stated in a constitution of Severus and Antoninus (C. 8, 54, 1), that a gift and delivery of the title-deeds of slaves were equivalent to a gift and delivery of the slaves themselves. If this be taken as a fair and complete statement of the law, it would be an extreme instance of symbolical delivery. Savigny and others contend with great vehemence that the text is incomplete, and that it must be understood as implying that the slaves were in the presence of the parties at the making of the gift. According to the view of these authors, the case stated is an example of delivery *longa manu*. There is some difficulty in acquiescing in this opinion, inasmuch as it attributes the operative part of the transfer to something not mentioned in the text, and denies any effect to the words that profess to give a complete account of the transfer.

Except by delivery, in the time of Justinian, property could not be conveyed. A mere agreement without delivery of possession, even if in writing, did not operate as a transfer of ownership.[1] (C. 3, 32, 27.)

But to this rule an exception existed in the case of *Societas*.

Traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur. C. 2, 3, 20.)

At no period in Roman law was a written document attesting a delivery necessary; but such documents were commonly made as a sure record of the fact. (C. 7, 32, 2; C. 4, 38, 12.)

It may be added that a delivery never gave the transferee any greater right than the transferrer possessed.[1] (D. 41, 1, 20, pr.) Hence land subject to a right of way passes to the transferree burdened therewith. (D. 41, 1, 20, 1.)

(2.) The delivery must be made with an INTENTION to transfer the ownership. That, but nothing more, was required. It was not necessary that there should be any consideration, any *quid pro quo*, for the transfer. Usually, however, some consideration existed, and the delivery took place in consequence of a previous contract of sale (*pro emptore*), or legacy (*pro legato*), or bargain for a dowry (*pro dote*), or in payment of a debt (*pro soluto*); but there need be nothing more than a purpose of liberality (*pro donato*). The Roman jurists expressed the relation of such facts to delivery in a somewhat peculiar way. They said that mere delivery (*nuda traditio*) was not a transvestitive fact of ownership, unless supported by what they called a *justa causa* or *justus titulus*. A *justa causa* was one of the circumstances above mentioned—sale, legacy, dowry, payment of debt, or free gift. It is more accurate to say that these are simply facts from which an intention to transfer ownership may properly be inferred.

If A delivers a ring to B, there is no presumption that B is owner; but on proving that the ring was bequeathed to B by a testator to whom A is heir, the nature of the transaction becomes at once apparent. Again, if it is proved that A intended to make a gift of the ring to B, the meaning of the transaction becomes clear. If, on the other hand, the ring was given to B in loan, or for safe custody, the conclusion would be that A remained owner, and that the delivery of the thing did not transfer the ownership to B.

The exposition of the Roman jurists is better suited to a practical lawyer than to a student of jurisprudence. In proving ownership, what a Roman lawyer had to consider was the delivery of possession, and a *justa causa, i.e.*, one of the facts that conclusively proved an intention to transfer. The real potent element is not the change of possession, but the intention of the owner to transfer his property; the delivery is

[1] *Nemo plus juris ad alium transferre potest quam ipse haberet.* (D. 50, 17, 54.)

merely a mode of unequivocally attesting the change; it marks the precise moment when a mere intention or obligation to deliver the ownership passes into an actual transfer of the ownership.

The intention to transfer the ownership must exist at the time that delivery is made. Thus, if a person sold a slave that he knew to belong to another, but the slave was not delivered until the owner had ratified the sale, the delivery transferred the ownership. (D. 41, 3, 44, 1.)

Nay, further, sometimes the wish of the owner, though its object is an indeterminate person, transfers the ownership of property. Prætors, for instance, or Consuls that throw gifts among the crowd, are ignorant what each member of the crowd is going to catch. And yet because it is their wish that what each catches should be his, they make him owner on the spot. (J. 2, 1, 46.)

(3.) Delivery does not transfer ownership (in the case of a contract of sale) until the price is paid.

If things are given by way of a gift or a dowry, or on any other ground, they are undoubtedly transferred. But things sold and delivered are not acquired by the buyer until he has paid the seller the price, or in some other way satisfied him, as by getting a surety or giving a pledge. This is indeed a provision in the statute of the XII Tables; and yet it is rightly said to be brought about by the *Jus Gentium*, that is the *Jus Naturale*. But if the seller is willing to give it to the buyer on credit, then it must be said that the thing sold becomes at once the property of the buyer. (J. 2, 1, 41.)

According to the construction put upon sale by the Roman law, the seller was understood not to intend to part with his property until he had got his money. If before receiving the price, or accepting something in lieu of it, he delivered the thing, he was understood to have done so without the intention of transferring the ownership. If the goods were sold on credit, the seller was regarded as parting with the ownership in confidence that the buyer would pay him, electing to accept a right *in personam* as against the buyer, instead of retaining his right *in rem* to the thing. The exceptional character of sale in regard to delivery is thus apparent, and not real. The intention to part with the ownership was held not to attach to the fact of agreement for sale, but to the fact of payment; and hence, in the language of the Roman writers, sale was not a *justa causa* unless coupled with payment of the price. In other cases, as in gift, dowry, etc., the transfer of ownership coincided with the delivery of possession.

There was another peculiarity in the Law of Sale. When the title of the purchaser was completed by the delivery to him of the thing sold and the payment of the price, his ownership was regarded as dating not from the delivery or payment, whichever happened last, but from the date of the contract. The delivery and the payment had a retroactive effect, and made the buyer practically owner from the date of the sale

Now, as sale is a contract formed by consent alone, the date of the sale is the moment when the thing to be sold and the price to be paid for it were agreed upon. (C. 4, 48, 1; D. 18, 6, 8.) The evidence of this retroactive effect is clear. In the first place, the buyer was entitled to all the produce and accessions (*fructus et accessiones*) of the thing from the date of the sale; and (2) if the thing perished without fault imputable to any one, the loss fell entirely on the buyer, for *res perit domino*.

1°. The buyer was entitled to all the produce and accessions of the thing sold from the date of the sale, as the work of slaves, the offspring of slaves or animals, and all fruits not gathered. (Paul, Sent. 2, 17, 7.) Also, any inheritance or legacy given to a slave belongs to the buyer (D. 19, 1, 13, 18; D. 28, 5, 38, 5): and he alone has the right to sue for harm done to the property. (D. 19, 1, 13, 12.) But if it were agreed between the buyer and seller that the seller should have the produce until the thing sold was delivered, then the sale had no retroactive effect. (Vat. Frag. 15.) In such a case the buyer would be free if the thing perished or were lost before delivery. (D. 50, 17, 10.)

2°. The property sold remained at the risk of the buyer from the date of the sale (*periculum rei*). (C. 4, 48, 4; D. 18, 6, 7.)

When once the contract for purchase and sale is made (and this is fully done, as we have said, as soon as the price is agreed on, if the business is transacted without writing), the thing sold is at the buyer's risk, although not yet delivered to him. Therefore, if the slave dies or is injured in any part of his body, if the house is either in whole or in part consumed by fire, if the field is either in whole or in part borne away by the violence of a river, or by reason of a flood or a whirlwind that dashes the trees to the ground, is lessened or changed for the worse—in all these cases the loss falls on the buyer, and he must needs pay the price, although he has not obtained the property. For all that befalls it, without fraud or negligence on the seller's part, leaves the seller free from responsibility. And if, after the purchase is made, any addition is made to the field by alluvion, that is the buyer's profit: for he that runs the risk ought to have the profit. (J. 3, 23, 3.)

If, however, a slave that has been sold runs away or is stolen, without any fraud or negligence on the seller's part coming in, we ought to look carefully whether the seller undertook to guard him till delivery. For certainly if he did, the risk of such an accident lies with him; if he did not, he will be free from responsibility. And so too with all other animals and things. The seller's action to reclaim the property, and his *condictio*, he must make over to the buyer; because certainly he that has not yet delivered the property to the buyer is still himself the owner. (J. 3, 23, 3A.)

Lucius Titius bought lands in Germany, and paid a part of the price. He died, and his heir was sued for the residue of the price. His heir pleaded that the lands by a

decree of the Emperor had been partly sold and partly given to veterans as prize. But Paul said this was no defence. The eviction was not due to anything existing at the date of the sale, but to a subsequent act of the sovereign; and therefore the loss fell on the buyer, who, although he could not get his lands, must still pay the price he promised. (D. 21, 2, 11.)

Titius sells his slave Stichus, along with his *peculium*, to Gaius. Before Stichus is delivered to Gaius, he steals from Titius property that is not recovered. Gaius must suffer the loss, and Titius may deduct the amount stolen from the *peculium*. (D. 19, 1, 30.)

If, however, the parties agreed that the thing sold should remain at the risk of the seller (D. 18, 1, 78, 3; D. 18, 6, 1), their agreement was binding. But, independently of the agreement of the parties, in certain cases the risk remained with the seller.

(1°.) *Res fungibiles.* When the things sold were fungible, *i.e.*, dealt with by number, weight, or measure (*res quae pondere numero, mensura consistunt*). In this case the principle is the same, but the date of the liability of the buyer is altered. It is not the date of the sale, but the time when the things are actually weighed, numbered, or measured, that fixes the liability. (D. 18, 1, 35, 5; D. 18, 1, 35, 7.) If, however, fungible things are sold *en bloc* (*per aversionem*, D. 18, 1, 62, 2) as "all that lot of wine, or oil, or corn," they are at the peril of the buyer from the date of the sale, for such a contract differs in no respect from a sale of land or houses. (D. 18, 6, 1; D. 18, 6, 4, 2.)

Wine sold becomes sour. If the wine was sold *en bloc*, the loss falls upon the buyer; but if the agreement was for so many *amphorae* (not specifying which), the loss falls upon the seller, unless the *amphorae* had been selected. (Vat. Frag. 16.)

If a flock is sold for one sum, the loss falls on the buyer from the date of the sale: if at so much a-head, then only from the time they are selected. (D. 18, 1, 35, 6.)

(2°.) Conditional sale. When the sale is conditional, *i.e.*, depends on some event future and uncertain, the rule is somewhat more complex. If the thing sold perishes altogether before the event occurs, the seller suffers the loss; if it does not perish wholly, but is impaired or deteriorated, the loss falls on the buyer. (D. 18, 6, 8, pr.; C. 4, 48, 5.) The reason is that, if the thing does not exist when the event happens, the seller cannot fulfil his obligation, because there is nothing for him to deliver; but if the thing exists in however bad a state, he can deliver it, and acquit himself of his promise.

(3°.) Sale of option. If the agreement were that the buyer should have the choice of two things, and one perished, the buyer took the other; if both perished, he must pay the price agreed upon. (D. 18, 1, 34, 6.)

2. Restrictions on delivery.

1°. There is a great difference between *res mancipi* and *res nec mancipi*. For the latter can be transferred by bare delivery to another, if only they are corporeal, and so admit of delivery. (G. 2, 18-19.)

Therefore, if I deliver to you a garment, or gold, or silver, whether by way of sale or gift, or on any other lawful ground, the thing becomes yours without any legal formality. (G. 2, 20.)

And so too with landed property in the provinces, whether it pays taxes or tribute. Now, lands that pay taxes (*stipendiaria*) are in the provinces that belong peculiarly to the Roman people. Lands that pay tribute are in the provinces that belong peculiarly to the Emperor. (G. 2, 21.) (P. 72.)

Tax-paying and tributary lands accordingly are alienated in the same way. Now the lands so called are provincial, and between them and Italian lands there is now under our constitution no difference. (J. 2, 1, 40.)

2°. Incorporeal things clearly do not admit of delivery. (G. 2, 28.)

Some things, besides, are corporeal, some incorporeal. Corporeal things are those that by their nature can be touched—a farm, for instance, a slave, a garment, gold, silver, and in short other things beyond number. Incorporeal again are those that cannot be touched, such as those that consist in a right, as an inheritance, a usufruct, a use; or obligations in whatever way contracted. And it is not to the point to object that an inheritance includes corporeal things. For the fruits, too, that are reaped from a farm are corporeal; and what one owes us under some obligation is often corporeal, as a farm, a slave, a sum of money. But the actual right of inheritance, the actual right of usufruct, and the actual right under the obligation, are incorporeal. (J. 2, 2, pr.-2; G. 2, 12-14.)

"Thing" is a name generally for any object that can be apprehended by the senses, and chiefly the objects of touch. But in this sense the term would not serve the purpose of Gaius. Is a contract a "thing"? If not, how is Contract to be made a department of the law concerning "things"? This difficulty was overcome in appearance by giving to the word "thing" a very wide definition. "Things" were said to be either corporeal or incorporeal. Corporeal things are things that can be touched; but by incorporeal things the jurists did not mean such things as soul, spirit, light, heat, etc.; they meant purely fictitious things. Incorporeal things were mere legal entities (*quae in jure consistunt*), such as usufruct, inheritance, *obligatio*. But these are not "things" in the ordinary acceptation of the term; they are bundles or aggregates of Rights and Duties. Things are thus divided into two classes:—(1) corporeal things; (2) inheritance, usufruct, and other legal aggregates.

Obviously this division is apparent, not real. We might as well divide animals into—(1) Vertebrata, and (2) Animal functions. But an examination of the Institutes shows that the division of "corporeal things" had really as little to do with "things" as the other division of "incorporeal things." What was really discussed under the head of "corporeal things" was ownership (*dominium*).

The jurists were led into this error from the accident that ownership in their law was transferred by the delivery of the thing, whereas lesser rights than ownership were created in a different manner. In English law, where the distinction appears in the contrast of corporeal with incorporeal hereditaments, an estate for life is classed with corporeal hereditaments, because at one time the ordinary mode of creating such an estate was livery of seisin, the English equivalent of *traditio*. Usufruct—the Roman equivalent for an estate for life—could not be created by delivery, and accordingly it was classed among *res incorporales*. The association of ideas was strengthened,

as Mr Poste points out, by the fact that in actions for ownership, the plaintiff claimed a *res*, and in actions for usufruct or servitude, he claimed a *jus*.

III. Prescription. (*Possessio longi temporis.*)

The investitive fact of *usucapio* was limited in its application. As belonging to the civil law, it operated only in favour of citizens, and of those Latins and others that had the *commercium*. It did not apply to lands out of Italy, nor, with certain exceptions, to servitudes. The Prætors supplied those defects of *usucapio* by the theory of possession for a long time. According to Ortolan, this long possession was of a different character from *usucapio*. He says *usucapio* is positive prescription, long possession is negative prescription. Long possession was a plea in defence (*prescriptio, exceptio*), by which the demand of the plaintiff could be resisted. (C. 7, 39, 8.) This is, however, a very different thing from negative prescription. After the time of prescription had elapsed, the possessor could recover the property, if he lost it, by vindication, the same as an owner. (C. 7, 39, 8, pr.)

In two ways a right of ownership may be effectually destroyed—either by the acquisition of an adverse right by another, or by denying the owner an action after a certain length of dispossession. If the latter course is adopted, and the form of the law is—after so many years no action shall be brought—then it is immaterial whether the actual possessor has or has not had it during the whole of that time, or whether he believes it to be his property, or knows that it is not. This plan seems the simplest and most efficacious. But the prescription or defence of long possession in the Roman law was founded positively on the adverse rights of a *bona fide* possessor. A *bona fide* possessor after a certain length of time was confirmed in his title, as against not only the owner, but all the world. The prescription of long possession was therefore very different from a statute of limitations, and was based on the claims of the possessor, not on the default of the owner. It was, therefore, in essence the same as *usucapio*. (D. 8, 5, 10, pr.)

1. Comparison of *usucapio* and *possessio longi temperis*.

(1.) Prescription supplied the deficiencies of *usucapio*. Inasmuch as *usucapio* was a mode of acquiring Quiritarian ownership, it followed that whatever was not an object of that species of ownership was not susceptible of *usucapio*. Hence lands out of Italy, of which the State retained the ownership, could not be acquired by *usucapio*, because no private person could be owner

of them. But subject to the claims of the State, the possessors of those lands were virtually owners, and for this important class of property the Prætors and Emperors devised long possession as an equivalent for *usucapio*. Servitudes also were held to be excluded from *usucapio* after the *lex Scribonia;* but they were capable of being acquired or lost by long quasi-possession. (D. 8, 5, 10, 1.) Moveables also belonging to cities fell under twenty years' prescription. (Paul, Sent. 5, 4, 4; D. 44, 3, 9; C. 7, 34, 2.) (2.) *Usucapio* was for two years in immovables, and one year in moveables. Long possession was for ten years if plaintiff and defendant lived in the same province, twenty years if they lived in different provinces. (Paul, Sent. 5, 2, 3.) But although the time differed, the principle was the same. The object was to allow an owner time enough to see to his rights. In early times, two years was no doubt an ample allowance; but when the confines of Rome extended over Europe and Asia, a very much longer time was necessary.

(3.) *Usucapio* gave ownership, with all the burdens attached to it. Thus if the land were mortgaged, the two years' possession gave the occupant the title of owner, subject, however, to the mortgage. In the same way he took the land burdened with whatever servitudes were attached to it. But long possession availed against both things, if no claim was asserted under them within the specified time. After ten or twenty years of non-claim, a mortgage or servitude was extinguished. (C. 7, 36, 2; C. 7, 36, 1; D. 44, 3, 12.)

(4.) A minor distinction, of no practical moment, is that *usucapio* was not cut short by the *litis contestatio*, but only by judgment, although the judgment decided according to the rights of the parties as fixed by the time of the *litis contestatio*. But possession is at once stopped by the *litis contestatio* (C. 7, 33, 2), although not by mere notice of an adverse title of ownership. (D. 41, 4, 13.)

2. Change by Justinian.

The *Jus Civile* established the rule that when a man in good faith bought a thing, or received it as a gift, or on some other lawful ground, from another that was not the owner, in the belief that he was the owner, then he might acquire that thing by use. And the time fixed was for a moveable anywhere one year; for an immoveable two years, but on Italian soil only. The aim of this was that the ownership of property might not be uncertain. When this policy was decided on, the ancients thought the times named above were enough for the owners to look after their property; but we have deliberately come to a better opinion. And, therefore, lest masters should be

despoiled of their property by undue haste, and lest this boon should be limited to a fixed locality, we have published a constitution on this subject. It provides that moveables may be acquired by use for three years, immoveables by long possession—ten years, that is, for persons present, twenty for persons absent. And in both these ways, not only in Italy, but in every land swayed by our rule, the ownership of property may be acquired, if only the antecedent ground of possession was lawful. (J. 2, 6, pr.)

To this prescription the old characteristics of *usucapio* attach. It confers the ownership (*dominium*), and it required the old conditions of *bona fides* and *justus titulus*. Parties were said to be "present" when they both had their domicile in the same province, "absent" if in different provinces (C. 7, 33, 12); and if they were domiciled partly in the same province and partly in different provinces, the time required was ten years, counting each two years of absence as one of presence. (Nov. 119, 8.)

Restrictions on Investitive and Transvestitive Facts.

A. *Persons to whom the ownership of things cannot be given.*

I. Slaves. — Slaves, as we have seen, had originally no rights in respect of their own person; much less, then, in respect of external things. But although a slave could not be owner, nevertheless alienations of property made to him were not void. The slave was regarded as a conduit pipe, through whom acquisitions might flow to the master. Whenever anything was transferred to a slave in such a manner that if he were free he would be owner of the thing, his master became owner of it. (J. 1, 8, 1.)

Peculium.

There grew up, however, under the sanction of custom and public opinion, a *quasi* right of property. Masters found it for their interest not to exact the uttermost farthing—not to strip their slaves in all cases as completely bare of things they could call their own as the law allowed. By leaving the slave a margin of his earnings, which he could by great industry increase, his total earnings would be so much augmented that the master would even profit by the remission. Slaves did a great portion of the intellectual as well as the manual work of Rome; and it was found expedient to reward their zeal and fidelity by allowing them the enjoyment and control of property. Whatever was thus allowed them was called *peculium*. It consisted of the savings made by a slave, or of presents given to him in reward of his services, and which his master was willing he should keep as his own property. (D. 15, 1, 39.) *Peculium* is a diminutive form of *pecunia*, indicating the trifling

importance of its amount. (D. 15, 1, 5, 3.) The *peculium* might consist of land or moveables, or other slaves (in that case called *vicarii*), claims arising from contract (*nomina*), etc. (D. 15, 1, 7, 4.) Necessaries that the master was bound to supply were not considered part of the *peculium* (D. 15, 1, 40); but even clothes might be in the *peculium* if they were given to the slave for his perpetual and exclusive use, and therefore to be kept solely by him. But clothes given by the master for a certain purpose, or to be used only at stated times, as when serving at supper, were not included in the *peculium*. (D. 15, 1, 25.) Everything, however, turned on the intention of the master. If he intended to surrender to the slave the exclusive control and enjoyment of anything as his *quasi* property, then it was *peculium;* otherwise not.

What was the legal character of a slave's interest in his *peculium?* It must be remembered that a slave had no rights; he could not sue either his master or any other person; but for many purposes his acts bound his master. Thus, he might enjoy the power of alienation. This was not considered an essential right of the *peculium*. (D. 15, 1, 7, 1.) A slave's garments might be treated as *peculium* to the extent of exclusive custody and use, but not for the purpose of alienation. If, however, the master allowed the slave free administration of his *peculium*, the slave could alienate any portion of it without the consent of the master. (D. 15, 1, 46.) If the slave had not obtained full administration, and sold anything out of the *peculium*, the buyer did not become owner. If the buyer did not know that the seller was a slave, he had *bona fide* possession, which might ripen by *usucapio* into ownership. (C. 4, 26, 10.) The power of pledging a thing goes along with, and is included in, the general power of alienation. (C. 4, 26, 6.) As we shall afterwards see, the *peculium* was liable for the debts contracted by the slave, and for all damages arising out of his contracts.

The consent of the master and the delivery of the thing to the slave (unless it was already in his possession) created the *peculium*. (D. 15, 1, 4.) So the expressed intention of the master to put an end to the *peculium* at once destroyed it even without the necessity of redelivering the things to the master. (D. 15, 1, 8; D. 15, 1, 40, 1.) The *peculium* was also extinguished if the slave ran away or was stolen, or if nobody knew whether he was alive or dead. (D. 15, 1, 48.)

II. Persons under the *Potestas*. *Filiusfamilias, filiafamilias.*

A *filiusfamilias* was exactly in the position of a slave as regards property; whatever would have been acquired by him through any investitive fact, if he had been independent, became the property of his *paterfamilias*. But by degrees the *filiusfamilias* obtained some rights of property, although never in Rome to the extent generally admitted in modern systems of law.

1. *Peculium.* The first mitigation was to allow the *filiusfamilias* to enjoy *peculium* on the same terms as a slave (D. 15, 1, 1, 5.) Beyond this stage no improvement was made in his lot during the Republic. A *filiusfamilias*, in the time of Cicero, even had he filled every office up to the consulship, or had, like Cincinnatus, twice saved the State, was not capable of, in the true sense of the word, *owning* the smallest coin current in Rome.

2. *Peculium castrense.* For the first time, under Cæsar or Titus, a soldier *filiusfamilias* was partially relieved from his proprietary disability in respect of certain acquisitions. The property that he was allowed to enjoy was called *peculium castrense*, and it may be defined as consisting of whatever he obtained by gift from his parents or relatives for his equipment, or would not have acquired except on service. (D. 49, 17, 1.)

Immoveables presented by a father to his *filiusfamilias*, a soldier on service, are not part of his *peculium castrense*, because they have no connection with his service. But immoveables gained by the son as prize of war are part of his *peculium castrense*. (C. 3, 36, 4.)

All that the *filiusfamilias* carries with him to war, with the consent of his *paterfamilias*, is *peculium castrense*. (D. 49, 17, 4.)

Two comrades in war make a fast friendship, and one leaves to the other his property by will. This is part of the *peculium castrense*. (C. 12, 37, 4; D. 49, 17, 19, pr.) Even if the testator was merely an acquaintance made through the service, the same result followed. (D. 49, 17, 5.)

An inheritance left by the wife of a *filiusfamilias* on service was decided also to be in his *peculium castrense* (D. 49, 17, 16, pr.; D. 49, 17, 13); rightly, if the inheritance was given as a sort of prize of valour; but when no such motive could be assigned, the inheritance did not go to the *peculium castrense*. (D. 49, 17, 16, 1.)

The dowry given to a *filiusfamilias* with his wife is not part of his *peculium castrense*, because it is got by marriage, not by service on the field of battle. (D. 49, 17, 16, pr.)

A friend of a *filiusfamilias* bequeathed to him a house, and expressly stated in his will that it was to form part of the son's *peculium castrense*. This declaration has in itself no efficacy. If upon the facts, apart from that statement, the legacy would be held not to fall into the *peculium castrense*, no effect was given to the declaration. (D. 49, 17, 8.)

In respect of his *peculium castrense* a son is absolute owner,

and he can deal with it as freely as if he were not under the *potestas*. He can receive such property (D. 49, 17, 5), and sue for it in a court of justice even against the expressed wishes of his *paterfamilias*. (D. 49, 17, 4, 1.) As to his testamentary power, see "Testamentum," under the head "Incapacity of Testator."

3. *Peculium quasi-castrense*. By successive enactments the privilege conferred on soldiers of retaining their prizes and equipment in full ownership was extended to persons engaged in the higher civil offices. Constantine (A.D. 320) enacted that the officials attached to the Imperial Palace (*Palatini*) should be owners of what they saved out of their salary, or obtained as gratuities from the Emperors, just as in the case of *peculium castrense*. (C. 12, 31, 1.) Theodosius and Valentinian extended the privilege to the officials of the Prætorian Prefect, clerks in the Chancery Court (*exceptores*), and the keepers of records (*scriniarii*). (C. 12, 37, 6.) Theodosius II. and Valentinian III. (A.D. 440) seem to have given a wider sweep to the privilege in the case of advocates of the Prætorian Court, or the Court of the City Prefect, giving them exclusive property in whatever they acquired from any source. (C. 2, 7, 8.) Leo and Anthemius (A.D. 469) allowed bishops, presbyters, and deacons free and full control over their clerical incomes. (C. 1, 3, 34.) To this list Justinian, with his greater zeal for the clergy, added sub-deacons, singers (*cantores*), and readers (*lectores*), giving to the clergy of every grade independent ownership over everything they acquired, thus rendering them, in regard to property, quite free from the most characteristic right of the *potestas*. (Nov. 123, 19.) Justinian, also, it must be remembered, released bishops from the *potestas* altogether. (Nov. 81.) He had previously decided in the Code that all gifts from the Emperor or Empress were to be the separate property of the receiver, free from the *potestas*. (C. 6, 61, 7.)

4. *Peculium adventitium*. The proprietary disabilities arising from the *potestas* were broken in upon on another line. The rights of the father were limited with respect to property coming to the children from their mother by her last will, or on her death intestate. It seemed natural that the property held by a wife independently of her husband should not become his by her attempting to give it to her children. Constantine (A.D. 319) enacted that a father should have only a life-interest (*ususfructus*) in the property acquired by his children from their

mother by her testament, or on her death intestate. The father was bound to manage it with all care, and could not sell it to a purchaser, so as to give him a title even by prescription. (C. 6, 60, 1). Arcadius and Honorius (A.D. 395) extended the rule to property coming from the maternal ancestors beyond the mother, and whether by gift during life or by will. (C. 6, 60, 2.) Theodosius and Valentinian (A.D. 426) gave only a usufruct to the father in the property that a son got through his *wife*, or a daughter through her husband. (C. 6, 61, 1.) Lastly, Justinian extended this limited ownership to all acquisitions of the son, except those made from the father's property.

Our children of both sexes in our *potestas* in old times indeed acquired for their parents all that came to them (except, it is true, *castrense peculium*) without any distinction. And this became the property of the parents so absolutely that they might at pleasure take what one son or daughter had acquired and give it to another son or to an outsider, or sell it, or apply it in any way they wished. This seemed to us harsh; and therefore, by a general constitution promulgated by us, we have both spared the children and reserved due rights to fathers. For the law as ratified by us stands thus:—If anything comes to the child from the father's property,[1] this according to ancient usage, he is to acquire wholly for the parent; for what hardship is it that what came because of the father should return to the father? If, again, the son acquires anything for himself in any other way,[2] the usufruct in this indeed he is to acquire for his father, but the ownership is to remain with himself; lest what his own toil or good fortune has added to his store should, by passing on to another, prove only a grief to him. (J. 2, 9, 1.)

Another change made by Justinian may be noticed. Constantine allowed a father on emancipating a child to retain a third of his property; but Justinian changed the rule as follows. (C. 6, 61, 6, 3.)

And we have made this arrangement also with regard to that class of cases where the parent, on emancipating the child, retained, if he wished, a third part of all the property that escapes acquisition by him. For under the earlier constitutions he had this privilege—the price, as it were, in a way, to be paid for the emancipation. Now it seemed harsh that the son should, as the result of his emancipation, be defrauded in part of the ownership of his property, and thus by the lessening of his effects lose all the honour conferred upon him by the fact that his emancipation made him *sui juris*. And therefore we have resolved that the parent, instead of the third of the goods that he was able to keep as owner, shall keep the half of the goods, not as owner, but in usufruct. For so the son's property will remain with him untouched,

[1] Hence called *peculium profectitium*, because arising from (*proficiens*) the father's property.

[2] Hence called *peculium adventitium*.

while yet the father will enjoy a larger amount in coming to control not a third, but a half. (J. 2, 9, 2.)

III. WIVES *IN MANU* and FREE PERSONS *IN MANCIPIO* were subject to the same proprietary disabilities as slaves or *filiifamilias* (G. 2, 86), and like these a wife could have *peculium*. But the institution of the *manus* disappeared so early that scarcely any interest attaches to it in respect of the law of property. Under the system of free marriage that took the place of *manus*, a proprietary institution of great historical interest and importance grew up. This was the dowry (*dos*), or contribution made by a wife's family for her support during the time of her marriage. At a late period in the Empire a corresponding contribution was sometimes made by the family of the husband (*donatio propter nuptias*), and that we may consider in connection with the dowry.

DOS.

DEFINITION.

Dos is the property contributed by a wife, or by any one else on her behalf, to her husband, to enable him to support the expenses of the marriage. This definition includes the only essential feature of the *dos* that need at this stage be considered.

Parapherna was that part of a woman's property that she reserved from the *dos*. The husband had no right to interfere with it or to burden it. (C. 5, 14, 8.) The practice was for a wife to make out an inventory (*libellus*) of the property she intended to use in her husband's house, if it was not to be in her *dos*, and to preserve the document after obtaining her husband's signature to it. The husband had no right to such reserved property; and if he retained it, the wife could sue him by the same actions that she could bring against any other person. (D. 23, 3, 9, 3.)

RELATION OF THE *DOS* to the *MANUS*.—The *dos* is an institution of considerable antiquity. It is referred to by Cicero (Top. 4) in a manner that would seem to show that it was better understood than the *manus;* and it was of such importance that Servius Sulpicius Rufus, who was consul B.C. 49, and died B.C. 42, wrote a book on the subject. That book is lost; but Aulus Gellius makes a statement, as from the work of Rufus, that securities for the restitution of the *dos* on the dissolution of marriage were first required when Sp. Carvilius Ruga put away his wife, by command of the censor, for barrenness. There is nothing incredible in the statement that about 200 years after the Decemviral Legislation the *dos* should have been in existence, as the XII Tables contained a provision by which

married women were enabled to escape subjection to the *manus*. The facts, indeed, show that the decay of the *manus* began at an exceedingly early period; or, to speak more accurately, the *manus* never, within the time covered by written records, existed with all the attributes that we must regard as originally inherent in it. The powers of a husband over his wife's person, at least such powers as he had over his children (and we must remember that in law the wife was a daughter), seem to have been reduced almost to nonentity from the earliest dawn of history. It was natural that the emancipation of the wife's person should precede by a considerable interval the emancipation of her property.

The interesting feature in the history of the wife's release from the disabilities of the *manus* is its abruptness, as compared with the liberation of children from the shackles of the *potestas*. We have traced the steps by which property gained in certain specific ways was withdrawn from the *potestas*, and the rights of the *paterfamilias* were ultimately reduced to a usufruct or life-interest, leaving the capital wholly to the children. Very different was the history of the *manus*. A woman was either wholly in or wholly out of the *manus;* either in law the daughter of her husband, subject to his absolute power in regard to contract and property, or free and independent, capable of bargaining with him on equal terms. Was the transition from one condition to the other abrupt? Did the Roman matron emerge at once from slavery and become the equal of her husband? That seems improbable; and we are left to conjecture by what steps the great change was accomplished.

It is probably safe to assume that a wife ceased to be regarded as property when her husband obtained her from her friends without paying for her. A state of the law that was in perfect harmony with the buying of wives, must offend the sense of propriety when marriage was entered into on equal terms. When we come to the Decemviral Legislation, we find no clear evidence of the real purchase of wives, although the form of marriage by sale continued long to exist. The time had therefore come when the relation of husband and wife in regard to property should be determined by the existing moral standard, and not by an ancient theory surviving merely in a legal formality. The *manus* must yield to the *dos*.

If we may hazard a conjecture, the *dos* was at first perhaps scarcely distinguishable from the *manus*. When a wife married

without the form of *confarreatio* or *coemptio*, her husband had no legal right to her property; but if she remained with him a year, and did not stay away three nights, she passed under his *manus*. Perhaps the first bargains were that the husband should have certain property in place of the *manus*. Whether this ever existed as a distinct stage we know not, but another step in advance, and we are on sure ground. The father gives certain property to the husband to support the wife, on condition that if he (the father) survive the wife, he shall recover from the husband as much as he gave him on the marriage. During the Republic, the husband (even in the absence of the *manus*) was absolute owner of all the wife's property given to him, subject to an obligation to return the property if the wife should die, leaving her father to claim it. It was not until the Empire that the process was effectually begun that ended in depriving the husband of the character of owner, making him in substance a trustee, with the privilege of taking the annual produce of the property during the continuance of the marriage.

1. *Dos profectitia* is the contribution made by the wife's father, or other ascendant on the male side, to the husband for the support of the wife. (D. 23, 3, 5, pr.; D. 23, 3, 5, 13; D. 23, 3, 5, 1; D. 23, 3, 5, 6.)

2. *Dos adventitia* is the contribution made by the wife herself, or by anyone else except her father, or other ascendant on the male side. (C. 5, 13, 1.)

3. *Dos receptitia* is the contribution made by anyone under (2), with the express agreement that the property shall be returned to such person on the dissolution of the marriage.

Rights and Duties.

A. Rights of the Husband.

I. To the *corpus* of the property.

A distinction must be drawn between permanent and perishable property. As regards fungible things—*i.e.*, things dealt with by weight, number, or measure (*quae pondere, numero, mensura constant*)—the property is given absolutely to the husband, subject to an obligation to return the same kind of things and the same quantities, in certain events, on the termination of the marriage. (D. 23, 3, 42.) Thus, if money is given to the husband, it is simply a loan without interest; he has the use of the money until the end of the marriage, with the chance of never having to restore it.

But even in the case of things that admit of being used, and returned after the marriage, as land or slaves, if the husband had the option of returning the things or paying a fixed price,

he was absolute owner; and if the property were accidentally destroyed, the loss fell entirely upon him. (C. 5, 12, 10.) In this case the property is said to consist of *res aestimatae.* (C. 5, 12, 5.) But if it were agreed that the wife, not the husband, should have the option of taking back the things, or their value, the husband did not acquire the uncontrolled ownership. (C. 5, 23, 1.)

L. Titius accepted from his wife Seia as part of her dowry a slave Stichus, taken at valuation (*aestimatus*), and had possession of him for four years. Did Titius become owner by *usucapio?* Certainly, if the slave was not stolen (*res furtiva*); and if Titius did not know that the slave belonged to another than his wife. The *usucapio* counts from the marriage. Thus Titius, not Seia, became owner. (Frag. Vat. 111.)

It is in the case of things not fungible, and not taken on valuation, that the much contested question arises—Was the husband owner (*dominus*), or was his interest confined solely to the rents and produce during the marriage? The true answer to this question must be historical. In the beginning probably the husband was owner, in the fullest sense of the word—perhaps even without any obligation to return the property on the dissolution of the marriage. The first step towards despoiling him of the ownership was when the father of the wife giving the *dos* (and that was doubtless the usual arrangement) insisted upon having it back if he should survive his daughter. Step by step various restrictions were imposed on the husband, until at length, although still called owner, he was divested of nearly every attribute of ownership, and reduced to the position of a tenant. The difficulties introduced by these gradual changes into the nomenclature of the law are amusingly shown by the irritated and yet half-uncertain tone adopted by Justinian in the constitution in which he deprived the husband of the last rag of ownership. As ownership (*dominium*) is purely a technical entity, the best test to apply is perhaps the action that the husband could use. The action appropriate to *dominium* was the *vindicatio;* and it was settled law (A.D. 287) that to the husband alone belonged the *vindicatio* (C. 5, 12, 11), and not to the wife. (C. 3, 32, 9.) Justinian, in changing the law, speaks of the ownership of the husband as a legal subtlety that obscured and defaced the true relation, and says that the property in truth (*naturaliter*) continued in the wife during the whole time. At the same time he shows a curious deference to the prejudices of the profession, so to speak, and endows the wife either with the real action (*vindicatio*), or, if that is too

strong, with a first and indefeasible mortgage over it, in preference to all creditors. (C. 5, 12, 30.)

A husband could manumit the slaves forming part of his wife's *dos*, either during his lifetime or by his will. (C. 5, 12, 3.) The only restriction was that, if he were insolvent, he could not give them liberty in fraud of his wife, who was a creditor for their value. (D. 40, 1, 21.) This is a clear instance of the exercise of ownership, because only the *dominus ex jure Quiritium* could give complete freedom to a slave.

If a slave were made heir to a stranger, it was only his owner (*dominus*) that could authorise him to accept the inheritance. This power the husband enjoyed in respect of a slave forming part of the *dos*. If, however, the husband acted wrongly, and either did not require the slave to enter on a lucrative inheritance, or required him to enter on one that entailed loss, he was responsible for the loss. To avoid this risk, the husband was advised not to take any action himself, but to leave it entirely to his wife; if she desired the inheritance, the slave was momentarily delivered to her as owner, on the condition that after the slave had accepted the inheritance, the wife should give him back to the husband, again to form part of the *dos*. (D. 24, 3, 58.)

Alienation by the husband.—The power of alienation is another test of ownership. Undoubtedly ownership may exist without that power, as in the case of children and the insane; but there is a distinction between a disability imposed, as in these cases, for the benefit of the owner himself, and one imposed on a nominal owner for the benefit of other persons interested in the property. In the latter case it is to a certain extent disestablishing the so-called owner.

For lands given as dowry cannot by the *lex Julia* be alienated by the husband against the woman's will; and that though they are his own, and given him as dowry [by *mancipatio*, or *in jure cessio*, or *usucapio*. And whether that rule of law relates to Italian lands only, or also to provincial, is doubted.] Now we, correcting the *lex Julia*, have put this on a better footing. For the statute applied to landed property in Italy only, and forbade it to be alienated against the woman's will, or to be mortgaged even with her consent. Both points we have amended. And now it is forbidden either to alienate or to burden (*obligatio*) even provincial lands; and neither can go on even with the woman's assent, lest the weakness of the female sex should be turned to the ruin of their substance. (J. 2, 8, pr.; G. 2, 63.)

The *lex Julia de adulteriis et de fundo dotali* was passed by Augustus. It applied to houses as well as land. (D. 23, 5, 13, pr.) Under the head of dotal land (*fundus dotalis*) was included land inherited by a slave forming part of the *dos*. (D. 23, 5, 3, pr.) The changes of Justinian are given in C. 5, 13, 1, 15.

On the principle that the greater includes the less, the husband could not burden his wife's land with a servitude, nor could he release a servitude belonging to it. (D. 23, 5, 5; D. 23, 5, 6.)

A husband acquires the ownership of land belonging to Titius, which is burdened with a servitude in favour of land forming part of his wife's *dos*. According to the

rule of law, when the ownership of the land entitled to the servitude, and of the land burdened with the servitude, united in the same person, the servitude was extinguished. Suppose the wife was divorced or survived the husband and recovered the dotal land, was she deprived of the servitude? In strict law she was, but her husband or his representative was required to pay damages if he did not re-establish the servitude. (D. 23, 5, 7, pr.)

The effect of an alienation by the husband against the *lex Julia*, and therefore also under Justinian's legislation, was to convey nothing to the transferee if the wife afterwards had any right to recover the land. The alienation was wholly void. (D. 23, 5, 3, 1.) But the husband, if he ultimately became entitled by survivorship to the dotal land, could not avoid his own act by pleading the prohibition of the *lex Julia*. As against him the alienation was valid. (D. 23, 5, 17; D. 41, 3, 42.)

II. To the income or produce of the property (*fructus*).

In the case of things reckoned by number, weight, or measure (*res fungibiles*), or of things taken upon valuation (*res aestimatae*), the husband's right of ownership is absolute, and applies equally to the thing itself and its produce. But in respect of the property that he must return, or that he may have to return at the end of the marriage, a different rule prevails, and the husband is entitled only to the income or annual produce (*fructus*). The object was to enable him to defray the expense of the marriage.[1]

In the case of slaves, the husband was entitled to their services, or to their wages if he let them out; but not to the children of female slaves. So strongly was it held that the offspring of slaves could not be treated simply as *fructus*, that even a special agreement between husband and wife to that effect was void. (D. 23, 3, 69, 9.) On the other hand, the young of animals were held to be *fructus*, and to them the husband was entitled after keeping up the number of the stock. (D. 23, 3, 10, 3.) The distinction thus drawn between slaves and animals is interesting as a mark of the regard paid by the Romans to the dignity of human nature, but does not seem otherwise to rest upon any solid ground.

In the case of land, the husband was entitled to the annual crops or rents. He could cut for firewood and lop pollards (*silva caedua*), but he was not entitled to the larger trees, even

[1] *Quum enim ipse onera matrimonii subeat, aequum est eum etiam fructus percipere.* (D. 23, 3, 7, pr.)

when they were thrown down by the wind. The wife was owner of the trees. (D. 24, 3, 7, 12.) He could open quarries or mines, or work those already opened, but he could not charge the expenditure against the estate. (D. 23, 5, 18, pr.; D. 24, 3, 8, pr.; D. 24, 3, 7, 14.)

III. Compensation for unexhausted improvements.

When a husband was entitled, not to the *corpus* of the property, but only to its produce, the question arose, what expenditure was he entitled to charge to the estate, and what ought to be defrayed out of the accruing income? In other, words, what expenditure must he pay himself, and what could he charge as a debt against his wife, or other person entitled to the property after the dissolution of the marriage? The answer turned upon the nature of the expenditure, and for this purpose the object of the expenditure must be considered. The Roman lawyers contemplated a threefold object :—

1. Necessary expenditure (*impensae necessariae*); that is, outlay required to prevent the deterioration or loss of the property (*impensae, quibus non factis, dos deterior futura sit*). (Ulp. Frag. 6, 15; D. 50, 16, 79, pr.) Another definition given by Paul throws an instructive light upon it. It is, says that jurist, such outlay as, if not made by the husband, would render him liable in damages to the wife to the extent of the loss caused by his neglect. (D. 25, 1, 4.)

Repairing a house. (Ulp. Frag. 6, 15.) Planting new trees in place of those decayed. (D. 25, 1, 14, pr.) Building a granary, or even, in some cases, a mill. (D. 25, 1, 1, 3.) Medical attendance on slaves. (D. 25, 1, 2.) Rearing vines, or making nurseries for the use of the land. (D. 25, 1, 3, pr.)

Necessary expenditure, although made without the knowledge or consent of the wife, could be charged against the estate; but not all necessary expenditure,—not what was spent to get in the crop or other produce, but only what was spent for the permanent improvement of the property. (D. 25, 1, 16.)[1] The caution is given that no general and exhaustive definition of necessary outlay can be given, but that each case must be considered with reference to the kind and amount of the outlay (D. 25, 1, 15); because if the expenditure is trifling it ought to be charged to current income, and not to

[1] *Nos generaliter definiemus multum interesse, ad perpetuam utilitatem agri vel ad eam quae non ad praesentis temporis pertineat, an vero ad praesentis anni fructum. Si in praesentis, cum fructibus hoc compensandum; si vero non fuit ad praesens tantum apta erogatio, necessariis impensis computandum.* (D. 25, 1, 3, 1.)

the *corpus* of the estate. Thus in the examples above cited of repairs to houses, medicine for slaves, planting vines, etc., if the amount in question is small, it must be charged to the year's produce. (D. 25, 1, 12.) Thus no claim could be made against the dotal estate for expenditure in teaching a slave any art, because the husband had the benefit of the exercise of the art; but, on the other hand, for the expense of putting out young slaves to nurse, the husband was entitled to compensation. (D. 24, 1, 28, 1.) An agreement that the wife should not be liable to make good necessary expenditure was void. (D. 23, 4, 5, 2.)

2. Beneficial (but not necessary) expenditure (*utiles impensae*) is that without which the property will be no worse, but with which it will yield greater produce; in other words, beneficial expenditure is whatever enhances the selling value (*promercalis*). (D. 25, 1, 10.)

Making a vineyard or oliveyard. (Ulp. Frag. 6, 16.) Putting cattle on land to manure it. (D. 25, 1, 14, 1.) Making a nursery garden. (D. 25, 1, 6.) Building a mill or granary, if the expenditure was not necessary. (D. 50, 16, 79, 1.)

In regard to expenditure that was beneficial but not necessary, the rule was that the wife must not be improved out of her estate, and that no charge could be made against her for such expenditure, unless she had known and approved it. (D. 50, 16, 79, 1.) For, says Paul, it would be very hard that a woman should be compelled to sell her property to pay for the improvements that had been made upon it. (D. 25, 1, 8.) Justinian allowed the estate to be charged with all beneficial expenditure, unless the wife had actually or by implication forbidden it. (C. 5, 13, 1, 5.)

3. Ornamental (but not necessary or beneficial) expenditure (*impensae voluptariae*) is outlay not required to keep the property intact, not adding to its selling value (D. 25, 1, 10), but only to its beauty or agreeableness; as, for example, pleasure-gardens and pictures (Ulp. Frag. 6, 17), baths (D. 25, 1, 14, 2), artificial fountains, ornamenting the walls with marble, etc. (D. 50, 16, 79, 2.) For such outlay the husband can charge nothing against the estate, but he is at liberty to carry off everything that can be separated without damaging the property. (D. 25, 1, 9; D. 25, 1, 11, pr.)

B. Duties of Husband.

1. The husband is bound to take as good care of the dota

property as he does of his own, but he is not responsible for accidental loss. Property that is his own absolutely (*res fungibiles* and *res aestimatae*) is entirely at his own risk, his obligation to return its value remaining intact, whether the property exists or not. (D. 23, 3, 17, 1 ; D. 24, 3, 11 ; D. 23, 3, 42 ; D. 23, 3, 10, 1 ; Frag. Vat. 101.) An agreement that the husband should not be responsible for negligence (*culpa*), but only for wilful wrong (*dolus*), was illegal ; but it was competent to the parties to agree that the risk (*periculum*) should or should not be borne by the husband. (D. 23, 4, 6.) But although the husband was not required to take more care of his wife's than of his own property, in one case, the heart, if not the logic, of the jurisconsult dictated an exception. A husband might be cruel to his own slaves, and no one be entitled to interfere ; but if he indulged his savage temper to the injury of the dotal slaves, he was responsible for the damage ; and the jurisconsult assigns as a reason, that conduct towards one's own slaves that can be censured only by opinion, if done to another's slaves is to be punished by law. (D. 24, 3, 24, 5.)

According to agreement, a *dos* included slaves taken on valuation (*aestimata mancipia*), but giving the wife an option, in the event of a divorce, to take the slaves or their value. Some of the slaves had offspring, and on a divorce the wife chose to have back her slaves. Was she entitled to the offspring produced during the marriage? No, says Paul, because the slaves lived at the risk of the husband, since he took them on valuation (*aestimata*). If he was to suffer the loss, he ought to have the profit accruing to him as owner. (Frag. Vat. 114.)

II. To defray the expenses of the marriage.

The object for which the *dos* was given to the husband is very clearly established—that he was substantially a trustee for the benefit of his wife. There does not appear, however, to have been any clear and distinct legal process to compel the husband, after getting the *dos*, to apply it to its proper purpose. He seems, indeed, in ordinary cases, to have been left to his discretion as to the mode of spending the money. The reason was probably that, owing to the almost unrestricted freedom of divorce, a wife if ill-used had the remedy in her own hands. This may be gathered from the procedure adopted when the wife was insane and incapable of defending herself. If her husband refused to divorce his wife in order to keep her *dos*, and left her without support, the curator of the wife might apply to the courts for a maintenance to the extent

of the *dos*, but not more. If the husband were not trustworthy, the court could order the *dos* to be taken from him. (D. 24, 3, 22, 8.)

Investitive Facts.

I. By promise (*dictio dotis, stipulatio*). The consideration of this topic is postponed till the subject of contract is discussed.

II. By giving the property to the husband (*datio dotis*). The husband could be invested with the *dos* in any of the ways in which any person could become owner.

III. Tacit re-settlement. In certain cases, after a divorce, if the parties remarried, the *dos* was held to be restored, unless it was shown that the parties did not intend the *dos* to be reconstituted. (D. 23, 3, 64; D. 23, 3, 40; D. 23, 3, 30.)

A wife, after a divorce, received part of her *dos*, part remaining with the husband. She married another person, who, however, died. She then returned to her first husband, and no mention was made of the part of her *dos* remaining in his hands. Once more a divorce occurred between them, and the husband, says Labeo, would have to return that portion of the *dos* on the same day as he would if the first divorce had not taken place; for upon the return of the wife, the *dos* was regarded as continuously existing up to the second divorce. (D. 24, 3, 66, 5.)

The *dos* might be made either *before* or *after* marriage; and if made before marriage, could be increased at any time during the marriage. (Frag. Vat. 110; C. 5, 3, 19.) If the property is transferred before marriage, the transfer is conditional upon the happening of the marriage. (Paul, Sent. 2, 22, 1.) Hence, whatever produce accrues from the property before the marriage takes place, follows the *dos*, and does not belong to the husband, unless it was agreed that he should have it as an ante-nuptial gift. (D. 23, 3, 7, 1.)

Divestitive Facts.

I. During the continuance of the marriage. When the husband became insolvent, or so poor that he could not pay back the *dos* at the end of the marriage, the wife had a right at once to recover what she could. (D. 24, 3, 24, pr.) Justinian allowed the wife to sue for the property as owner if her husband became needy; but she was bound to apply the income to keep the husband, herself, and children. (C. 5, 12, 29.)

II. Termination of the marriage by the captivity of husband or wife. The *dos* cannot be recovered merely because one of the parties is captive; but if the person continues in captivity till death, then the marriage was held to have been dissolved

at the time of the captivity, according to the rule of the *lex Cornelia.* (D. 24, 3, 10 ; C. 5, 18, 5.)

III. The marriage terminated by the death of the wife, leaving the husband surviving. In this case a distinction existed according to the origin of the *dos.* If the *dos* was given by the wife's father, or male paternal ancestor (*dos profectitia*), such person, if alive, could demand it back. If such person were dead, his heirs obtained nothing, and the husband remained absolute owner of the *dos ;* unless he had killed his wife. (D. 24, 3, 10, pr. ; D. 23, 3, 6, pr. ; C. 5, 18, 4.) Even, however, if the father were alive, he could not always claim the *dos*, for the husband could retain one-fifth of the *dos* for each child of the marriage : so if there were five children nothing would be returned. (Frag. Vat. 120.)

A grandfather (paternal) gives a *dos* to the daughter of his *filiusfamilias.* The grandfather and daughter die, leaving the *filiusfamilias* surviving. Can he recover the *dos?* Yes, even if he were disinherited by his father because it is made on his behalf for his daughter. (D. 37, 6, 6.)

Such was the law prior to Justinian ; but he enacted that if the father or male paternal ancestor were dead, the *dos* should go, not to the husband, but to the wife's heirs (C. 5, 13, 1, 6), and that no deduction should be made by the husband on account of his having children by the marriage. (C. 5, 13, 1, 5.)

When the *dos* was given by the wife, or by anyone other than a male paternal ancestor (*dos adventitia*), the husband retained it himself, unless there was a special agreement that it should go back to the person that gave it, or to such person's heirs (*dos receptitia*). (Ulp. Frag. 6, 5.) Justinian changed the rule, and gave the *dos* to the heirs of the wife, unless the person giving the *dos* had specially agreed that it should go back to him or his heirs. (C. 5, 13, 1, 13.) After the changes introduced by Justinian, the husband surviving was thus in every instance deprived of the *dos.*

IV. Termination of the marriage by divorce, one of the parties being in fault. In this case the rules will be found under the head of DIVORCE.

V. Termination of the marriage by divorce, neither of the parties being in fault, or by the death of the husband, leaving the wife surviving. These two cases are governed by the same rules. If the wife was *sui juris*, she alone could demand back the *dos*, whether it was *profectitia* or *adventitia.* Of course, if it was *receptitia*, it would go back to the donor. (Ulp. Frag. 6, 6;

C. 5, 18, 11; D. 24, 3, 30, pr.; D. 24, 3, 42, pr.) An agreement that if there were children the *dos* should remain with the husband, was not valid against the wife surviving (D. 23, 4, 2); but it was valid if the wife died first, or the divorce occurred through her fault. (D. 33, 4, 1, 1.) An agreement to reserve even a portion of the *dos* to the children was not valid if the wife survived. (C. 5, 14, 3.) The explanation of this seemingly harsh prohibition must be sought in the strong feeling that prevailed in Rome, that the expense of the children should fall upon the father, and that the wife's property (*dos*) was not to be charged with the burden of providing for them. The wife's heir had no claim unless the husband failed to restore the *dos* within the time allowed by law. (Ulp. Frag. 6, 7; Frag. Vat. 97.) After Justinian, however, the heir of the wife certainly had an action even if no delay occurred, because in the case of *dos adventitia* there was an implied stipulation that the wife should get the *dos*, and the benefit of this stipulation descended to her heirs. (C. 5, 13, 1, 13.) Probably a similar construction would have been adopted in the case of *dos profectitia*.

If the wife is not *sui juris*, but under the *potestas* of his father, then both together had a right to the *dos*, whether it were *profectitia* or *adventitia*. (Ulp. Frag. 6, 6; D. 24, 3, 2, 1.) No receipt was effectual to discharge the husband or his heirs, unless it were signed by both father and daughter. (D. 24, 3, 3.) The consent of the daughter was assumed, unless she distinctly refused. (D. 24, 3, 2, 2.)

A father, in virtue of his *potestas*, sent to his son-in-law, against the wish of his daughter, a bill of divorce. Could the father also demand back the *dos* he gave with his daughter? Paul answered that the effect of the bill of divorce was undoubtedly to dissolve the marriage, but that the father could not forcibly take away his daughter from the son-in-law, and could not recover the *dos* from him without her consent. (Frag. Vat. 116.)

Time of restoring the *Dos*. According to Ulpian (Ulp. Frag. 6, 8), fungible things must (in the absence of special agreement) be returned in three portions in three successive years from the dissolution of the marriage. Things not fungible were to be restored at once. Justinian altered the rule, and enacted that moveables, animals, and incorporeal things should be restored within one year; land or houses immediately. (C. 5, 13, 1, 7.)

An agreement that the restitution of the *dos* should be delayed beyond the legal time was void, but not an agreement to hasten the time. (D. 23, 4, 14-16.)

Remedies.

A. In respect of Rights and Duties.

1. A husband could, in restoring the *dos*, deduct the amount he had expended on necessary improvements. (Ulp. Frag. 6, 9 ; C. 5, 13, 1, 5.)

For to meet his expenses on the property forming the dowry, the husband is allowed to keep back part. For by the very nature of the right, from the dowry must be subtracted all necessary expenses, as may be learned from the fuller statements in the Digest. (J. 4, 6, 37.)

2. Justinian took away the right of retention in the case of useful expenditure (*utiles impensae*), and left the husband to sue, either by (1) *actio mandati* (the usual action to enforce agency), when the wife consented to the outlay , or (2) by *actio negotiorum gestorum*, when she did not, but had not forbidden the expenditure. (C. 5, 13, 1, 5.) These actions will be explained under the law of contract.

B. In respect of Investitive Facts. The husband had the usual remedies of an owner (*dominus*). (C. 5, 12, 11.)

C. In respect of Divestitive Facts. The wife or other person entitled to the *dos* on the dissolution of the marriage could not take possession of the property without the authority of a judge. (C. 5, 18, 9.)

1. *Actio rei uxoriae* was the remedy by which a wife or her father could recover the *dos* from the husband or his heirs. It was an action *bonae fidei*, that is to say, one in which the *judex* could take into account equitable considerations, although they were not pleaded *in jure*. (See Book IV., Proceedings *in Jure*.) It had, besides, the peculiarity that the husband was not compelled to pay so much as to reduce him to destitution ; and the same privilege was extended to his sons if heirs, but not to any other persons when his heirs. (D. 24, 3, 12 ; D. 24, 3, 15, 2 ; D. 24, 3, 18 ; D. 24, 3, 54.)

And again, if a woman brings an action at law for her dowry, it is held that the husband ought to be condemned to pay only what he can—as much, that is, as his means allow. Therefore if his means are equal in amount to the dowry, he is condemned to pay the entire sum ; but if not, then as much as he can. And the claim for repayment is lessened by his right to keep back part of the dowry. (J. 4, 6, 37.)

This was a privilege that the husband could not deprive himself of, even by his own agreement. (D. 24, 3, 14, 1.)

2. *Actio ex stipulatu*, or *actio in factum praescriptis verbis*. (For *dos recepticia*.) Such was the remedy of anyone that had bargained that the *dos* given by him to a wife should return to him. It was simply the ordinary action for contract.

These actions are personal (*actiones personales*) ; that is, they are to enforce rights *in personam* merely, not rights *in rem*. It follows, therefore, that so long as these were the only remedies, the wife's interest in the *dos* after marriage was not of the nature of ownership (*dominium*), but rather of mere obligation. This was, however, affected by the prohibition of the *lex Julia*, which made the husband's alienation void against the wife, and so enabled her, through the medium of a personal action, to recover her property.

3. Changes by Justinian. Justinian abolished the *actio rei uxoriae*, and decided that the *actio ex stipulatu* should take its place, but so that every benefit of the former should be attached to the latter. (C. 5, 13, 1, §§ 1, 2, 9-13.)

Formerly the action to recover a wife's property (*actio rei uxoriae*) was one of the proceedings in good faith (*ex bonae fidei judiciis*). But finding the *actio ex stipulatu* gave more scope, we have transferred all the rights

attaching to the wife's property to the *actio ex stipulatu;* but with many distinctions when it is put forth to recover dowries. And rightly as the action to recover a wife's property is thus done away with, the *actio ex stipulatu*, brought in to take its place, has justly taken the nature of a proceeding in good faith, and is therefore so regarded — but only when employed to obtain a dowry. (J. 4, 6, 29.)

He also gave the real actions (*vindicatio* or *actio hypothecaria*) to recover the property, whether in the hands of the husband or of another. (C. 5, 12, 30; C. 5, 13, 1, 1.)

DONATIO PROPTER NUPTIAS.

This was a gift from husband to wife, corresponding to the *dos*, but of immensely less antiquity. The first undoubted notice of it (for we may assume that C. 5, 3, 7 refers to a match being broken off, and not to the dissolution of the marriage) is in A.D. 449, in a constitution of Theodosius and Valentinian, where forfeiture of the donation is taken along with forfeiture of the *dos* as a punishment for causeless divorce. Justinian says it is, in name and reality, the same as the *dos* (C. 5, 3, 20, pr.), being a correlative contribution by the husband to the wife. Justinian gave the wife a real action (*vindicatio*) against all possessors to recover the property included in the *donatio propter nuptias* (Nov. 61, 1), and it is not perhaps an unreasonable inference that the wife had the same general powers in respect of such donation as the husband had in respect of the *dos*. The following passage is given in the Institutes :—

There is also another kind of *donatio inter vivos*, entirely unknown to the old jurists, but brought in after their time by the later of our imperial predecessors. This was called the *donatio ante nuptias* (prenuptial gift), and implied as a tacit condition that it should not be binding till followed up by the marriage. Indeed it was called *ante nuptias* because it was accomplished before the marriage, and after the celebration of the nuptials no such gift was bestowed. But the late Emperor, *Justinus* our father, seeing that increase of dowries after marriage was allowed, was the first to permit by his constitution that in any such event the *donatio ante nuptias* might be increased also, even though the marriage had already taken place. But the name remained, though now unsuitable ; for it was called prenuptial, while it thus received a postnuptial increase. But we being anxious to sanction a full and final settlement, and carefully suiting names to things, determine that such gifts may not only be increased, but may begin even when the marriage has already taken place. And further, we determine that the gifts shall be called not *ante nuptias* but *propter nuptias*, and shall be put on the same footing as dowries in this respect, that as dowries are not only increased but come into being when the marriage has already taken place, so too

those gifts brought in *propter nuptias* may not only precede marriage, but may even after it is contracted be both increased and settled (for the first time). (J. 2, 7, 3.)

The children of the marriage had no interest in the donation any more than in the *dos*. (C. 5, 3, 18.) Justinian also enacted (C. 5, 3, 20, 1) that the same kind of agreements as were valid in the case of the *dos* should be allowed in the donation. He observes that as such gifts, under the general law, required to be registered in court (*insinuatio*), and as husbands often purposely neglected to do so, with the object of depriving their wives of a legal remedy, henceforth such registration might be made at any time during the marriage. (C. 5, 3, 20, 1.)

In another respect the analogy was at least partially kept up. Heretic fathers (as also Jews and Samaritans) having orthodox children were obliged to give them both *dotes* and *donationes* to the satisfaction of the Provincial Presidents and Bishops. (C. 1, 5, 13 ; C. 1, 5, 19.)

B. *THINGS OVER WHICH OWNERSHIP CANNOT BE EXERCISED.*

By ownership (*dominium*) is understood private property where a person exercises all the rights of enjoyment and alienation summed up in the word ownership. There were many objects, however, over which the full right of ownership could not be exercised. These objects will now be enumerated, with a statement of such rights as could be exercised in respect of them.

(A.) Things common to all men (*Res communes*).

Private property implies not merely the right of the owner to use the thing of which he is owner, but also the right to prevent anyone else using it, even where such use would not in the slightest degree interfere with his enjoyment of it. But certain objects cannot be so appropriated. The atmosphere, for instance, must be used incessantly by all on pain of death, and no human being can be excluded from the use of it. Private property in the air is physically impossible. Next to the air, the high sea is most difficult of appropriation, and practically no combination of men is ever likely to have such a naval force as would enable them to prevent others using the ocean. A restricted ownership is indeed allowed by modern international law. Every nation has an exclusive right to control the navigation and fisheries on its coasts for a limited distance.

And, indeed, by the *jus naturale* these things are common to all men—the air, and running water, and the sea ; and therefore the sea-shores. Hence no one is forbidden to approach the sea-shores, provided only he respects villas, and monuments, and buildings ; because they are not under the *Jus Gentium* as is the sea. (J. 2, 1, 1.)

The sea-shore extends to the highest point reached by the waves in winter storms. (J. 2, 1, 3.)

The use by the public of the shores is part of the *Jus Gentium* just as is the use of the sea itself. And therefore it is free to anyone to place a hut there to which to betake himself, or to dry nets there, or to haul them up from the sea. But of those shores it is understood that no man is owner; for they come under the same rules of law as the sea itself and the underlying earth or sand. (J. 2, 1, 5.)

Rights in *res Communes*. 1. The right of fishing in the sea belongs to all men. This was specially stated by Antoninus Pius in a rescript to the fishermen of Formiae and Capena. (D. 1, 8, 4, pr.) 2. Everyone had a right to build on the shore, or, by piles, upon the sea, and retained the ownership of the construction so long as it lasted; but when it fell into ruins, the soil reverted to its former state as a *res communis*, which any other person might build upon. (D. 1, 8, 6, pr.; D. 1, 8, 10.) But anyone could forbid the erection of a pier or other construction that would interfere with his use of the sea or beach. (D. 43, 8, 3, 1; D. 43, 8, 4.)

Remedies.—1. *Actio injuriarum.*—Whosoever prevents a man fishing in the sea was considered to commit an *injuria*. (D. 47, 10, 13, 7; D. 43, 8, 2, 9.) 2. *Interdictum utile.*—Any person whose use of the sea or beach would be impaired by any construction or building could move for an interdict, after the analogy of the interdict (*ne quid in loco publico fiat*), to prevent such nuisance in public places. (D. 43, 8, 2, 8.)

(B.) Things belonging to the State (*Res Publicae*).

Those things are alone said to be public that belong to the Roman people (D. 50, 16, 15); to this must be added things that may be used by the public.

All rivers again, and harbours, are public, and therefore the right of fishing therein is common to all. (J. 2, 1, 2.)

The use of the banks, too, is public by the *Jus Gentium*, like that of the river itself. And so anyone is free to bring-to his ship there, to make it fast by cables to the trees that grow there, and to unload any burden upon the banks, just as he is to sail along the river itself. But the adjoining landowners are proprietors of those banks, and therefore the trees that grow thereon belong to them. (J. 2, 1, 4.)

The distinction between public things and common things was not in the nature of the rights exercised over them, for in both the use of the things belonged to men generally; but the difference was that common things were regarded as having no owner (*res nullius*); whereas public things were regarded as belonging to the State, or, as in the case of river banks, to

private individuals. The shores of the sea were not considered subject to the ownership of the State (D. 41, 1, 14, pr.), but simply as under its supervision or jurisdiction. (D. 43, 8, 3, pr.)

The State might be owner in two very different ways. In one way, it might exercise all those rights of exclusive use that an ordinary private proprietor did; as, for example, in the Republican Exchequer (*Ærarium*), the Imperial Exchequer (*Fiscus*), the slaves belonging to the State (*servi populi Romani*), mines (*metalla*), and lands (*agri vectigales*). Such things may truly be said to be in the ownership of the Roman people (*in patrimonio Romani populi*). (D. 43, 8, 2, 4.) The things subject to such rights were not called public.

In another sense, the State may be regarded as a sort of owner, as in respect of harbours where the ownership of the soil was regarded as inhering in the State, but the perpetual use thereof was dedicated to the public. This left an extremely shadowy sort of ownership in the State; but in regard to rivers and their banks, the right of the private proprietor was only suspended so long as the water kept its channel; if it deserted its bed, he again recovered his right of exclusive enjoyment.

The two chief classes of public things were public roads and rivers and harbours.

1. Public Roads. (*Publicae viae*). Roads are of several kinds; (1) public, either Prætorian, or consular, or military; (2) private, connecting fields; and (3) local (*vicinales*), which either are in villages or lead to them. (D. 43, 8, 2, 22.) The local roads are established by private persons upon their own land; but if the memory of such private individual has perished, they are treated as public. (D. 43, 7, 3, pr.) A military road must terminate in the sea, or in a town, or in a public river, or in another military road; the local roads may not even join to a military road. (D. 43, 7, 3, 1.)

Private roads are of two kinds; (1) strictly private, confined in their use to the owners of certain lands; and (2) private roads with permissive use to the public, and connecting a house with a public highway. (D. 43, 8, 2, 23.)

Public roads in the city of Rome were under the care of the Curule Ædiles, who had full powers to keep them in order, and prevent all injury to them, or interference with their legitimate use. To them we do not in the subsequent remarks refer, but

only to the ads in the country. (D. 43, 10, 1, 1 ; D. 43, 8, 2, 24.)

(1.) Every person was entitled to the use of a public road as a highway. (D. 43, 7, 1.)

(2.) It was forbidden to obstruct a highway, or other place of which the use was in the public, as by setting up a monument (D. 43, 7, 2) or any construction. (D. 43, 8, 2, pr.) Even if a thing has been built without objection, it cannot be repaired if it is an obstruction. (D. 43, 8, 2, 7.)

Anyone could compel the removal of the obstruction, and get compensation if he was injured, as by taking away his outlook or light (D. 43, 8, 2, 14), or interfering with the approach to his house. (D. 43, 8, 2, 12.)

(3.) No one was allowed to do anything to a road, or place anything upon it, rendering it less useful as a highway.[1]

A road is made worse, when, from being plain, it is made hilly : when, from being smooth, it is made rough; or when it is made narrower or swampy. (D. 43, 8, 2, 32.)

After some hesitation, it was held that a road was deteriorated when a bridge was built over it, or a drain made below it. (D, 43, 8, 2, 33.)

A road is made worse when a sewer is opened into it (D. 43, 8, 2, 26); or if water is allowed to overflow from an artificial pond (D. 43, 8, 2, 27), or when it is built upon in such a way as to prevent the rainfall running off the road. (D. 43, 8, 2, 28.)

A road is also regarded as made worse if noisome smells are made in the vicinity of it. (D. 43, 8, 2, 29.)

A public road is either one constructed by public authority, or a private road that has been so long used by the public that the time when it was first made has been forgotten. (D. 43, 11, 7, 3, pr.)

No prescription avails against the rights of the public to the use of a public road or path. It remains public although it is never used by the public. (D. 43, 11, 2.)

(1.) The right of using a public road was secured by interdict.[2] "The Prætor says, I forbid any violence to be done to hinder a man from going or driving freely along a public road or way." This interdict applied only to public roads; curiously enough, rights to other public things or common things were not protected by any interdict, except the right of navigation in rivers. Thus a right to fish or sail in the sea, to play in the public parks, to bathe in a public bath, or to sit in a public theatre, was protected by the *actio injuriarum.* (D. 43, 8, 2, 9.)

(2.) To prevent buildings and constructions prejudicial to private individuals, an interdict could be brought by the person directly injured. (D. 43, 8, 6.) The inter-

---

[1] *Ait Prætor: In via publica itinereve publico facere, immittere quid, quod ea via idve iter deterius sit, fiat veto.* (D. 43, 8, 2, 20.)

[2] *Prætor ait: Quominus illi via publica itinereve publico, ire agere liceat, vim fieri veto.* (D. 43, 8, 2, 45.)

dict was prohibitory; its object was to prevent, not to punish; hence, if any one builds without objection, he cannot be compelled to pull down; but the procurator of public works may, if it obstructs the public, pull it down, or, if it is no obstruction, impose a ground-rent (*solarium*). (D. 43, 8, 2, 17.) If the building or construction is not finished, security is required that it shall not be proceeded with. (D. 43, 8, 2, 18.)

(3.) Damage to the road itself was dealt with by a special interdict, which might be brought by anyone (whether complaining of any special injury or not), and after any length of time: the amount of damages was fixed with reference to the interest of the complainant in the condition of the road. (D. 43, 8, 2, 34.) It is not merely preventive, but remedial (*restitutoria*), and the wrong-doer is obliged to restore the road to its previous state, as by giving back what he has taken away, or by taking away what he has left on it. (D. 43, 8, 2, 43.)

2. Rivers and Banks of Rivers. A river (*flumen*) is distinguished from a stream (*rivus*) by its greater magnitude, or by reputation. (D. 43, 12, 1, 1.) Rivers are either permanent (*perennia*), flowing all the year round, or winter torrents (*torrentia*) that leave their beds dry in summer. A permanent river might, however, occasionally dry up without forfeiting its character. (D. 43, 12, 1, 2.) A public river is a permanent river. (D. 43, 12, 1, 3.) Public rivers are of two kinds, navigable and not navigable. A bank of a river (*ripa*) is defined, after the analogy of the sea-shore, as the furthest reach of the river. (D. 43, 12, 3, 1.) This, however, is true only so long as the river keeps within its natural course. Occasional floodings do not change the legal extent of the bank, otherwise all Egypt would be a bank of the Nile. But if the increase or abatement is permanent, the bank is regarded as altered. (D. 43, 12, 1, 5.)

(1.) "The Prætor says I forbid any violence to be done to hinder any man from freely sailing a ship or boat on a public river, or from loading or unloading at the bank. And also I will grant an interdict to secure the right to sail freely over a lake, a canal, or a pond that is public."[1]

Lake (*lacus*) is a natural and permanent collection of water. (D. 43, 14, 1, 3.)

Pool (*stagnum*) is a natural collection of rain-water, and not permanent, but often dried up. (D. 43, 14, 1, 4.)

Fossa is a trench or canal made by men (D. 43, 14, 1, 5), which was sometimes public.

(2.) It was forbidden to do anything to a river or its banks, or place anything thereon, that would impede the navigation or use of the banks. (D. 43, 12, 1, pr.)

[1] *Prætor ait: Quominus illi in flumine publico navem, ratem agere, quove minus per ripam onerare, exonerare liceat, vim fieri veto. Item ut per lacum, fossam, stagnum publicum navigare liceat interdicam.* (D. 43, 14, 1, pr.)

The owner of both sides of a stream cannot throw a private bridge across the stream. (D. 43, 12, 4.)

Water may be led from a river, unless specially forbidden by the Emperor or Senate, or unless it makes the river less navigable. (D. 43, 12, 1, 15; D. 43, 12, 2.)

Water withdrawn from a public river for irrigation ought to be divided according to the dimensions of the fields; but water was never allowed to be withdrawn if it were to cause injury. (D. 8, 3, 17; D. 43, 20, 3, 1.)

Repairs of a river bank were permitted only if no damage was done to the navigation. (D. 43, 15, 1, 2.)

Anything that would cause a public river to change its channel from that in which it ran during the preceding summer, or to make its course more rapid, was unlawful. (D. 43, 13, 1, pr.; D. 43, 13, 1, 3.)

These rights were enforced by interdicts. (D. 43, 14, 1, 1; D. 43, 12, 1, pr.; D. 43, 13, 1, 11.)

(C.) Things belonging to corporate bodies (*res universitatis*).

These are things that belong to a corporation, not to individuals; city theatres, for instance, race-courses, and the like, owned in common by the cities. (J. 2, 1, 6.)

The expression *universitas* is used in two different significations; the correlative word *singuli* is used with corresponding diversity of meaning. *Res singulorum* mean things belonging to individual men; their opposite is *res universitatis*, or corporate property. *Res singulae* mean any things or aggregate of things as opposed to a *universitas juris*, or totality of rights and duties inhering in any individual man, and passing to another as a whole at once. The most interesting and important example of a *universitas juris* is inheritance; the analysis of the notion will be reserved. Meanwhile it is sufficient to note the ambiguity in the word *universitas*.

A *universitas* or corporate body exists when a number of persons are so united that the law takes no notice of their separate existence, but recognises them only under a common name, which is not the name of any one of them. (D. 3, 4, 2; D. 3, 4, 7, 1.) All the members are considered in law as a single unit or being. (D. 46, 1, 22.) Such units are sometimes called fictitious persons, because the corporate body, as such, may sue and be sued, receive or part with property, bind itself or bind others, through some agent or syndic (D. 3, 4, 1, 1) who acts in the name of the whole, just as any individual may act for himself. (D. 3, 4, 7, 1.) The chief characteristic of such a body is that it does not necessarily die. (D. 5, 1, 76.)

A corporation could not, by the Roman law, be created by private agreement; it required the authority of a statute (*lex*), *Senatus Consultum* or constitution of an Emperor. (D. 3, 4, 1, pr.) The lowest number that could form a corporation *collegium*) or company (*societas*) was three (D. 50, 16, 85); but it seems that if the number of an existing corporate body was

reduced to two or even to one in a town, it could still be maintained. (D. 3, 4, 7, 2.) There were many such corporations in Rome, chiefly connected with trades, such as the guild of bakers, and shipowners, companies of tax-gatherers, companies for working mines of gold, silver, salt, etc. The internal government of the corporate bodies was in the hands of the members (*sodales*).

Corporate bodies, like States, might enjoy two kinds of ownership. They might be owners, just like private individuals; and herein such bodies form no exception to the general observations made with reference to private property. But some of such bodies—municipalities for example—might hold property of which people in general were entitled to the use. It is to this alone that Justinian refers. In this sense alone are *res universitatis* analogous to *res publicae;* the former belong to cities or municipalities, the latter to Rome itself. We have thus three classes of things of which the use was general: common things, having no owner; public things, the ownership being in the Roman people; and *res universitatis*, of which the use was in the public, and the ownership in the municipality.

(D.) The last class of things withdrawn from the exercise of ownership (*dominium*) is connected with religion (*res divini juris*), and consists of three groups.

The ultimate division of things, then, is into two classes; for some are under Heaven's law, some under man's law. (G. 2, 2.)

Of things under Heaven's law, things sacred and devoted are instances. (G. 2, 3.)

1. Sacred things are things consecrated to the gods above (*res sacrae*); devoted, those left to the gods the shades (*res religiosae*). (G. 2, 4.)

But a sacred thing, it is held, can be made so only by the authority of the Roman people; for it is consecrated by a statute passed, or by a *Senatus Consultum* made for that purpose. (G. 2, 5.)

Sacred things are things that have been duly (that is by the priests) consecrated to God—sacred buildings, for instance, and gifts duly dedicated to the service of God. And these we, by our constitution, have forbidden to be alienated or burdened (*obligari*), except only in order to redeem prisoners. But if any man, by his own authority, establishes a would-be sacred thing for himself, it is not sacred, but profane. A place, however, in which sacred buildings have been erected, even if the building is pulled down, remains still sacred, as Papinian too wrote. (J. 2, 1, 8.)

Those two passages illustrate the change introduced by the adoption of Christianity as the state religion of the Empire. In the old religion certain deities were supposed to preside over the celestial region, and property consecrated for their worship was *res sacrae;* other deities to preside over the realms of the dead, and, in their regard, the

place where a dead body was placed, became *religiosus*. In the time of Justinian the gods of the celestial region were replaced by the God of the Christians; and *res sacrae* continued to mean things devoted to religious worship. There was also a continuity in the investitive facts. No property could be allowed to pass under the exclusive care of the priests, except with the sanction of the State. Under the Empire, the Emperor alone could authorise the dedication of property to religious uses. (D. 1, 8, 9, 1.)

The constitution to which Justinian refers allowed the sale of church property in famine also; for he says it is not unreasonable to prefer the lives of men to vessels and vestments. (C. 1, 2, 21.) By a later enactment, a church unable to pay its debts was allowed to sell superfluous vessels, but not its immoveables, or anything required for the service of the church. (Nov. 120, 10.)

2. Burial-ground (*res religiosae*).

A place in which the body or ashes of a human being (even a slave) (D. 11, 7, 2, pr.) were laid became religious, if the consent of the proper parties had been obtained, and if it were intended to be the final, and not merely a temporary resting-place. (D. 11, 7, 2, 5; D. 11, 7, 40.) A monument or erection in memory of a deceased person (D. 11, 7, 2, 6) was not a sepulchre unless it contained a dead body. (D. 11, 7, 42; D. 11, 7, 6, 1.)

RIGHTS of the quasi-owner of a burial-place.

(1.) A burial-place was not alienable. (C. 3, 44, 9; C. 9, 19, 1.) On a sale of the land in which it was contained, it did not pass to the buyer. (Paul, Sent. 1, 21, 7.)

(2.) A wrong was done by erasing the inscriptions, throwing down any statue, or overthrowing a stone or column, or otherwise defacing a tomb. (Paul, Sent. 1, 21, 8.)

(3.) It was an offence to bury a person in a sepulchre without having the right to do so. (D. 47, 12, 3, 3; Paul, Sent. 1, 21, 6.)

INVESTITIVE FACTS.—(1.) A devoted place we make so by our own choice by bringing a dead man into a spot that is ours, if only it is our part to bury him. (G. 2, 6.)

But in provincial soil, according to the general opinion, a place cannot be devoted; because of that soil the Roman people or Cæsar is owner, while we have only the possession and usufruct. A place of that sort, however, although not devoted, is looked on as if it were (*pro religioso*). For so, too, in the provinces, what has not been consecrated by the authority of the Roman people, although properly not sacred, is yet looked on as if it were. (G. 2, 7.)

The theory that no ownership (*dominium ex jure Quiritium*) could exist over lands in the provinces, inasmuch as they belonged to the State, was, by the construction explained by Gaius, not permitted to deprive the inhabitants of the pleasure of having their burying-places secure from intrusion. It will be observed that the introduction of Christianity led to no essential alteration of the law of sepulture.

A devoted place is made by each man of his own choice, when he brings a dead man into a spot that is his. But into a pure spot owned in common

you cannot bring the dead against the will of a joint owner; into a burying-place owned in common, however, you may, even against the will of all the other owners. And again, if the usufruct is another's, it is held that the proprietor cannot, unless the other consents, make the place devoted. Into another's ground, by the owner's leave, you may carry the dead; and even if he ratifies the deed only after the dead has been carried in, yet the spot becomes devoted. (J. 2, 1, 9.)

A pure spot is one not before used for interment.

It was a law, moreover, that no one could be buried within the city, even in his own land. (Paul, Sent. 1, 21, 2; D. 47, 12, 3, 5.)[1]

Divestitive Facts.—(1.) Paul tells us that if a river laid bare a sepulchre, or it threatened to fall down, the body might be removed during the night, after the offering of solemn sacrifices, to another place, which would thereupon become devoted. (Paul, Sent. 1, 21, 1; D. 11, 7, 44, 1.) In other cases the removal of a dead body from the place intended to be final was forbidden. (D. 11, 7, 39.)

(2.) If the land were taken in war, it was regarded as losing its character; which, however, was restored if the land was reconquered. (D. 11, 7, 36.) "The tombs of the enemy are not sacred to us," was the churlish maxim of the law. (D. 47, 12, 4.)

Remedies. (1.) *Actio de sepulcro violato.* It was a crime to hinder the burial of any body wilfully, or to violate a sepulchre (D. 47, 12, 8); but the action here named carried only a fine in money. (D. 47, 12, 9.) The action was Prætorian, and was given in the first instance to the owner of the soil; and if the owner did not appear, then to anyone that pleased; and if several appeared, then to whichever seemed to have best reason. (D. 47, 12, 3, pr.)

When an action was brought by the owner of the soil, the damages were fixed at whatever sum might be considered by the judge to be proper; and if by a person not owner, the penalty was 100 *aurei.* (D. 47, 12, 3, pr.) Condemnation carried with it infamy. (D. 47, 12, 1.)

(2.) *Actio in factum.*—To prevent a person burying a body where he had no right. The Prætor says, "If it is alleged a dead man, or the bones of a dead man, are carried into pure ground [*i.e.*, ground not sacred, or devoted, or hallowed, (D. 11, 7, 2, 4)] belonging to another, or into a burying-place to which there is no right, then the doer shall be liable to an *actio in factum*, and shall be subjected to a pecuniary penalty." (D. 11, 7, 2, 2.)

(3.) A special interdict was allowed when anyone was prevented burying a corpse in land that belonged to him. (D. 11, 8, 1, pr.)

3. Hallowed things (*res sanctae*), too, such as walls and gates, are in a way under Heaven's law, and therefore form part of no one's goods. And the reason why we call walls hallowed is this, that a capital penalty is fixed for those that do them any wrong. And for the same reason, too, we call those

[1] XII *Tables.* *Hominem mortuum in urbe ne sepelito neve urito.* (p. 22.)

parts of statutes in which we fix the penalties for those that act in defiance of the statutes "sanctions." (J. 2, 1, 10; G. 2, 8.)

Isidorus derives *sanctus a sanguine hostiae.* It was usual at the foundation of walls in ancient cities to make valuable sacrifices, as of a horse, and sometimes even of human beings.

Ambassadors also were regarded as hallowed: persons who struck or injured them were delivered up to the nation they represented. (D. 50, 7, 17, pr.)

The walls of cities could not be touched or even repaired without the authority of the State. To leap the walls was the offence for which Romulus is said to have killed his brother Remus. (D. 1, 8, 11.)

Things sacred and hallowed were protected by an interdict which was both prohibitory and restitutory. (D. 43, 8, 2, 19; D. 43, 6, 2.)

C. *RESTRICTIONS ON VOLUNTARY ALIENATION.*

The Roman law imposed restrictions on the voluntary alienation of property, both in respect of the mode of alienation and also of the amount that might be given. A voluntary alienation is one that a person is not compelled by law to make; as a gift.[1]

(A.) Restrictions as to the mode of voluntary alienation.

There are other gifts too made without any thought of death, and called *inter vivos.* These are not to be compared to legacies in any respect, and if once completed they cannot be readily revoked. And they are completed when the giver has openly declared his intention, whether in writing or not. Our constitution, too, has determined that these gifts, like sales, should in themselves involve the necessity of delivery, but so that if no delivery took place, they should be fully and completely valid, and the necessity of delivery should rest upon the giver. And since the arrangements of former emperors willed that such gifts should be registered in the public records if of more than 200 *solidi*, our constitution has extended the amount to 500 *solidi*, and decided that gifts up to that sum shall stand even without registration. It has, too, found certain gifts, of which registration is entirely needless, which are in themselves most fully valid. And many other points beside we have found tending to the freer issue of gifts, that can all be gathered from our constitutions laid down regarding this. Yet it must be known that although the gifts are quite unqualified, still if those that receive the boon prove ungrateful, we have by our constitution given leave to revoke the gifts on certain fixed grounds. For we would not have those that have bestowed their property on others to suffer at the hands of these very men outrage or loss after the fashions enumerated in our constitution. (J. 2, 7, 2.)

In this passage Justinian deals with two very distinct though closely related subjects, voluntary promises and voluntary alienations. The effect of a voluntary promise

[1] "*Quod nullo jure cogente conceditur.*" (D. 50, 17, 82.)

was to bind the promiser to deliver what he promised ; but until delivery there was no change of ownership in the thing. Moreover, gifts exceeding 500 *solidi* must be registered.

Constantine enacted that voluntary alienations should be evidenced by a written document, containing the name of the donor, and a description of the nature of his rights and of the property ; that this document should be registered, and that the property should be delivered in the presence of witnesses. (C. Th. 8, 12, 1 ; C. Th. 8, 12, 3.) These precautions were superseded by the rules introduced by Justinian.

(B.) Restrictions on the amount of gifts.

I. An old statute (*lex Cincia*, B.C. 204) that continued to exist up to the time of Constantine, but fell into desuetude before Justinian, prohibited gifts beyond a certain amount (which is not stated), except as between certain relatives. Gifts to the extent to which they exceeded the limit, but no further, were void. (Frag. Vat. 266 ; Ulp. Frag. pr. 1.) It seems, however, that if the donor did not revoke the gift during his life or by will, the gift was confirmed. (Frag. Vat. 294.)

The persons exempted from the restrictions of the *lex Cincia* were (1) all persons related by blood (*cognati*) up to the fifth degree, and to second cousins in the sixth degree ; also those in whose *potestas*, *manus*, or *mancipium* such persons were, or those over whom such persons had *potestas*, *manus*, or *mancipium*. (Frag. Vat. 298-301.) (2) Persons related by affinity, so long as the tie lasts, but no longer. (Frag. Vat. 302.) (3) Tutors to pupils, but not pupils to tutors. (Frag. Vat. 304.) (4) Patrons and freedmen. (Frag. Vat. 307-309.) (5) Any blood relation beyond the sixth degree could make a gift as a dowry. (Frag. Vat. 305, 306.)

II. Gifts between Husband and Wife. Before marriage, an intending husband or wife could make gifts to the other without restriction, and the gifts might even be conditional upon the celebration of the marriage (Frag. Vat. 262) ; but after marriage a husband could not make a gift to his wife, nor to her father, if she were under his *potestas* ; nor could a wife make a gift to her husband, nor to his father, if he were in his father's *potestas*, nor to his children if they were in his *potestas*. (C. 5, 16, 4 ; Frag. Vat. 269.) In the age of Antoninus this rule was ascribed to custom (D. 24, 1, 1 ; D. 24, 1, 3, pr.) ; but it has been pointed out that the prohibition of the *lex Cincia* did not apply to husband and wife, from which it may be perhaps inferred that the rule did not exist during the Republic, about B.C. 200.

When a wife ceased to be in the *manus* of her husband, she enjoyed complete proprietary independence, unless she remained in the *potestas* of her father. Thus the wife, like the husband, kept her property separate. As both, therefore, might by foolish generosity be deprived of their property, the rule prohibiting gifts was made applicable to both ; for, as was

said by the Emperor Antoninus, the object of marriage was the satisfaction of an honourable love, and not that either husband or wife should gain money by it. (D. 24, 1, 3, pr.)

Exceptions.—1. Birthday and other presents, if moderate in amount, were not prohibited. According to custom, every year husbands made presents to their wives on the Kalends of March, and wives to their husbands on the Saturnalia. (D. 24, 1, 31, 8.)

2. Gifts were valid if they were not to take effect until the dissolution of the marriage. A gift made in contemplation of an immediate divorce was valid; but was prohibited if made with reference to a future possible divorce. (D. 24, 1, 60, 1; D. 24, 1, 62, 1; D. 24, 1, 12.)

3. Gifts were not prohibited unless they made the giver poorer, and also the receiver richer. (D. 24, 1, 25.)

A husband refuses a legacy or inheritance, which thereby goes to his wife. Although the husband did this by way of gift, the wife's title is perfect. The renunciation does not take from the husband's property. (D. 24, 1, 5, 13; D. 24, 1, 5, 14.)

Either husband or wife may grant to the other, as a gift, a burial-place. (D. 24, 1, 5, 8; D. 24, 1, 5, 9.) A gift to a wife of a valuable tombstone is not void, but the property in it remains in the husband until a dead body is placed there, and the place becomes devoted. The gift does not enrich the wife. (D. 24, 1, 5, 10.)

A husband may present a slave to his wife with a view to manumission, although indirectly this was a gift of the valuable rights of patronage. (C. 5, 16, 22; D. 24, 1, 9, 1.)

Either husband or wife may have the use of the other's slaves, or of a dwelling-house, gratuitously. (D. 24, 1, 18.)

Either party may surrender to the other a thing pledged to the other without a consideration, the debt not being thereby extinguished. (D. 42, 8, 18.)

Gifts by a wife to her husband, to enable him to acquire any public dignity, are valid. Hence gifts to defray the expenses of standing for office or of the games. (D. 24, 1, 42; D. 24, 1, 40.)

Confirmation of invalid gifts.—The prohibition did not extend beyond the lifetime of the parties; after the marriage was at an end, gifts might take effect. Therefore, just as a gift made before marriage, to take effect only after marriage, was declared void, so a gift during marriage to take effect after the marriage was dissolved by the death of one of the parties, was valid. (D. 39, 6, 43; D. 24, 1, 9, 2; D. 24, 1, 11, pr.) A husband or wife, therefore, having made gifts to the other, could confirm them by Will. It became usual to insert in wills a clause to that effect, when it was desired that gifts made during marriage should be retained. At length Antoninus, before coming to the throne in the reign of Severus, carried a *Senatus Consultum* to the

effect that all gifts invalid during the marriage should become valid on the death of the donor, unless expressly revoked during life, or by testament. (D. 24, 1, 32, 2.) A question, however, arises where property was not given, but only a promise made. Can the promise be enforced against the heir of the deceased? There was a difference of opinion between the two great classical jurists, Papinian and Ulpian. Papinian held that the *Senatus Consultum* applied only to gifts of things, and that an invalid promise was not made obligatory by the death of the promiser. (D. 24, 1, 23.) Ulpian, however, explicitly held that a stipulation, for example, for an annuity, could be enforced after the death of the promiser, if he had not withdrawn from it in his lifetime. (D. 24, 1, 33, pr.; D. 24, 1, 33, 2.) Justinian decided not merely that all such promises should be enforced, but that even a mortgage or pledge by the husband of the things promised should not be considered an implied revocation of the gifts. (Nov. 162, 1.) Previous to this time pledging a thing had been construed as a tacit revocation. (C. 5, 16, 12; D. 24, 1, 32, 5.)

In certain cases, however, death did not operate as a ratification.

(1.) If the parties were divorced, or even permanently separated without a formal divorce, and not re-married before death. (D. 24, 1, 62, 1; D. 24, 1, 32, 10; D. 24, 1, 32, 19.)

(2.) If the donee or receiver of the gift died first, or was reduced to slavery. (D. 24, 1, 32, 6; D. 24, 1, 32, 18.)

(3.) Such confirmed gifts were subject to the rules applicable to gifts made *mortis causa*. Therefore both doner and donee must have a capacity to give and receive at the time of death. (C. 5, 16, 24; D. 24, 1, 32, 7; D. 24, 1, 32, 8.)

(4.) Justinian, in the Code, required the gift to be expressly confirmed by will if it exceeded the amount that required registration; but the provision was repealed in the Novels. According to the latest law, such gifts took effect up to the amount that did not require registration, but beyond that amount were invalid. (C. 5, 16, 25; Nov. 162, 1, 2.)

III. Gifts to concubines or natural children. Constantine seems to have prohibited all gifts or bequests to natural children or concubines. (Nov. 89, pr.; C. Th. 4, 6, 1.) This was part of his policy to discourage and repress concubinage. With this object in view he introduced, on the one hand, the privilege of legitimation by subsequent marriage; and, on the other hand,

he imposed on concubines and natural children an incapacity to take any property from the father, either in his lifetime or on his death. In A.D. 371, however, we find this severity mitigated in certain cases by a constitution of Valentinian, Valens, and Gratian. (C. Th. 4, 6, 1.) If a person died leaving legitimate children or grandchildren, or a father or mother, all gifts or bequests made by him to his concubine or natural children exceeding one-twelfth of his property were declared void. If a person died without leaving such relatives, he could give his concubine or natural children as much as one-fourth, but not more. In substance this provision agrees with a subsequent constitution of Arcadius and Honorius, A.D. 403. (C. 5, 27, 2.) Justinian admitted a further relaxation. If a person has any legitimate children, he cannot give his natural children or his concubine more than one-twelfth of his property. If he leaves no legitimate children, but ascendants, for whom he is obliged to provide in his will, then the natural children can get as much as the father pleases, if enough is left to satisfy the legal claims of the ascendants. If there are no legitimate children, and no such ascendants, a father may leave his whole property to his concubine or natural children. (Nov. 89, 2.)

IV. It was enacted by Severus and Antoninus that alienations made by persons after the commission of a capital crime, without valuable consideration, should be invalid if condemnation followed. (D. 39, 5, 15; D. 39, 5, 31, 4.)

Extension of Investitive and Transvestitive Facts.

We may, with Savigny, regard Agency as an extension of investitive and transvestitive facts. It is convenient, in the first instance, to assume that a transvestitive fact operates universally—that anybody may become the owner of anything. Thereafter the qualifications to which this statement is subject may be enumerated,—the persons that cannot be owners, and the things that cannot be the objects of ownership. But the transvestitive facts admit of extension as well as restriction. Thus, if A mancipates a slave to B, B becomes owner, and that is the simple form; but if, in consequence of the mancipation, not B, but C becomes owner, then we have a transvestitive fact operating in favour of C, who has taken no part in the transaction. We may regard this as an extension of the simple transvestitive fact.

Did the Roman law recognise any such extension — any agency? In answering this question a distinction of much importance and constant recurrence appears in view. It is that between the old formal and the newer non-formal modes of conveyance. In respect of the former, no agency was possible except through slaves or persons in an analogous state but in respect of the informal modes of conveyance, such as delivery, agency was permitted universally.

A. Agency in respect of the formal transvestitive facts.

We acquire things not only ourselves directly, but also by means of those that we have in our *potestas* [*manus* or *mancipium*], and also of those slaves in whom we have a usufruct; and further, of freemen or slaves belonging to others that we possess in good faith. Let us look into these cases narrowly one by one. (J. 2, 9, pr.; G. 2, 86.)

1. Slaves and persons subject to *potestas*, *manus*, or *mancipium*.

And further, all that [your children *in potestate*, and all that] your slaves [receive by *mancipatio* or] obtain by mere delivery (*traditio*), all rights that they acquire by stipulation or on any other ground whatever, all are acquired for you, and that though you know it not, or even against your will: for the slave that is in your *potestas* can have nothing of his own. And, therefore, if he is appointed heir, he cannot enter on the inheritance except at your bidding; and if at your bidding he does enter, it is for you he acquires the inheritance, just as if you had been appointed heir. And so also with a legacy. (J. 2, 9, 3; G. 2, 87.)

But we must bear in mind that when a slave belongs to one man *in bonis*, and to another *ex jure Quiritium*, all that is acquired through that slave, on any ground, goes to the owner *in bonis*. (G. 2, 88.)

And not only property (*proprietas*) is acquired for you by persons in your *potestas*, but also possession. For when they have gained possession of a thing, that possession is held to be yours. And thus, by means of them, the time for *usucapio* or *longi temporis possessio* begins to run. (J. 2, 9, 3; G. 2, 89.)

But as regards persons *in manu* or *in mancipio*, though by means of them you acquire property on any ground, just as through persons in your *potestas*, yet, whether you acquire possession is usually questioned, because they themselves are not in your possession. (G. 2, 90.)

2. Slaves possessed in good faith.

The same decision has been come to with regard to a person in good faith in your possession, and that whether he is free or another man's slave. For the decision as to him that has the usufruct holds with regard to the possessor in good faith too. All he acquires, therefore, on any ground outside those two, belongs either to himself if he is free, or to his master if he is a slave. (J. 2, 9, 4; G. 2, 92.)

"Outside those two."—For the meaning of this, see the following extract, "3. Slaves held in usufruct."

But if the possessor in good faith has come by *usucapio* to own the slave, and thus to be his master, then all the slave acquires on any ground goes to him as his master. (J. 2, 9, 4 ; G. 2, 93.)

But he that has the usufruct cannot become owner by *usucapio ;* in the first place, because he is not possessor, but has only the right of use and enjoyment ; and in the second place, because he knows that the slave belongs to another. And it is not property alone that you acquire by means of slaves in whom you have a usufruct or who are in good faith in your possession, or by means of a free person in good faith in your service, but possession as well. With regard to the person of both slaves and freemen, we speak in accordance with the limitation just set forth ; viz., that the possession must have been gained by them either with your property or by their own exertions. (J. 2, 9, 4.)

3. Slaves held in usufruct.

As regards slaves held by you only in usufruct, it has been decided that all they gain with your property or by their own exertions is added to your estate ; but all they gain on other grounds than those belongs to the master that owns them. And therefore if such a slave is appointed heir, or any legacy is left him, or gift bestowed on him, it is acquired not for the man that has the usufruct, but for the master that owns him. (J. 2, 9, 4.)

B. Non-formal transvestitive facts.

From all this, then, it appears that through freemen neither subjected to your power nor possessed by you in good faith, and also through other men's slaves in whom you have neither the usufruct nor lawful possession, you can in no case acquire. And this is the meaning of the saying that through an outsider nothing can be acquired. [The only doubt is with regard to possession,—whether it can be acquired through an agent.] (J. 2, 9, 5 ; G. 2, 95.)

To this there is one exception. For it is held that through a free person—a procurator, for instance—you can acquire possession, not only knowingly, but even in ignorance, as was settled by a constitution of the late Emperor Severus. And by possession of this sort you acquire ownership even, if it was the owner that delivered the property ; or if not, you can acquire it by *usucapio,* or *longi temporis praescriptio.* (J. 2, 9, 5.)

It makes no difference whether the owner in person delivers the property to another, or whether some one else delivers it by his wish. (J. 2, 1, 42.)

And on this principle, if anyone is allowed by the owner to manage his business freely, and he in the course of business sells goods and delivers them, he thereby makes them the property of the receiver. (J. 2, 1, 43.)

Titius and Gaius bought land, which was delivered to Titius partly for himself and partly as the agent of Gaius. By this delivery Gaius becomes part owner of the land. (D. 41, 1, 20, 2 ; C. 4, 27, 1 ; C. 7, 32, 8.)

Sempronius takes delivery of a slave from Mævius with the intention of holding it for Julia. Julia afterwards hears of the transaction. From that moment she begins to acquire by *usucapio.* (C. 7, 32, 1.)

Titius, the agent of Julius, at his request buys a farm, and takes delivery of it in the name of Julius. That delivery immediately vests the ownership in Julius, even before he knows that the delivery has actually taken place. (D. 41, 1, 13 pr.) If,

however, Titius bought the farm without any special order, Julius does not become owner until he hears of the transaction, and ratifies it. (D. 41, 2, 42. 1.)

The distinction between formal and non-formal Investitive Facts pervades the whole Roman law. It appears in the manumission of slaves, adoption, conveyance of property, contract, inheritance, and procedure. Everywhere the Roman law presents the same characteristic. In antiquity it was characterised by a spirit of intense formalism—a spirit emulated by the jurists in the narrow pedantry of their interpretation. The forms or ceremonies had doubtless at some remote period a real significance, if for nothing else, as symbolising an almost superstitious reverence for law. These forms had also a marked utility among a people to whom the art of writing was unknown as an instrument in the transactions of daily life. It followed that no one could be affected by the forms except the persons that actually took part in the ceremony. Hence the general rule, that in no legal transaction could one freeman represent or act for another. The only exception was in the case of slaves, and other persons subjected to a qualified ownership. But in the course of time, as the law paid less attention to forms, and more to the meaning and intention of parties, the rule of the civil law was felt as an inconvenience as well as an anomaly. Thus it was held that anyone could acquire possession by another, so that the possession of A should be held to be the possession of B. In the later period of the Roman law delivery of possession (*traditio*) became the exclusive mode of conveying property; and thus, as Justinian states, ownership could be acquired not only by slaves, but by any free person.

Remedies.

A. Remedies in respect of Rights and Duties.

First, Rights to moveables. (*Res se moventes*, and *res mobiles*.)

I. Theft—*Actio Furti*. This is the remedy against the thief. It is concurrent with other actions, such as the ordinary actions for recovering ownership (*vindicatio, actio ad exhibendum*), but generally these would only be resorted to when the stolen article (*res furtiva*) was in the possession of a person innocent of the theft. The *actio furti* is cumulative with the *condictio furtiva*, an action whose characteristics will be presently described. (D. 13, 1, 7, 1.)

The *actio furti*, whether brought for twofold or for fourfold the loss, looks only to the recovery of the penalty. For the recovery of the thing itself the master had a remedy outside this—by *vindicatio*, namely, or *condictio*. *Vindicatio* is the remedy against the possessor, whether that is the thief or some one else. *Condictio* lies against the thief himself or his heir, although he is not the possessor. (J. 4, 1, 19.)

1. The *penalty* for theft varied according as the thief was or was not caught in the act. Hence a distinction between manifest and non-manifest theft. (*Furtum manifestum* and *nec manifestum.*) The standard of punishment was thus determined with a regard to the feelings of vengeance that might be expected to actuate a sufferer taking into his own hands the punishment for the depredations on his property.

The penalty for a thief taken in the act (*manifesti furti*) was by the statute of the XII Tables capital. For a freeman was scourged, and adjudged (*addictus*) to him from whom he had stolen. But whether he was made a slave by being so adjudged, or was put in the position of a debtor assigned to a creditor (*adjudicatus*), was a question among the older writers. A slave, again, was scourged in like manner and put to death. But afterwards the harshness of the penalty was censured ; and for a theft by a slave as well as by a freeman the remedy fixed by the Prætor's edict was an action for fourfold the amount. (G. 3, 189.)

For a thief not taken in the act (*nec manifesti*), the penalty imposed by the statute of the XII Tables was an action for twofold the amount ; and this the Prætor retains. (G. 3, 190.)

The penalty for theft is, where the thief is taken in the act—fourfold, whether he be slave or free ; where he is not—twofold. (J. 4, 1, 5.)

The severity of the penalty for theft was probably due not to the cruel disposition of the lawgiver, but to the weakness of the executive authority. It was a high bribe to induce the party whose goods were stolen to forego the right of private vengeance. By the XII Tables a nocturnal or an armed thief might be lawfully slain. When the civil authority had once established its ascendancy, there was no longer any justification of such excessive severity, and the Prætor modified the law in the manner stated in the text.

Furtum manifestum, some have said, is theft detected while it is still being committed. Others go further and say that it is theft detected while the thief is still on the spot where it is committed : for instance, if olives are stolen in an olive-grove or grapes in a vineyard, as long as the thief is in that olive-grove or vineyard ; or if in a house, as long as the thief is in that house. Others again go still further, and say that a theft must be called *manifestum* if detected before the things stolen have been carried to the place where the thief meant to carry them. And others, going further still, say whenever the thief is seen holding the thing stolen. This last opinion has not been accepted. And even the opinion of those that think that until the things stolen have been carried to the place meant for them by the thief, the theft, if detected, is a *furtum manifestum*, has been disapproved by most. For it raises doubts as to the limit of time to be set, whether one day or more ; a point that comes in, because often the thief means to carry things stolen in one State into other States or provinces. Therefore, of the two opinions first stated, one or other is the approved one ; and most prefer the latter. (G. 3, 184.)

A *fur manifestus* is what the Greeks call ἐπ' αὐτοφώρῳ. And the term includes not only the thief taken in the very act, but also the thief taken on the spot where the theft is committed ; for instance, if he has committed a theft in a house, and is taken before he goes out of the door ; or in an olive grove, or vineyard of olives or grapes, and is taken while still in that olive grove or vineyard. And even further than this the term *furtum manifestum*

must be extended. For so long as the thief is seen or taken still holding the thing stolen, and that whether in private or in public, by its owner or by anyone else, before he has reached the place where he meant to carry the thing and lay it down, he is a *fur manifestus*. But if he has carried it to the point to which he meant to carry it, although he is taken with the thing stolen in his possession, he is not a *fur manifestus*. (J. 4, 1, 3.)

What *furtum nec manifestum* is, appears from what we have said. For all that is not *manifestum* is *nec manifestum*. (J. 4, 1, 3 ; G. 3, 185.)

The penalty was double or quadruple—what? A difference existed when the owner (*dominus*) sued the thief, and when any other person interested in the property did so.

(1.) The owner, as a general rule, was confined to the price or real value of the stolen property. (D. 47, 2, 80, 1.) (*Non quod interest sed rei verum pretium.* D. 47, 2, 50, pr.)

(2.) A person, not an owner, having a right to sue a thief, recovers double what he loses by the theft, not twice the worth of the article stolen. (D. 47, 2, 80, 1.)

A's female slave is stolen from him and sold by the thief to B, an innocent purchaser, who gives the thief two *aurei*. The slave is again stolen by Attius, who is sued both by A and B. What penalties will each recover? A obtains double the value of the slave, B double the value of his interest (*duplum quanti ejus interest.*) The owner measures by the ownership, the possessor by the possession. (D. 47, 2, 74.)

The value of the thing, if it afterwards perishes or is deteriorated, is taken as it was at the time of the theft. But if its value is enhanced between the time of the theft and the commencement of the action, its *maximum* value is taken. (D. 47, 2, 50, pr.)

Thus, a thief steals a child, and is sued by the owner when the child has grown up : the measure of damages is not the value of the child, but the highest value of the adult ; because it would be monstrous to give the thief the benefit of any change resulting from his own wrong. (D. 47, 2, 67, 2.)

The owner also can add remote damages.

A has sold an article to B, which he is bound to give to B by a day named under a penalty. Before the day, the article is stolen, and A has to pay the penalty. He recovers from the thief twice what he has had to pay. (D. 47, 2, 67, 1.)

A slave instituted heir is stolen. The thief must pay twice the value of the inheritance, as well as twice the value of the slave. (D. 47, 2, 52, 28.)

When securities are stolen (*tabulæ vel cautiones*), the thief must pay double or quadruple not merely the value of the material, but of the sums for which the documents were the securities. (D. 47, 2, 27, pr.) It makes no difference if the documents are cancelled (D. 47, 2, 82, 3), unless there is other valid evidence. (D. 47, 2, 27, 2.)

2. The *actio furti* may be brought *by* the heirs of the injured person, but not *against* the heirs of the thief, because the action is penal. (D. 47, 2, 41, 1 ; C. 6, 2, 15.

3. Aggravated theft. (*De incendio, ruina, naufragio, rate, nave expugnata.* (D. 47, 9.)

When the theft was committed from a building on fire, a house fallen down, a shipwreck, or a boat or ship attacked by force, the thief was liable to a fourfold penalty if the action were brought within the year, but after that time only to a single penalty. The words of the edict are given. (D. 47, 9, 1, pr.)

The Prætor says,—If it is alleged that a man, after a fire, the fall of houses, or a shipwreck, or by the violent capture of a boat or ship, has carried off any plunder, or has knowingly received it, or has under these circumstances inflicted any damage on any one, against that man I will give a remedy—if within a year from the first time there

is power to try the case, then for fourfold the loss ; if after a year, then for the loss simply.[1]

The edict also includes buildings adjacent to those that are burned or have fallen down. (D. 47, 9, 1, 3.)

Naufragium includes what is cast ashore at the time of a wreck, but not when an interval has elapsed. (D. 47, 9, 2 ; D. 47, 9, 5.) What is stolen on the shore, not under the excitement of the shipwreck, falls under the head of simple theft. (D. 47, 9, 3, pr. ; D. 47, 9, 3, 6 ; D. 47, 9, 4, 1.)

Rate vel nave expugnata is when a boat or vessel is attacked by pirates or robbers, and things are stolen either by them or by others under cover of the tumult. (D. 47, 9, 3, 1.)

II. Other actions in case of theft.

Of thefts there are [according to Servius Sulpicius and Masurius Sabinus, four kinds, *manifestum* and *nec manifestum*, *conceptum* and *oblatum*. But Labeo makes] two kinds only, *manifestum* and *nec manifestum;* for *conceptum* and *oblatum* are rather species of procedure attaching to theft than kinds of theft. [And this is certainly the truer view, as will appear below. (J. 4, 1, 3 ; G. 3, 183.)

1. *Furtum conceptum.* An action against the possessor (whether innocent or not of stolen goods.

The term *furtum conceptum* is applied when in a man's house, before witnesses, something that has been stolen is sought and found. For against him there is a special action, even although he is not the thief, called the *actio (furti) concepti.* (J. 4, 1, 4 ; G, 3, 186.)

2. *Furtum oblatum.* Imposing stolen goods on one to escape the former action.

The term *furtum oblatum* is applied when something that has been stolen is brought to you by some one, and is found on formal search in your house, especially if brought to you with the intention that it shall be found in your house and not in the giver's. For you, in whose house it is found upon a formal search, have a special action against the man that brought it, although he may not be the thief. And this is the *actio oblati.* (J. 4, 1, 4 ; G. 3, 187.)

The penalty in the *actiones concepti* and *oblati* is by the statute of the XII Tables threefold. And the same penalty is still enforced by the Prætor. (G. 3, 191)

3. *Actio prohibiti furti.* Resisting the search for stolen goods.

There is also an *actio prohibiti furti* against the man that prevents another when wishing to search for stolen goods. (G. 3, 188.)

This *actio prohibiti* is for a fourfold penalty, and was brought in by the Prætor's edict. But the statute fixes no penalty on that account ; it only orders the man that wishes to search to go naked to the search, girt with a

---

[1] *Prætor ait:* " *In eum qui ex incendio, ruina, naufragio, rate, nave, expugnata, quid, rapuisse, recepisse dolo malo, damnive quid in his rebus dedisse dicetur, in quadruplum in anno, quo primum de ea re experiundi potestas fuerit: post unnum in simplum judicium dabo.*"

linen girdle and holding a flat dish ; and if he finds any stolen goods, the statute declares it a case of *furtum manifestum*. (G. 3, 192.)

What the linen girdle is has been questioned. But the truer view is that it is a kind of decent covering for the man's loins. And so the whole statute is absurd. For the man that prevents another from searching with his clothes on, will also prevent him from searching with his clothes off ; and all the more that if the thing is sought and found in that fashion, he will be made liable to a greater penalty. And again, it is absurd to order him to hold a flat dish. For whether the aim was to keep the hands of the holder engaged so that he could not slip in anything, or to supply him with a dish whereon to place what he found, neither aim is attained if the thing sought for is of such a size or nature that it could neither be slipped in nor placed upon the dish. This assuredly is undoubted, that a dish of any material satisfies the statute. (G. 3, 193.)

Yet because the statute ordains that a theft so discovered (viz., by the search *lance et licio*) is a *furtum manifestum*, there are some writers that say that *furtum manifestum* is of two kinds—statutory and natural ; statutory being that of which we are speaking ; natural, what we have set forth above. But in truth *furtum manifestum* is natural ; for no statute can turn a *fur nec manifestus* into a *fur manifestus* any more than it can turn him that is no thief into a thief, or him that is not an adulterer or a man-slayer into an adulterer or man-slayer. But what the statute can do is this—it can ordain that a man shall be punished exactly as if he had been guilty of theft or adultery or manslaughter, although really guilty of none of them. (G. 3, 194.)

There is also an *actio prohibiti furti* against the man that prevents another for searching for stolen goods when he wishes to do so in the presence of witnesses. Besides, a penalty is fixed by the Prætor's edict to be enfored by the *actio furti non exhibiti* against the man that has not produced stolen goods, when sought for and found in his possession. (J. 4, 1, 4.)

But these *actiones, furti concepti, furti oblati, furti prohibiti*, and also *furti non exhibiti*, have fallen into disuse. For the search for stolen goods is not now-a-days conducted with the old formalities. And rightly, therefore, as a result of this, the actions just spoken of have passed out of common use. For it is plain beyond all dispute that all that knowingly receive and hide stolen goods are liable to the *actio furti nec manifesti*. (J. 4, 1, 4.)

4. *Condictio furtiva.* **For the recovery of stolen goods.**

Since actions are thus distinguished, it is certain that the plaintiff cannot demand what is his from another by the formula, "*Si paret eum dare oportere*" (if it appears that he ought to give it). For it cannot be said that what is the plaintiff's ought to be given him ; for when a thing is given to anyone, what is meant is that it is given him to make it his ; and what is already the plaintiff's cannot be made any the more his. Plainly from hate of thieves, however, and to make them liable to more actions, it is provided that beside the penalty of twofold or fourfold damages in order to regain the thing, thieves should be liable to this action too, "*si paret eos dare oportere*," and that although there lies against them the *actio in rem* also by which a man claims what is his own. (J. 4, 6, 14 ; G. 4, 4.)

The only person that could bring this action was he that was owner of the

thing at the time the action was brought. (D. 13, 1, 1; D. 13, 1, 10, 2.) It may be brought against the heirs of the thief. (D. 13, 1, 5; D. 13, 1, 7, 2.)

In another respect it differs from the action for theft; namely, that if any one of several accomplices is sued and pays, the rest escape. (C. 4, 8, 1.)

The defendant is bound to restore the thing if he has it, or to pay its value if he has not. (C. 4, 8, 2; D. 13, 1, 8, 1; D. 13, 1, 13; D. 13, 1, 3.)

III. Robbery. *Actio Vi Bonorum Raptorum.*

The *actio vi bonorum raptorum* if brought within a year is for fourfold, after a year for the direct loss only. And this action is available even if the robber has taken but one thing, and that the most trifling. The fourfold claim, however, is not wholly penal; for it includes beside the penalty the recovery of the thing taken, just as in the *actio furti manifesti* of which we have spoken. In the fourfold amount, then, the recovery of the thing is included, so that the penalty is threefold, and that whether the robber is arrested in his wrong-doing or not. For it is absurd that a robber by force should get off more lightly than a thief by stealth. (J. 4, 2. pr.)

It must also be remembered that a robber is necessarily a manifest thief, because the exercise of violence implies resistance. (D. 47, 2, 80, 3.)

IV. Damages. *Damnum injuria.*

This action may be brought alternately with a criminal prosecution.

It is open to him whose slave has been killed both to proceed at private law for the damage done (under the *lex Aquilia*), and to charge the slayer with a capital crime. (J. 4, 3, 11; G. 3, 213.)

1. The measure of damages.

1st Chapter of the *lex Aquilia.*

These words in the statute, "the highest value he bore within a year," mean, that if anyone kills a slave of yours that at the time limps or is blind of an eye, or maimed, but within a year of his death was sound and valuable, then the slayer is bound to pay not the value at the time, but the highest value the slave bore within the year preceding. And so one is liable not merely for the loss he has inflicted, but sometimes for far more. And on this ground it is believed that the action under this statute is penal. It is agreed, therefore, that it cannot pass so as to be brought against his heir. It would, however, have passed if damages were never given beyond the actual loss. (J. 4, 3, 9; G. 3, 214.)

3d Chapter of the *lex Aquilia.*

It is manifest that, as under the first chapter, a man is liable if by his *dolus* or *culpa* a man or a fourfooted beast is killed; so under this chapter he is liable for all other damage caused by his *dolus* or *culpa.* (J. 4, 3, 14.)

But under this chapter the amount of damage in which the wrongdoer is condemned, is the value within the last thirty days, not within a year. And even the word "highest" is not added. [Some writers, therefore, of the opposite school, have thought that, in so far as relates to the last thirty days, the Prætor was free to insert in the *formula* the day on which the thing was of most value, or another on which it was of less.] But Sabinus rightly decided that the damages must be reckoned just as if here too the

word "highest" had been added. For the [lawgivers] Roman commons, who on the proposal of the tribune Aquilius passed this statute, contented themselves with using the word in the first part. (J. 4, 3, 15; G. 3, 218.)

Common to both chapters; remote damages.

It has been decided, not by the express wording of the statute, but as a matter of interpretation, that the judge must reckon, as we have said, not the mere value of the body that is cut off, but further, all the damage over and above that is done you by the cutting off of that body.

[If by the killing of another's slave the master suffers damage greater than the price of the slave, that too is reckoned.]

If, for instance, some one appoints your slave his heir, and before the slave enters, by your orders, on the inheritance, he is killed; then it is agreed that in reckoning the damage the loss of the inheritance must be taken into account.

And, again, if one of a pair of mules or of a team of four horses, or one of twins, is killed, or one slave out of a band of comedians or singers, the reckoning includes not only the person killed, but in addition the depreciation in value of the rest. (J. 4, 3, 10; G. 3, 212.)

The Measure of Damages is the loss sustained by the negligence or wrongful act of defendant (*quanti interfuit non esse occisum*). (D. 9, 2, 21, 2.)

A slave whom his owner is bound under a penalty to give to a purchaser is killed. This penalty is the measure of loss, if the slave is wrongfully killed before the day he is to be delivered. (D. 9, 2, 22, pr.)

A slave has committed great fraud in his accounts with his master, and the master intends to put him to the torture to discover his accomplices. Before doing so, however, the slave is killed. The measure of damages is the value of the discovery to be made by the torture of the slave, and not merely the market value of the slave. (D. 9, 2, 23, 4.)

The damage must, however, be certain. Thus the measure of damages in destroying nets is not the possible capture of fish, but merely the value of the nets; because that is the only quantity capable of being determined. (D. 9, 2, 29, 3.)

A *pretium affectionis* was not recognised. Thus, if the slave killed happened to be a natural son of his owner, no increase of damages could be obtained. (*Pretia rerum non ex affectione, nec utilitate singulorum, sed communiter fungi.*) (D. 9, 2, 33, pr.)

2. A defendant denying his liability was subject to a penalty of double damages. (D. 9, 2, 23, 10; C. 3, 35, 4.)

3. The action is given *to*, but not *against*, the heirs, unless in so far as the heir of the defendant has been enriched by the wrongful act or negligence. (D. 9, 2, 23, 8.)

Second, Duties in respect of self-moving things (*res se moventes*).

I. *Pauperies.* The *actio de pauperie* is noxal (*noxalis actio*); that is, it imposes an alternative duty on the owner of cattle that has done damage either to surrender the animals or pay the damage. It dates from the XII Tables. The action lies only against the owner (*dominus*), and may be brought, not only by the owner of the thing injured, but by the borrower of it, or other persons interested in it. (D. 9, 1, 2, pr.) It is given to the heirs of the injured party, and also against the heirs of the owner of the animal that did the injury, if they are owners by right of succession. (D. 9, 1, 1, 17.)

If the defendant in an action *de pauperie* denies the ownership, and it is proved against him, he must pay the full amount of the damage, and cannot escape by the surrender of the animal. (D. 9, 1, 1, 15.)

II. The action for double penalties on the edict of the Ædiles being penal could be brought by the heirs of the sufferer, but not against the heirs of the wrongdoer.

Third, Protection of rights to immoveables (*res immobiles*).

I. *Actio de termino moto.*

1. The penalty was 50 *aurei* for each stone removed, and went to the *fiscus.*
2. The action was *popularis ; i.e.,* any one could bring the action, whether the person injured or not.

II. Ejectment by force. Interdict *de vi et vi armata.* (D. 43, 16.)

What penal actions were to moveables, interdicts were to immoveables. The difference in the remedy arises from the difference in the thing. Moveables can be furtively abstracted ; immoveables hardly, except by removing landmarks. The interdict by which possession was restored to a person that had been disturbed by force, served the same purpose as the action *vi bonorum raptorum* for the robbery of moveables. In the case of land, the effect of violence is simply to remove the possessor, not to take away the land. *That* can always be found, and is beyond the reach of the robber. Hence, while in robbery the law regards the act of violence as having accomplished its object, and as beyond recall, and attempts only to apply a very strong motive to all men to refrain from the like acts, in the violent dispossession of immoveables it keeps less in view the punishment of the wrongdoers than the restitution of the possessor. It proceeds not by penal actions, but by supplying a complete remedy to the sufferer.

1. The object of the interdict is restitution of the possessor ; that the defendant shall peaceably suffer the possessor to resume possession. (D. 43, 16, 1, 42.) If the defendant has himself lost possession, he is condemned to pay a sum compensating the possessor for his loss. (D. 43, 16, 15 ; D. 43, 16, 1, 42.) Although the interdict is primarily applicable only to immoveables, yet, if restitution is ordered, it will include all the moveables on the land at the time of ejectment. (D. 43, 16, 1, 32-33.) The dispossessor is also compelled to restore the fruits he has, or ought to have, gathered. (D. 43, 16, 1, 40-41.)

2. The interdict may be brought by the heirs of the person ejected (D. 43, 16, 1, 44), but not against the heirs of the dispossessor. The remedy against them is an *actio in factum* for the restitution only of what had fallen into their possession. (D. 43, 16, 1, 48 ; D. 43, 16, 3, 18.)

3. The interdict *de vi cottidiana* must be brought within a year from the ejectment (D. 43, 16, 1, 39 ; C. 8, 4, 2) ; but by a constitution of Constantine the time did not run against those who were absent. (C. 8, 5, 1.)

The interdict *de vi armata* could be brought at any time. (Cic. ad Fam. 15, 16.)

Justinian put both on this footing : that both interdicts should be given with all their consequences within the year ; and after the year, only for that which came to the hands of the person who resisted the restoration of the possessor.

III. Offences against the use of an immoveable.

1. *Actio arborum furtim caesarum.*

1°. Penalty. The XII Tables imposed a penalty of 25 *asses* for each tree. This fell into disuse, and its place was taken by the edict giving a penalty of double the damage sustained (D. 47, 7, 7, 7) ; *i.e.,* double the loss that the damage causes the owner (*quanti domini intersit non laedi*), including, therefore, more than the mere value of the trees destroyed. (D. 47, 7, 8, pr.)

2°. Like all penal actions, it could be brought by, but not against, the heir. (D. 47, 7, 7, 6.)

3°. If there were more than one person concerned in the mischief, each must pay double the damage. (D. 47, 7, 6, pr.)

4°. This action was concurrent with (1) *actio damni injuria ;* (2) the interdict *quod vi aut clam* (D. 47, 7, 11) ; and (3) if the trees were cut down, *lucri faciendi causa,* the *actio furti* could be brought. (D. 47, 7, 8, 2.)

2. *Actio legis Aquiliae*—could be brought for injury to immoveables as well as to moveables.

3. The special remedy, however, for that purpose, was the interdict *quod vi aut clam.*

1°. The object of the interdict was restitutory. The wrongdoer was bound not only to permit the old status to be restored, but to pay the expense of doing so, and could be condemned in a sum compensating the sufferer for the wrong done. (D. 43, 24, 15, 7.) If the wrongdoer is not in possession, he is liable for the expense : if the person who is in possession was not the wrongdoer, then he is bound only to suffer restitution, not also to defray the cost. (D. 43, 24, 16, 2.)

2°. The interdict could be brought not only by the owner, but by anyone that had an interest in preventing the objectionable acts. (D. 43, 24, 11, 14 ; D. 43, 24, 16, pr.)

3°. It could be brought by the heir, and against the heir to the extent of what was in his power to remedy. (D. 43, 24, 15, 3.)

4°. The interdict was only for one year (D. 43, 24, 15, 3) ; but the time did not run against minors, or those absent on the service of the State. (D. 43, 24, 15, 6.)

4. Interdict *uti possidetis.*

This interdict will be described in the proper place (*possessio*) ; but here it may be referred to as occasionally employed in repelling attempts to interfere with an owner or possessor in the free use of his land. (D. 43, 17, 3, 4.)

IV. Wrongs by adjoining proprietors.

1. Interdict *de arboribus caedendis.*—The object of this interdict is to compel the owner of trees overhanging his neighbour's land to cut them down, or to permit him to cut them down. (D. 43, 27, 1, 2.)

2. Interdict *de glande legenda.*—The object was to compel the owner of adjoining land to permit his neighbour to enter every third day and collect fruits falling on it.

3. *Actio aquae pluviae arcendae.*—This action is not in *rem* but *in personam*, against him that has made any construction that threatens damage to his neighbour in respect of rain water. (D. 39, 3, 6, 5 ; D. 39, 3, 1, 1.)

It could be brought only by the owner of the injured land, and only against the owner of the land from which the damage issued. (D. 39, 3, 3, 4.) If a tenant committed the wrong, the remedy against him is the interdict *quod vi aut clam.* (D. 39, 3, 5.) But a *utilis actio* (*aquae pluviae arcendae*) was given to and against the usufructuary and the *emphyteuta.* (D. 39, 3, 23, 1 ; D. 39, 3, 22, pr. ; D. 39, 3, 22, 2.)

If the owner has done the wrong, he must undo it at his own expense : if he has not wilfully done it, he must permit the injured person to remove the grievance. (D. 39, 3, 6, 7.) The defendant is only answerable for damage accruing after the *lis contestata*, not before ; the proper remedy in that case being the interdict *quod vi aut clam.* (D. 39, 3 6, 6 ; D. 39, 3, 6, 8 ; D. 39, 3, 14, 3.)

The heir of the wrongdoer may be sued. (D. 39, 3, 6, 7.)

B. Remedies for Investitive, Transvestitive, Divestitive Facts.

I. *Vindicatio.*

Hitherto, in the remedies that have been enumerated, it has been assumed that there was no dispute as to ownership ; *that* being admitted, the only question was by what means the undoubted owner could assert his rights against those that infringed them, but without setting up a rival title of their own. We now come to the action in which the question of ownership itself could be tried ; when the point to be determined is simply which of two or more claimants is the owner of the property in dispute. In this controversy the real issue raised was whether an investitive or transvestitive fact existed in favour of the claimant ; and thus we have to examine the means by which an investitive or transvestitive fact was established in law.

The *vindicatio* was the same whether it applied to moveables or immoveables (D. 6, 1, 1, 1) ; but it was not the proper remedy for the recovery of of persons under the *potestas* (D. 6, 1, 1, 2) ; nor did it apply to disputes concerning sacred

or religious places (D. 6, 1, 23, 1); nor to those other forms of ownership that have been described with their appropriate remedies.

1. Only the owner (*dominus*) can bring the *vindicatio*. (D. 6, 1, 23, pr.) The person invested with the ownership may bring the *vindicatio*, although by a condition annexed to the investitive fact he is liable to be divested of it at a future time. (D. 6, 1, 41, pr.; D. 6, 1, 66; D. 50, 17, 205.)

A person not actually invested with the ownership, although he is in a position to demand investiture, cannot bring the *vindicatio*. Thus a purchaser, before the article bought has been actually delivered to him, is confined to his action against the vendor, and cannot by *vindicatio* recover the thing itself. (D. 6, 1, 50, pr.)

2. Only the person in possession of the thing sued for is the proper defendant in a *vindicatio*. (C. 3, 19, 1.) In this instance the word *possessor* is used in its largest signification, including not only such a possessor as could protect himself by interdict, but anyone that had physical control over the thing, and could restore it. (D. 6, 1, 9.) To prevent injustice, by the setting up of a sham possessor to defeat the true owner, special precautions were required by a constitution of Constantine in the case of immoveables. If the possessor of an immoveable were not the true owner, he ought at once to state in court the name of the real owner; whether such owner lived in the same city, or in the country, or in another province. The possessor is thereupon regarded as out of the suit, and the owner is, within a time to be named by the judge, to be summoned to appear; and if he fails, the plaintiff is to be put in possession — reserving, however, leave to an absent owner to reopen the question. (C. 3, 19, 2.)

A possessor, who handed over the property to another to avoid judgment, was regarded as still in possession, because, to use the quaint phraseology of Paul, the fraud is tantamount to possession (*pro possessione dolus est*). (D. 50, 17, 131.) A possessor is also responsible if he has lost the thing, not intentionally, but through negligence; thus, if he has sent a ship to sea insufficiently equipped, and it is wrecked. (D. 6, 1, 36, 1.)

3. Where must the *vindicatio* be brought? Generally speaking, an action must be brought within the jurisdiction in which the defendant lives (*Actor rei forum, sive in rem, sive in personam sit actio, sequitur*) (C. 3, 19, 3); but in actions *in rem* the action was required to be brought in the place where the property was situated. (C. 3, 19, 3.)

4. Steps preliminary to the suit.

Anciently, the elaborate introduction of the *sacramentum* prefaced every suit for ownership, but that fell into disuse; and indeed, in later times, the *vindicatio* itself was very much thrust into the background. The history of this point cannot well be understood until the history of *possessio* is examined; but the following facts may be here noted. The burden of proof rested upon the claimant (*petitor*); the defendant was not bound to show that he had any title whatever. (C. 3, 31, 11.) The defendant had therefore an enormous advantage, because, unless the *petitor* conclusively established his right, he lost his action. Possession was thus made worth, if not nine, at all events a considerable number of points of the law. The contest then began for the possession. The owner tried by means of an interdict to regain possession; and if he succeeded in that step, he seldom required to do anything more. It was only when the owner had neglected his claim, or for any other reason could not demand an interdict, that he was obliged to appear as claimant (*petitor*) in the *vindicatio*. (D. 6, 1, 24.) Now, what the interdict was to immoveables, that the *actio ad exhibendum* was to moveables. The purport of this action was simply to have the property in dispute produced in court; but as no one could succeed in that who could not show some interest in the property, the question of ownership was virtually raised, and often practically decided, in the preliminary action. Such was not its ostensible object, for in reality the *actio ad exhibendum* was only a personal action,

not an action *in rem* (D. 10, 4, 3, 3) ; but it was a preliminary that often rendered it unnecessary to take any further steps.

In an *actio ad exhibendum* (for production) it is not enough for the defendant to produce the object, but he needs must produce also all that appertains to it (*causa rei*). In fact the plaintiff must have it in the same condition as he would have had, if the thing had been produced and handed to him when first he brought the *actio ad exhibendum*. And, therefore, if by means of the delays between, the possessor has acquired the thing by *usucapio*, yet none the less he shall be condemned to restore it. And, besides, the judge ought to take account of the fruits yielded during the interval—during the time, that is, between the plaintiff's receiving leave to go before a judge and the giving of the decision. If, however, the defendant denies that he can produce the thing at present, and asks time to do so, and that seemingly not with intent to hinder justice, then time ought to be given him ; provided always that he gives security that he will make restitution. But if he neither produces the thing at once in obedience to the order of the judge, nor gives security that he will do so hereafter, then he must be condemned to pay a sum representing the plaintiff's interest in having the thing produced from the very first. (J. 4, 17, 3.)

5. The judgment.—The chief object of the *vindicatio* was the restitution of property to the owner. If the possessor refuses to deliver up the property when judgment is given against him, the successful litigant will be put in possession by force (*manu militari*). If the possessor has fraudulently given up the thing to another, and is therefore unable to restore it, he is condemned in a sum which is fixed by the oath of the demandant (*petitor*) ; if he is unable to give it up from causes other than fraud, he is condemned in a sum fixed by the judge. This general rule prevails in every form of action when the object is restitution. (D. 6, 1, 68.)

Several other ends might be accomplished by the judgment. Thus, if the possessor had injured the property, he was amenable to the *lex Aquilia ;* but if the demandant chose, he might have the damage included in the judgment on surrendering his right to sue under the *lex Aquilia*. (D. 6, 1, 13 ; D. 6, 1, 14.) When a slave had been beaten, the same alternative was presented with the *actio injuriarum*. (D. 6, 1, 15, pr.)

Fructus, Causa, Instrumentum.—The most important addition to the judgment in a *vindicatio* was the restitution of the fruits, produce, or other accessories accruing to the property during the time it remained with the possessor. Hence it occasionally happened that, even when the property had perished, judgment in a *vindicatio* could be given on account of the fruits or produce. (D. 6, 1, 16, pr.)

Fructus was used in an extended sense, like *glans*. *Glans* properly is an acorn, but it was used as a name for every sort of fruit growing on plants, shrubs, or trees. (D. 50, 16, 236, 1.) So *fructus* was employed to signify not only fruits in general, but mineral produce and the young of animals. (D. 50, 16, 77.) It includes also (*fructus civiles*) the rents of houses. (D. 22, 1, 36.) Usury was not considered the *fructus* of money lent, because it did not arise from the money itself, but from a special agreement. (D. 50, 16, 121.)

Causa includes the offspring of a female slave, which, out of respect for humanity, was not treated as *fructus*. It applied also to any actions accruing to the owner of the slave, as an *actio legis Aquiliae*, for damage done to the slave. (D. 6, 1, 17, 1.) In the same manner, an inheritance or legacy given to a slave was considered *causa*. (D. 6, 1, 20.)

Instrumentum.—The *instrumentum* of a house is contrasted with ornament : it does not form part of a house, but is added to it by way of protection, chiefly from fire and tempest. (D. 33, 7, 12, 16.) The *instrumentum* of a farm is the implements required

for obtaining and preserving the produce. (D. 33, 7, 8, pr.) *Instrumentum* is distinguished from *pars fundi*, because not affixed to the soil. (D. 19, 1, 17, pr.) In suing for a ship it was necessary to demand separately its *armamenta*, rigging, tackle, anchors, ship's boats, etc. (D. 6, 1, 3, 1.)

To what extent then must the possessor restore not only the thing, but its *fructus causa*, and *instrumentum*? The answer depends upon a distinction that has already been explained in its bearings on *accessio* and *usucapio*; namely, that between a *bona fide* and *mala fide* possessor. The *mala fide* possessor is bound to restore the thing with all its *fructus*, etc.; and not merely the *fructus* he has actually gathered, but what the owner could have enjoyed had he been suffered to possess his own. (D. 6, 1, 62, 1.) The *bona fide possessor* is bound to restore all the produce in the same manner from the time of the *litis contestatio*; but before that time only those in existence, which have not been acquired by him by *usucapio*. (C. 3, 32, 22.) The *usucapio* runs from the moment the *fructus* are separated from the soil. (D. 41, 1, 48, pr.)

And if the action is *in rem*, the duty of the judge is, if he decides against the plaintiff, to acquit the possessor; but if against the possessor, to order him to restore the object in dispute and its fruits as well. If, however, the possessor affirms that he cannot restore it then, and asks for time to do so, seemingly with no intent to hinder justice, then the favour should be granted him; provided always that he gives security both by himself and by a surety for the value of the object in dispute (*litis æstimatio*) if he does not restore it within the time given him. If it is an inheritance that is claimed, the same rules in regard to fruits are observed as those that come in, as we have said, in claims for single objects. Those fruits that by his own neglect (*culpa*) the possessor has not gathered, are treated pretty much the same in both forms of action, if the possessor was a robber. If, however, he was in possession in good faith, no account is taken of those that are consumed or ungathered. But account is taken from the date on which the claim first was made of those that by the possessor's neglect either were not gathered, or were gathered and consumed. (J. 4, 17, 2.)

On the other hand, the defeated possessor had claims upon the *petitor*.

If a man buys a farm in good faith from one that is not the owner, believing him to be the owner, or receives it from him in like good faith as a gift, or on some other lawful ground, it is decided by natural reason that the fruits he has reaped shall be his in return for his tillage and care. And, therefore, if the true owner afterwards comes forward and claims the farm, he can bring no action for the fruits the possessor has consumed. But if the possessor knew the farm to be another's, no such favour is granted him. And so he is forced to restore not only the farm, but the fruits as well, even though they have been consumed. (J. 2, 1, 35.)

As might be expected, least indulgence was shown to a *mala fide possessor*. He could demand a set-off only for necessary expenses (*impensæ necessariæ*); as regards *utiles impensæ*, he could carry off only what might be taken away without leaving the property worse than he found it. (C. 3, 32, 5.) The *bona fide possessor* cannot sue the *petitor* for even necessary expenditure, but he can resist ejectment by *exceptio doli mali* until his claim is met. (D. 6, 1, 48.) If the possessor has had to pay damages for a wrong done by the slave whom he must restore, he must have the amount repaid him. When he has built on the land from which he is to be ejected, the *petitor* had the option of allowing him to remove the building instead of giving compensation. (D. 6, 1, 27, 5; C. 3, 32, 16.)

A has imprudently bought land belonging to B, and has built upon it or sown it. A is evicted at the suit of B. What ought to be done with the improvements? If B would have done the same thing if in possession, he ought to pay to the extent to which A has improved the land. If, however, B is poor, and would be deprived of his ancestral property if he had to pay A out in full, then A shall have power to carry away only in so far as he does not injure the land; and even B may in certain cases be allowed to retain the things for what it would be worth to A to carry them off. If, again, B were trying to recover the property to sell it, he must pay the full value of the improvements. (D. 6, 1, 38.)

6. Costs.

By the XII Tables,[1] if the possessor failed, he must pay double the produce. This lasted up to A.D. 309; and we learn from a constitution of Valentinian and Valens (C. Th. 4, 18, 1), that the possessor had to pay double *fructus*, in addition to the regular costs of suit, if he were evicted by the judgment. This constitution is not contained in the Code of Justinian, and we may, therefore, take it that in his time the double penalty had fallen into disuse.

In the *actio finium regundorum* the *judex* ought to look narrowly whether any award is needful. In one case, certainly, it is needful, if it is more convenient that the fields be marked out by clearer bounds than they have been marked with of old. Then some part of one man's land must be awarded to the owner of the other land; and in this case it follows that the latter ought to be condemned to pay to the former a fixed sum of money. And there is another ground for condemning a man in this proceeding; namely, if, as may happen, he has wilfully done some wrongful act in regard to the bounds —stolen the boundary-stones, for instance, or cut down the boundary-trees. And obstinate contempt of court (*contumacia*) too is a ground of condemnation in this proceeding, as when the *judex* orders the lands to be measured, and the owner does not allow this to be done. (J. 4, 17, 6.)

JOINT-OWNERSHIP (*Condominium*).

Definition.

Joint-ownership exists when more than one person has an interest as owner in any undivided thing. The owners are entitled in common to the produce of the property, and must in common defray the necessary expenses.

And again, if something belongs to several persons (not partners) in common; if it has been, for instance, bequeathed or given to them equally; and if one of them is liable to a proceeding *communi dividundo* on the part of the other, because he alone has enjoyed the fruits of that thing, or because his fellow-owner has alone spent what was needful upon it, then he cannot be said to be subject to an *obligatio ex contractu*, for no contract was made between them; and because he is not liable *ex maleficio*, he is liable *quasi ex contractu*. (J. 3, 27, 3.)

1 (*Si vindiciam falsam tulit, si velit is . . . . tor arbitros tris dato, eorum arbitrio . . . . fructus duplione damnum decidito.*)

Rights and Duties.

A. Rights of Co-owners.

1. The co-owners are entitled to the produce according to their shares. (D. 10, 2, 56.) The mode of enjoying the produce may be determined by agreement between the parties, thus—that each shall have the fruits in alternate years. (D. 10, 3, 23.)

2. Each owner is entitled to alienate his undivided share (C. 3, 37, 2); and, upon his death, it descends to his heirs. (D. 10, 3, 4, 3.)

B. Duties of Co-owners.

1. It is the duty of the joint-owners to defray their share of the expense incurred by any one of them on behalf of the joint-property, and also to exonerate a joint-owner from any liability he has incurred. (D. 10, 3, 4, 3; D. 10, 3, 15.) This includes all expenditure from the date that the property was held in common (D. 10, 3, 4, 3), up to the time that judgment is given in a suit for partition. (D. 10, 3, 6, 3.)

One of two joint-owners (brothers), for his own better accommodation, adds a new wing to the family mansion. This comes under the head of ornamental expenditure (*voluptariae impensae*), and cannot be recovered. (D. 3, 5, 27, pr.)

A and B are co-owners of a slave. A releases the slave from pawn. The slave dies. A can require B to share the expense of releasing the slave. (D. 10, 2, 31.)

A and B are co-owners of a slave; and A, being sued in an action *de peculio*, is compelled to pay a debt contracted by the slave. B must pay his share of that sum. (D. 10, 3, 8, 4.)

A and B are co-owners of a farm; A thinks that C is his co-owner. A spends money on the farm for necessary and beneficial purposes. Can he sue B to compel him to pay his share? Yes, because he acted as a partner, although he was mistaken in the person. (D. 10, 3, 6, pr.; D. 10, 3, 29, pr.) But if A did not know that B was a partner, and thought himself sole owner, he could not afterwards sue B, for he did not intend to form an obligation with anyone (D. 10, 3, 14, pr.); but he could, as a *bona fide possessor*, resist eviction until he had received compensation for his outlay. (D. 10, 3, 14, 1; D. 10, 3, 6, 2.)

2. Each co-owner must share in the loss caused by a slave or animal held in common. If a slave held in common steals from one of the owners, or injures his separate property, the other owners must share in the loss, or surrender their share in the slave. If the co-owners have sold their share the purchaser is responsible, because the remedy follows the slave (*actio noxalis caput sequitur*); and so, if the slave is dead, there is no redress at all. (D. 47, 2, 61, pr.)

3. Each co-owner is bound to take the same care of the common property that he does of his own, and must make good

all loss sustained by his default to the co-owners in proportion to their shares. (D. 10, 3, 8, 2; D. 10, 2, 25, 16; D. 10, 3, 20.) A co-owner is not responsible, however, for more than the actual loss sustained; he is not subjected to any penalty, as under the Aquilian law. (D. 10, 2, 17.) In like manner, the heir of an owner is liable for all damage done by his ancestor, although he would not be responsible under the Aquilian law. (D. 10, 3, 10, pr.) The reason is that he is not subject to penal damages, but only to such as equity requires.

INVESTITIVE FACTS.—1. By agreement between two or more persons forming a partnership (*societas*); in this case actual delivery of the property is not necessary.

2. By legacy of a thing to two or more persons, or by gift or other mode independent of the agreement of the co-owners. (D. 10, 3, 2, pr.)

It was unnecessary that the parties should obtain the property at the same time, or in the same right. Thus, when a partner sells his share, the buyer becomes a co-owner with the former partner; and so when a co-owner dies, and is succeeded by his heir. (C. 3, 37, 2; D. 10, 2, 48.)

DIVESTITIVE FACTS.—1. Release. If a co-owner agrees to refrain from demanding his share, the joint-ownership is at an end. (D. 10, 3, 14, 4.)

2. Voluntary division. If the co-owners are not minors, they may divide the property, in the usual mode, by delivery of possession. (C. 3, 38, 8.) Writing was not required. (C. 3, 36, 12; C. 3, 37, 4.) A voluntary division might take place, even after an application for a judicial partition. (D. 10, 2, 57.)

3. Judicial partition. Any co-owner had a right to a judicial partition. (D. 10, 3, 29, 1; D. 10, 3, 8, pr.; C. 3, 37, 5.) An agreement that the property should not be divided for a certain time delayed the application, but an agreement that the property should remain for ever undivided was void. (D. 10, 3, 14, 2.) The judge had perfect freedom in the mode of division, but was bound to make such a division as the co-owners desired, or was most expedient for all. (D. 10, 3, 21; C. 3, 37, 1.)

The steps are the same if the *actio communi dividundo* is brought in regard to more things than one. For if it is brought in regard to some one thing—a field, for instance—if that field can be conveniently divided, a part ought to be adjudged to each; and if one man's part seems unfairly large

he ought to be condemned in turn to pay a fixed sum of money to the other. But if it cannot be easily divided—if it is a slave, perhaps, or a mule, that is the object of the action—then it must be adjudged entire to one, and he must be condemned to pay the other a fixed sum of money. (J. 4, 17, 5.)

The judge could give the land to one, and a usufruct of it to the other (D. 10, 2, 16, 1; Frag. Vat. 47); also, he could impose a servitude upon one portion of the divided land in favour of another. (D. 10, 2, 22, 3; D. 10, 3, 18.)

And in those proceedings whatever is adjudged to anyone becomes at once the property of him to whom it is adjudged. (J. 4, 17, 7.)

But the parties must guarantee each other against eviction (D. 10, 3, 10, 2); they were in fact regarded as reciprocally vendors and purchasers, each a purchaser of his own share, and a vendor of all the other shares. (C. 3, 36, 14; C. 3, 38, 1.)

REMEDY. *Actio communi dividundo.*

This action might be brought, during the continuance of the joint-ownership, to enforce the duties of the co-owners, as well as to obtain a judicial partition. (D. 10, 3, 14, 1; D. 10, 3, 23; D. 10, 3, 6, 1; D. 10, 3, 11.)

1. The plaintiff and defendant are not distinguished in this suit very easily, as all have the same interest. In one sense all parties are at once plaintiffs (*actores*) and defendants (*rei*) (D. 10, 2, 2, 3); but in a special sense, the person that demands the judicial partition may be called plaintiff (*actor*). (D. 10, 3, 2, 1.)

2. The action may be brought more than once, so long as any of the joint-property is undivided. (D. 10, 3, 4, 2.)

Some *actiones* seemed to be mixed in character, being at once *in rem* and *in personam*. Such are the *actio familiae erciscundae*, open to co-heirs for the division of the inheritance; *communi dividundo*, given as between those that for any reason have come to be joint-owners, and wish the property to be divided; and *finium regundorum*, an action between owners of adjoining lands. In all three proceedings the judge is allowed to adjudge the property to one of the parties in the action on fair and equal grounds; and if one man's part seems too large, to condemn him to pay in turn to the other a fixed sum of money. (J. 4, 6, 20.)

POSSESSION.

DEFINITION.

POSSESSION is the *occupation* of anything with the *intention* of holding it as *owner*.

Exceptions.—Two exceptions are recognised in the Digest—*pignus* and *precarium*. A mortgagee and a tenant at will have possession, although their interest necessarily excludes the notion of ownership.[1]

Explanation.—It is immaterial whether an occupier of a thing, who means to keep it as his own, believes himself to hold as owner (*bona fides*) or knows that he is not owner (*mala fides*). The distinction between possession *bona fide* and *mala fide* is vital for usucapio (p. 268), but for the purpose of possession, it is irrelevant.

A thing is said to be occupied or held (*tenetur*) when the occupier is in a position freely to deal with it. A captain occupies his ship, but not the ocean through which it passes.

An occupier, if not also a possessor, had no legal remedy to protect him in his occupation. But an occupier, holding as owner, and, therefore, a possessor, was secured in his possession by interdicts, as effectually as if he were a true owner. To obtain such protection, it was not necessary that the possessor should personally occupy or hold the thing; it was enough if the thing were occupied by his agent.

In one case, however, a mere occupier was allowed one Interdict. A tenant of land, who, according to the definition of possession, could not possess, inasmuch as his intention was not to hold as owner, could, if evicted from his farm, bring the Interdict *Quod vi aut clam* to recover his crops; but not any other Interdict. (D. 43, 24. 12.)

[1] *Licet enim juste possideant, non tamen opinione domini possident.* (D. 9, 4, 22, 1.)

Subject to exceptions by no means inconsiderable, but not worthy of discussion in detail, the correct meaning of the Roman technical terms relative to the question of possession is as follows :—

Mere occupation, not protected by Interdicts, was called *Detentio, Naturalis Possessio* or *Custodia.* For exceptions, see D. 43, 16, 1, 9-10.

Possession fortified by Interdicts is called *possessio* simply, or *possidere,* without any qualifying adjective or adverb. For an exception, note *missio in possessionem,* and the text in D. 10, 4, 3, 15.

When possession is accompanied by *bona fides* and the conditions requisite for *usucapio,* it is generally called *civilis possessio.* For an exception, see D. 41, 2, 24.

Rights and Duties.

A possessor, so long as his possession continues, has the rights of an owner. Indeed, the very meaning of possession is that it secures, without title, the enjoyment of property. So a possessor was liable, like an owner, to *actiones noxales.* (D. 9, 4, 13 ; D. 9, 4, 11.) To this rule, however, *pignus* and *precarium* are exceptions. (D. 9, 4, 22, 1.)

In the case of immoveables, the possessor had exactly the same remedies as the owner,—the Interdicts *Unde vi* and *Quod vi aut clam.* In the case of moveables, for theft or damage, a possessor was not altogether in so good a position as the owner, unless he possessed *bona fide.* (D. 9, 2, 11, 8.) The case of those *peregrini* that did not enjoy *commercium* with the Roman people, was met in the manner stated by Gaius in the following passage :—

> And again, an alien is by a fiction regarded as a Roman citizen, when he is plaintiff or defendant on some ground for which an action is established by our Statutes, provided only it is just that such an action should be extended even to an alien. If, for instance, it is alleged that an alien has aided or been privy to a theft, and an action is brought against him, the formula is framed thus :—" Let there be a *judex.* If it appears that Dio, a Greek, aided or was privy to the theft of a golden platter from Lucius Titius, and ought, on that account, if he were a Roman citizen, to be cast in damages as a thief," and so on. Again, if an alien brings an action for theft, he is by a fiction regarded as a Roman citizen. In like manner, also, if under the *lex Aquilia* an alien bring an action for *damnum injuria,* or if such an action is brought against him, then by the fiction that he is a Roman citizen a remedy is given. (G. 4, 37.)

The Statutes referred to, it is supposed, must in terms have been applicable only to citizens; hence the necessity, if *peregrini* were to be protected in their property, for an extension of the actions in the manner stated by Gaius.

Acquisition of Possession.

Possession involves a physical fact (*corpus*), and a mental state (*animus*). "We gain possession with the body and mind, but not with the mind itself, nor with the body itself."[1] Let us examine first the nature of the physical fact required for possession.

A. The Physical Fact (*Corpus*).

The fundamental difference between a title to ownership and a possessory title, is that the former may be gained while absent, but the latter only in the presence of the object. To possess a thing, we must be able to deal with it and use it at pleasure. For this purpose actual contact with the object is unnecessary (*non corpore et actu sed etiam oculis et affectu*). (D. 41, 2, 1, 21.) Many writers, prior to Savigny, felt so much difficulty in following out this idea, that they came to the conclusion that an actual physical basis for possessory rights was not always required in the Roman law, but that, in some cases at least, its place might be taken by *fictitious* or *symbolical* prehension. Savigny has done good service in showing that the necessity for resorting to such legal fictions arises from giving, in the first instance, too narrow an interpretation to the physical basis of possession.

The power of dealing with a thing at pleasure may be prevented by one of two causes—either by physical difficulties, or by the opposition of another's will. Thus, one living in England cannot occupy land or other objects in the heart of China or Africa, until by going to those countries he has got over the obstacle of distance. [For the moment, we leave out of account the possibility of occupying by an agent.] Again, to take an example from the Digest (D. 41, 2, 13, pr.), a ship carrying marble is wrecked in a river. Here the possession is lost; for, until the owner has succeeded in raising the marble, the water interposes an insuperable obstacle to his freely dealing with it. In the case of *feræ naturæ*, other examples are given.

[1] *Apiscimur possessionem corpore et animo; neque per se animo, aut per se corpore.* (D. 41, 2, 3, 1.)

But the opposition of another's will may as effectually prevent the power of dealing with an object, as an obstruction in nature. A man does not acquire the free power of dealing with an object, unless he has overcome the resistance of an opponent.

In acquiring possession of objects not before owned or possessed by others, the question is whether the intending possessor has so far overcome the physical difficulties as to be able freely to deal with the object. In this case, attention is principally fixed on the physical attitude of the claimant. But when it is a question of the transfer of possession, the chief, or rather the sole obstacle in the way of a new possessor is the will of the previous possessor. As soon as that is removed, there is practically no hindrance to the new possessor; and in this case, attention is fixed chiefly upon facts from which the intention of the previous possessor to go out and leave the thing to the occupation of the new possessor, may be with reasonable certainty inferred. Thus, in the case of delivery *longa manu*, it was held that the possession might be handed over, if the land was pointed out from a neighbouring height, although the new possessor had not actually set foot on the land. (D. 41, 2, 18, 2.) The assumption is that the will of the previous possessor is the only hindrance to the change of possession, and when that obstacle is removed, the new possessor is as free to deal with the land as if he were actually walking on it. Such an assumption is justified by the ordinary experience of life, and there is nothing in the transaction fairly to be called symbolical or fictitious. The change of possession is real and actual.

Many of the difficulties that have surrounded the question of possession have arisen from treating occupation as an absolute quantity, while it is in reality a question of degree; and the determination of the *quantum* of power over a thing that will suffice to give the occupier possessory rights is more or less arbitrary. Thus, to take a simple instance, I have mislaid a book, and on searching cannot find it. Have I lost possession? For the moment I have not the power of dealing with it; but for so slight a temporary hindrance I could scarcely be deprived of my possessory remedy, if I should discover the book in the hands of some one else. Something must turn upon the length of time that has elapsed since the book was lost, the place where it was last known to be, and the diligence of the searches

made for it. But there comes a point at which it must be held that the object is definitely lost, and its owner ceases to be possessor.

The question of degree turns up in the case of land. I clearly occupy land upon which I stand, or which is in close proximity. To what extent upon the strength of my occupying an acre may I claim possession over adjoining land? In a settled country, this question does not present any legal difficulty, because possession occurs in cases where the land has previously been in the possession of another. The limit of the occupation is thus defined by the boundaries within which the previous possessor actually occupied the land. (D. 41, 2, 3, 1.) Thus the occupation of a small portion of land will *prima facie* establish a possessory right over a large estate, or, it may be, over hundreds of square miles. That is strictly in conformity with the definition of occupation, if we assume, in accordance with the fact, that, on such a transfer of possession, the old possessor gives only that land over which he has exercised undisputed power. Very different was the nature of the act of certain Europeans, who, on the first discovery of the American continent, put up a flag on a few inches of soil, and, thereupon, supposing that they were acting upon a rule of law, took possession in the name of their sovereign of the whole continent. Such an extreme proceeding is a caricature of the Roman law, and is manifestly ridiculous; but a real question remains, how far should the possession of such adventurers be admitted as good in law? The answer would depend on the extent to which they had made good their footing, and had, in fact, the power of dealing with the land,—manifestly a question of degree. A similar question arises with regard to the discovery of veins or beds of minerals. To what extent is a possessor of a part of a lode the possessor of the lode itself? Very difficult questions of that kind may arise. When a conflict exists, a line must be drawn, but to some extent it must be an arbitrary line.

I. Acquisition of possession in the case of things not before owned (*res nullius*) or possessed.

In such cases, to acquire possession is, at the same time, to acquire ownership. The examples are fully stated by Justinian and Gaius.

Therefore all you take [a wild beast, a bird, or a fish, the moment it is taken, becomes yours, and] is understood to be yours so long as you guard

it and keep it in. But if it escapes your guard and regains its natural freedom it ceases to be yours, and becomes again the property of him that first seizes it. And its natural freedom is understood to be regained when it has either escaped from your sight, or, though it is still in view, is very hard to follow up. (J. 2, 1, 12; G. 2, 67.)

The question has been raised whether, if a wild beast be so wounded that it can be taken, it is to be understood at once to be yours. Some have decided that it is yours at once, and continues to be yours so long as you follow it up; but that if you leave off following it up it ceases to be yours, and again becomes the property of him that first seizes it. Others think that it is yours only if you take it. And it is this latter opinion that we confirm; because many accidents often happen to hinder you from taking it. (J. 2, 1, 13.)

In the case of animals that habitually go away and come back again [pigeons, for instance, and bees, and hinds, that habitually go to the woods and come back again], the rule that is [handed down] approved is this,—that they are understood to be yours so long as they intend to return. For if they cease to intend to return they cease to be yours, and become the property of those that first seize them. And it is considered that they cease to intend to return when they cease from the habit of returning. (J. 2, 1, 15; G. 2, 68.)

Bees, too, are by nature wild. Therefore those that settle on your tree, before you hive them, are no more yours than birds that build their nest there. And so if any one else hives them he will be their owner. And the combs too, if they have made any, may be taken away by any one. But, of course, while they are still untouched, if you see in time any one entering your lands, you can lawfully stop him from entering. A swarm, again, that has flown away from your hive, is understood to be yours so long as it is in view, and is not hard to follow up. Otherwise it becomes the property of him that first seizes it. (J. 2, 1, 14.)

Peacocks and pigeons also are wild by nature, and it does not matter that they are in the habit of flying away and flying back again—for bees too do the same; and it is agreed that they are naturally wild. Deer, too, some people have so tame that they are in the habit of going to the woods and coming back again; and yet that they are naturally wild no one denies. (J. 2, 1, 15.)

Fowls and geese are not wild by nature; and that we can understand from the very fact that there are other kinds of fowls and geese expressly called wild. And, therefore, if your geese or fowls are by an accident panic-struck and fly away; even though they have escaped your view, wherever they may be, they are understood to be yours. And the man that, with an intention to make a gain of it, keeps those animals, is understood to be guilty of theft. (J. 2, 1, 16.)

Fish in the well of a boat are in possession, but fishes in ponds, where they retain their natural freedom, are not in possession. So wild animals in a park, retaining their natural liberty, are not in the possession of the owner of the park. (D. 41, 2, 3, 14.)

II. Transfer of Possession (*Traditio*).

The modes of transferring possession are cited here, but

must not be forgotten that in the later Roman law, such a transfer usually operated as a change of ownership. But in order to transfer ownership, possession must first be transferred, and it is convenient here to indicate the several ways in which this might be done.

1. The simplest case is where the possession arises from contact.

A agrees to allow his friend B to take stones from his quarry. From the moment B severs the stones from the rock, he acquires possession, and thereby ownership. A cannot prevent B from carrying away the stones thus severed, because B is the owner of the stones. (D. 39, 5, 6.)

2. Deposit of a thing in a man's house gave him possession. (D. 23, 3, 9, 3; D. 47, 10, 5, 2.) It was not necessary that the occupier of the house, or any one in it, should actually have touched the object. (D. 41, 2, 18, 2.) Of course, the occupier of the house must have the intention of possessing. Here it is not necessary to suggest any symbolical or fictitious delivery. The occupier of a house has under his control whatever, to his knowledge, is in the house. This knowledge is necessary, for a man cannot be said to have control of a thing of the existence of which he is ignorant. The mere fact that a thing is in a man's house does not of itself show that he is possessor of it; for if it is not within the man's knowledge, he can have no control over it.

3. Is the possessor of land, by that fact alone, also possessor of treasure that has been buried by another in the land? This question was resolved, though not without some difference of opinion, in the negative, and it was held that the possessor of the land did not begin to possess the treasure until he had dug it up. (D. 10, 4, 15; D. 41, 2, 44, pr.) The reason is, that until the possessor of the land has dug out the treasure, he has not got it under his custody or control. Even if he knew that treasure was in the soil, and desired to be considered owner of it, yet, inasmuch as he had not the physical power of actually dealing with the treasure until he had dug it out, he was not a possessor. (D. 41, 2, 3, 3.)

4. Delivery of the keys of a house.

And, again, if a man sells valuables deposited in a warehouse, as soon as he delivers the keys of the warehouse to the buyer, he transfers the property in the valuables to the buyer. (J. 2, 1, 45.)

The delivery of keys operated as a transfer of possession, not as a symbol of dominion, but because it gave the buyer the means of obtaining the custody of

the goods, and at the same time deprived the vendor of any power of further dealing with them. (D. 41, 1, 9, 6; D. 41, 2, 1, 21.) The delivery of keys had no other effect. (D. 18, 1, 74.)

5. Delivery *longa manu.*

Without any actual contact, a person acquired possession if the object were placed in his presence, with the intention that he should have possession. (D. 41, 2, 1, 21.) It is assumed that there is no obstacle to his power over the object except the will of the previous possessor, and that is removed.

A owes a sum of money, which, at B's request, he places before B, with the intention of transferring the possession. B immediately, before taking it, possesses the money. (D. 46, 3, 79.)

A sells an estate of land, and showing it to B from a neighbouring height, declares that he delivers free and undisturbed possession. This is a delivery of the land to B. (D. 41, 2, 18, 2.)

6. Branding, or putting marks on an object. By putting marks upon logs of wood, the possession was transferred (D. 18, 6, 14, 1); but the same result was not admitted if wine jars were marked. (D. 18, 6, 1, 2.) Putting marks is not a symbolical transfer, but proof of an actual transfer. Logs of wood could not be transferred by the hands of the vendor into the hands of the buyer; the only mode of transfer in such large objects was delivery *longa manu.* Upon such delivery it was usual for the purchaser to put his mark on the wood, and such marks were, therefore, evidence of the transfer. But it was not usual to put marks on wine jars, and, therefore, the presence of marks did not create any presumption of fact that the possession had been transferred.

An allegation in writing that a transfer had been effected was not conclusive. A makes a gift of land with slaves thereon to B, and declares in writing that he has delivered possession. In point of fact he had not. This does not transfer the possession to B. But if B received one of the slaves included in the gift, and forthwith sent him to the lands, B acquired possession of the lands through the slave. (D. 41, 2, 48.)

B. The Intention (*Animus*) requisite for Possession.

Mere occupation is not possession. To constitute possession, besides the ability freely to deal with a subject, there must be an intention to exclude all other persons. In the Roman law, even this was not enough; the intention must be to hold in ownership, and not for any interest in things falling short of ownership. A man holding as a tenant for years was not a possessor.

A person may occupy without any intention to possess. Thus, a guest admitted to one's house or to one's farm, has no possession; for he has no intention of excluding the owner. (D. 41, 2, 41.)

Usually the intention to possess coincided, in point of time, with the occupation, as in the ordinary case of delivery; but that was not essential, and the occupation might begin with a different intention.

Sometimes, too, without delivery, the bare wish of the owner is enough to transfer the property; as when a man lends it, or lets it out to you, or deposits it with you, and then sells it or gives it to you. For although it was not on that ground that he delivered it to you, yet by the very fact that he suffers it to become yours the property in it is at once acquired by you, just as if it had been delivered on that account. (J. 2, 1, 44.)

This was called delivery *brevi manu*.

Restraints on Acquisition of Possession.

A. In respect of Things.

As a rule what could not be the object of ownership could not be the object of possession. Thus *res publicæ* (D. 41, 2, 30, 3), and *res divini juris* could not be possessed. (D. 41, 2, 30, 1.) A free born man could not be the subject of possession, even although possession was said to be a *res facti*. (D. 41, 2, 23, 2.) But the restrictions on ownership that sprung from the *jus civile* did not apply to possession; thus land out of Italy could not be held in *dominio ex jure Quiritium*, but it could be possessed. (Theoph. ad Inst. 2, 1, 40.) Whatever could be an object of property, according to the *jus gentium*, could be an object of possession.

B. In respect of Persons.

What has been said of things is true of persons. Those who cannot acquire as owners cannot acquire as possessors. Thus slaves and persons in *potestate* are subject to the same disabilities in respect of possession as of ownership. Madmen (*furiosi*) cannot acquire possession, owing to mental incapacity (D. 41, 2, 1, 3), but for the same reason they cannot lose possession, except by loss of occupation, as they are incapable of disclaiming possession. (D. 41, 2, 27.) *Pupilli* could not acquire possession without the *auctoritas* of their tutors, unless they were old enough to understand the nature of the transaction. (D. 41, 2, 32, 2.) Again, juridical persons (such as corporations, or a

hereditas jacens) could not acquire possession, because they had not any *animus;* but for convenience they were allowed to acquire possession by their agents. (D. 41, 2, 1, 22; D. 41, 2, 2.)

But restrictions on ownership peculiar to the *jus civile* did not affect possession. *Peregrini* could acquire possession, although, unless they had *commercium*, they could not acquire property by the investitive facts belonging to the *jus civile.* Again, by law gifts from husband to wife were invalid, yet property delivered to a wife as a gift by her husband was in her legal possession. (D. 41, 2, 1, 4.)

Loss of Possession.

Both *occupation* and *intention* are necessary to constitute possession; it follows, therefore, that if either occupation or intention ceases, the possession is destroyed. Some texts appear to deny this inference, and in a constitution of Diocletian and Maximian (A.D. 290) it is broadly stated that although *animus* alone does not suffice to create possession, yet *animus* alone is sufficient to keep it, once it is acquired. (C. 7, 32, 4.) But the example there given shows that such is not its true meaning. The case is put of a man who leaves his land uncultivated through fear. Time passes away, and from the same motive he does not return; still he has not lost possession. But this case proves no more than that the law presumes in favour of the continuance of a possession once begun, and that when no hostile occupant has entered on a deserted farm, the presumption of abandonment of possession, arising from neglect, is rebutted by proof that the occupier was deterred by fear, and had no intention of giving up possession.

A. Loss of Possession (*Corpore.*)

Two cases must be considered. Either the loss of occupation by the possessor is followed by the occupation of some one else, or it is not.

I. Loss of occupation:—The object not being occupied by anyone else.

One continues to possess an object so long as one either has the custody of it, or is in a position to renew the custody at will (D. 41, 2, 3, 13), and so, in the case of a farm, so long as there is no hostile occupant, the possessor, who has been

merely neglectful, may at any moment renew his occupation. If there is no physical obstruction in dealing with land, and no opposition from the will of a hostile occupier, there is no difficulty in presuming a continuance of the possession, unless there is proof of an intention to give it up. (D. 43, 16, 1, 25.)

Cattle stray beyond the limits of their pasture and cannot be found. The possession is lost, even although they do not fall into anybody's possession. (D. 41, 2, 3, 13.)

A buries money for the purpose of concealment, on the occasion of his being obliged to leave his home, in a field belonging to B. After some time he returns, but is unable to remember the exact spot where his buried treasure lies. Papinian decided that the possession was not lost by A nor acquired by B. He said mere defect of recollection of the exact spot where a thing was deposited ought not to destroy possession, unless some one else finds the treasure. (D. 41, 2, 44, pr.)

A has lost a gold chain ; he is unable to recollect whether in his own grounds or elsewhere. A has lost possession. (D. 41, 2, 25, pr.) The distinction between this case and the former seems to be, that in the former the owner was considered as knowing the place where he concealed his money, but owing to forgetfulness, which might at any moment be removed, he was unable to point out the exact spot. There existed the hope that at any moment he might recover his recollection. But in this case, A had no clue to the place where he lost his chain, and, so far as it depended on his recollection, he would never recover it.

Summer or winter pastures are left unoccupied during the respective parts of the year when they are not used. The absence of such use creates not even a slight presumption that the possessor intends to give up possession. The pastures continue to be in the occupation of the possessor. (D. 41, 2, 3, 11 ; D. 43, 16, 1, 25.)

II. Loss of occupation—object occupied by hostile possessor.

Possession was lost when the thing was occupied by any one with the intention of excluding the possessor.

When a moveable was stolen, possession was lost by the possessor and acquired by the thief. (D. 41, 2, 15.)

A person bound hand and foot by trespassers on his own land, was held to be ejected, *i.e.*, to have lost possession. (D. 43, 16, 1, 47.)

Titius has gone from home leaving no one in charge of his house. During his absence Gaius enters, and on the return of Titius prevents him entering by threats of violence. Titius loses possession. (D. 43, 16, 1, 24.) But at what time is possession lost, when Gaius enters or Titius returns? Labeo and the older jurists said it was when Gaius entered, who consequently was said to have possession like a thief (*clandestina possessio*). Apparently this was the case provided for by the interdict *de clandestina possessione*. (D. 10, 3, 7, 5.) But the necessity for that interdict disappeared, when it was held that possession was not lost, in the case stated, when Gaius entered, but only when Titius came to know that he had entered, or rather was repelled by force on attempting to turn him out, or from fear did not try to recover the occupation. (D. 41, 2, 18, 3 ; D. 41, 2, 25, 2 ; D. 41, 2, 3, 7-8 ; D. 41, 2, 46 ; D. 43, 16, 5 ; D. 4, 2, 9, pr.)

B. Loss of Possession, *animo.*

Usually an intention to give up possession was accompanied by the transfer of the occupation, as in *traditio* by a vendor to a buyer. But the question of *animus* became very important, when it was doubtful whether the occupation continued. Thus to leave a farm uncultivated, with no one in charge, did not necessarily destroy the owner's possession, so long as no hostile occupant entered; but, if the neglect was prolonged, the presumption arose that the owner intended to give up possession. (D. 41, 3, 37, 1.)

A person might lose possession by change of *animus* alone, while keeping the occupation. Thus, if a man resolves no longer to hold a thing as owner, he ceases to be possessor; but while he occupies it, no one else can acquire possession. (D. 41, 2, 3, 6.) Or, a man may resolve to hold not for himself, but on behalf of another, and thereby that other at once becomes possessor. (D. 41, 2, 18, pr.) This has been called by modern writers *constitutum possessorium*, and is the converse of delivery *brevi manu.*

Seia made a gift of a farm to her step-daughter by letter, and stated that she would continue to occupy the farm as a tenant, paying a yearly rent. This was held to amount to a transfer of the possession, and therefore of the ownership, to the step-daughter; because Seia ceased voluntarily to be a possessor, and accepted the place of a mere occupier. (D. 6, 1, 77.)

ACQUISITION OF POSSESSION BY AGENTS.

A. By persons not in the power of the possessor.

A man acquired and retained possession, if he had the intention to exercise rights of ownership in respect of the subject matter, although he did not himself occupy the thing, provided the occupier held on his behalf.[1]

A acquires possession of a moveable or immoveable, if the moveable or immoveable is occupied by B; if B and A both intend that A shall be the possessor, and B acts under the authority of A. (D. 41, 3, 41; C. 7, 32, 1.) If that authority was given before B entered into occupation, from the moment of B's entry A became possessor, even before he learned the fact of B's entry. (D. 41, 1, 13, pr.) If, however, B has not the

[1] *Animo utique nostro, corpore vel nostro vel alieno.* (Paul. Sent. 5, 2, 1.)

authority of A to enter, yet, if he holds for A, and A afterwards ratifies his act, from the moment of such ratification, A is possessor. (D. 41, 2, 42, 1.)

B. By slaves and persons *in potestate.*

A slave, equally with a freeman, could occupy property with the intention of excluding all the world, and therefore, but for his disability to sue in court, he was truly a possessor. In the same way a slave might unite all the elements forming a legal contract, but he could not sue. He could have *naturalis possessio* and make a *naturalis obligatio.* It will appear, hereafter, to what extent a master could enforce contracts made by the slave; at present we must inquire to what extent a master could treat his slave's *naturalis possessio* as a ground for invoking on his own behalf the possessory interdicts.

Two cases may be conceived in which this may occur; for either the slave acts under the orders of his master, or without his authority or knowledge. In the first case, a slave acting under the orders of his master, acquires possession for his master, subject to precisely the same conditions as apply to acquisition by a free agent. Thus, when a master ordered his slave to take possession of an object, and the slave occupied it with the intention that it should be acquired for Titius and not for his master, it was held that the master did not acquire the possession. (D. 41, 2, 1, 19.)

The next case is where the slave acquires the *naturalis possessio* of an object, without the authority or knowledge of the master. Whatever a slave obtained lawfully as part of his *peculium* was possessed by his master; but what he obtained wrongfully or by violence was not in the possession of his master. (D. 41, 2, 24.) This rule, we are told by Papinian, was based upon expediency (*utilitatis causa jure singulari receptum*) inasmuch as it would have been highly inconvenient to require the master's knowledge or authority in respect of every item composing the *peculium.* (D. 41, 2, 44, 1.) Moreover, according to Paul, express assent to each acquisition was unnecessary, inasmuch as by allowing a slave to have a *peculium,* the master gave the slave a general authority to acquire whatever he lawfully could (*quia nostra voluntate intelligantur possidere, qui eis peculium habere permiserimus*). (D. 41, 2, 1, 5.) The distinction between a slave and a free agent was that, in

the case of a slave, a general authority to acquire was sufficient to vest the possession of any object in the master when the slave had *naturalis possessio;* but in the case of free agents, there must be a distinct mandate for each acquisition, or else a subsequent ratification.

With regard to slaves held in common (D. 41, 2, 42, pr.; D. 41, 2, 1, 7); slaves held in usufruct (D. 41, 2, 1, 8); and slaves not owned but possessed *bona fide* (D. 41, 2, 1, 6), a master can acquire possession to the extent only that he can acquire rights by their contracts.

A slave, if not in the possession of his own master, can acquire for others by their express authority. (D. 41, 2, 34, 2.)

Those who are in paternal power can hold *peculium*, but cannot possess on their own behalf. In respect, however, of things comprised in *peculium castrense* and *quasi-castrense*, sons could have possession, just as they could be owners.

The disability to *possess*, coincides with the disability to be owners. When a son acquired anything as part of his *peculium*, the possession was vested in his father, even although the son was actually kept by another as a slave, and the father did not know he had the potestas. (D. 41, 2, 4.) On the other hand, if a man, under a mistake, thinks a certain person is in his power, when he is not, he cannot acquire either possession or ownership through him. (D. 41, 2, 50, pr.)

Subject to these qualifications, the rules applicable to slaves, equally apply to persons under potestas.

Loss of Possession by Agents.

A. By persons not in the power of a possessor.

Just as in the case of a principal, so in that of an agent, possession may be lost (*a*) *corpore*, or (*b*) *animo*. But the relation of principal and agent introduces some complications, and a principal does not lose possession in all cases, by the act or default of his agent, although such act or default, if his own, would undoubtedly cause him to lose possession. The first case to be considered is where the agent ceases to be occupier.

I. Loss by the agent, *corpore*.

Here three cases require to be considered.

(1.) The agent may be ejected by a third party, in which

case it is obvious that a hostile occupation and possession at once arise, and the principal loses possession in the same way as if he had been personally evicted. (D. 43, 16, 1, 22). Manifestly in this case, the possession is lost to the principal, even before a knowledge of the ejectment is brought to him.

(2.) The agent may die. In this case it was held that the principal did not lose possession, until an adverse claimant entered into occupation, or the death of the agent was brought to the knowledge of the principal, and he neglected to take possession by himself or some other agent. (D. 41, 2, 40, 1).

(3.) If the agent voluntarily abandons the property, it may happen that no one enters. In this case, the text above cited (D. 41, 2, 40, 1), if *aliud existimandum ait* be the correct reading, would be an authority to show that possession was lost. But some of the MSS. read *idem* for *aliud*. Even if *aliud* be the correct reading, the law would appear to be altered by Justinian's constitution (C. 7, 32, 12) ; and accordingly in the later law, possession was not lost. Even if a third party entered with the connivance of the agent, according to the same constitution the principal did not lose possession, until he had knowledge of the fact, and neglected to assert his claim to possession. (D. 41, 2, 25, 1.)

2. Loss by the agent, *animo*.

Could possession be lost if the occupier, without ceasing to occupy, resolved no longer to hold for the possessor, but to hold for himself? Undoubtedly an occupier who thus tried to make his occupation a means of fraud would be a *mala fide* possessor, but would he not be a possessor? Would he not unite actual occupation with the intention to hold as owner, and are not these the only elements of possession? Such reasoning is unassailable ; and if we regard possession as a mere anomalous separation of rights from investitive facts, there seems no reason why the argument should not have been given effect to. But if we admit that possession meant really equitable ownership, it would be highly inconvenient to allow a mere occupier by an act of fraud to make himself possessor, and entitle himself to the protection of the Interdicts. If that had been allowed, it would have been a serious drawback to a system of equitable rights for aliens. We find, as might be supposed, that this danger was guarded against, and in a very simple way. It was laid down that no one having been ad-

mitted as an occupier could by a mere act of will convert himself into a possessor; and that no one admitted to possession in a given capacity could of his own volition change that capacity.[1]

A ring is left in deposit with a jeweller. He resolves to deny the deposit, with the intention of fraudulently appropriating it to himself. He still continues a mere occupier, not a possessor; but if he removed it from the shop where it was left, he became at once possessor and a thief. Removing the ring from its place of custody is a *contrectatio*, and *contrectatio* was a change in the *corpus* as well as in the *animus*. The possessor lost possession, but had an *actio furti*. (D. 41, 2, 3, 18.)

A tenant of a farm hearing of the death of his landlord, and that no heir was likely to be found, resolved to keep the farm for himself. He is not a possessor, and hence, although in this case anciently his *mala fides* was no bar to *usucapio* (p.), he did not become owner by *usucapio*. (D. 41, 5, 2, 1.)

The owner of a farm sold it, and gave an order to the buyer to take possession. The tenant of the farm refused to allow the buyer to enter. The tenant was subsequently ejected by violence by a third person. The tenant could bring the interdict *Unde vi* against that person, and in turn, was liable to the same interdict at the instance of his landlord. (D. 43, 16, 12.) The distinction between this and the former case is, that the tenant's refusing admission to the buyer was a refusal to admit his landlord. By such a refusal the landlord was deprived of his land *corpore* as well as *animo*. The landlord could therefore bring the interdict against his tenant, who thus made himself a possessor, although as against his landlord his *possessio* was *vitiosa*. But his possession was not invalid as against the person who evicted him.

Suppose it was the vendor that ejected the tenant by force. In this case, as before, the tenant is liable to the landlord, but the buyer is likewise liable to an interdict *Unde vi* at the instance of the tenant. Even if the buyer, in ejecting the tenant, had acted at the request of the landlord, it was no defence, for an order to do an illegal act is not valid. (D. 43, 16, 18, pr.)

A tenant, without the knowledge of his landlord, lets to a sub-tenant. The landlord retains possession through his sub-tenant, as his agent. (D. 41, 2, 25, 1.)

A tenant buys the farm he occupies from a person he believes to be heir to his landlord. He at once becomes possessor, even if that person proves not to be heir. (D. 41, 3, 33, 1.)

B. By slaves and persons *in potestate*.

1. Loss *corpore*. By a slave or person *in potestate*, possession was lost *corpore*, when it would have been lost in the hands of a free agent.

2. Loss *animo*. In this case, there was a difference between a slave and a free agent.

A free agent, while retaining physical occupation, cannot, by a mere act of will, decide to hold for himself or another and thereby destroy the possession of his principal. But if the agent ejects the principal in the case of land, or actually

[1] *Nemo sibi ipse causam possessionis mutare potest.* (D. 41, 2, 1º 1.)

deals with a moveable in such a manner as to involve a *contrectatio rei*, and thereby a change in the holding (*corpore*), the agent becomes a possessor wrongfully, but still a possessor. In the case of a slave, however, the possession was not lost by any such dealing with the object, if, as a fact, the thing continued in his custody or power. The rule applied that the possession of the slave is the possession of the master.

A slave stole property from his master. So long as the slave did not actually part with the property, it remained in the possession of the master. (D. 41, 2, 15.)

A slave runs away from his master with the intention of never returning. He is still in the possession of his master (D. 41, 2, 13, pr.; D. 41, 2, 15), unless he is possessed by another. (D. 41, 2, 50, 1.) Ulpian explains this decision by saying that a slave cannot be allowed to take away his master's possession.

A farm was given to a master in mortgage, and his own slave by violence ejected the master. Nevertheless, the possession of the slave was the possession of the master, and the master retained legal possession. (D. 41, 2, 46, pr.)

Remedies.

1. Remedies in respect of rights of possession of immoveables.

The interdicts *Unde vi* and *quod vi aut clam* were the ancient remedies for a possessor. In later times, however, it would appear that an alternative procedure by means of actions was allowed. The interdicts seem, indeed, to have been pushed aside by possessory *condictiones*. Thus we are told there was a possessory *condictio* for the recovery of land analogous to the *condictio furtiva* for stolen goods (D. 47, 2, 25, 1.) Again, it is said that an owner could bring a *condictio* to recover his ownership, a possessor to get back his possession. (D. 13, 3, 2.) The distinction between *interdictum* and *condictio* consisted entirely in the forms of procedure (see Book IV., Proceedings *in Jure*); and after the changes made by Diocletian, there was no distinction whatever except in words.

2. The remedies in respect of the investitive fact of possession were the interdicts *Uti possidetis* and *Utrubi*. These interdicts could be used only for protecting possession, not for acquiring it.[1]

The interdicts that are the means of retaining possessions are *Uti possidetis* and *Utrubi*. These are granted when two parties are at variance in regard to the ownership of some property; and the prior question is raised, which

[1] The formula of *Uti possidetis* given by Festus is: "*Uti nunc possidetis eum fundum, quo de agitur, quod nec vi nec clam nec precario alter ab altero possidetis, ita possideatis adversus ea vim fieri veto.*"

In the Digest it is given thus:—*Prætor ait:* "*Uti eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quominus ita possideatis, vim fieri veto.*

"*De cloacis hoc interdictum non dabo.*

"*Neque pluris quam quanti res erit; intra annum, quo primum experiundi potestas fuerit agere permittam.*" (D. 43, 17, 1, pr.)

The interdict *Utrubi* is mentioned in D. 43, 31, 1, pr. *Praetor ait:* "*Utrubi hic homo, quo de agitur, majore parte hujusce anni fuit, quo minus is eum ducat, vim fieri veto.*"

of the two is to go to law as possessor, and which as claimant? [To decide this question the *Uti Possidetis* and *Utrubi* have been introduced.] (J. 4, 15, 4; G. 4, 148.)

If lands and houses are at stake, the interdict *Uti possidetis* is employed; if the possession of moveables, the interdict *Utrubi*. (J. 4, 15, 4A; G. 4, 149.)

Now the force and effect of these two interdicts was among the ancients widely different. In the case of the interdict *Uti possidetis*, he that was in possession at the time of the interdict prevailed, if only he had not obtained possession from his opponent by force (*vi*), by stealth (*clam*), or by leave (*precario*). A third party, however, he might have driven out by force, or from him he might have stealthily snatched the possession, or he might have begged leave to become possessor. But in the case of the interdict *Utrubi*, he that was in possession during the greater part of that year prevailed, if only he was in possession as against his opponent neither by force, nor by stealth, nor by leave. [And this is sufficiently shown by the very words of the interdicts.] (J. 4, 15, 4A; G. 4, 150.)

The year, too, is reckoned backwards. And so, if you, for instance, were in possession for eight months before me, and I for the seven later months, I shall be preferred, for possession during the first three months will not help you in this Interdict; it belongs to the previous year. (G. 4, 152.)

At the present day, however, the usage is different. For the effect of both interdicts, as far as regards possession, has been made just the same. So then, whether the object in dispute is landed property or a moveable, he prevails that at the time of the law-suit holds the property in his possession, if only he has not got possession from his opponent by force, by stealth, or by leave. (J. 4, 15, 4A.)

Now under the interdict *Utrubi*, a man profits not only by his own possession, but by another's, if fairly reckoned as accessory; by the former possession, for instance, of a man whose heir he is, or from whom he has bought the thing, or received it as a gift or by way of dowry. If, therefore, the lawful possession of another, when joined to our possessions, overtops the opponent's possession, then under that interdict we prevail. But if a man has no possession of his own, no time beyond is given or can be given as accessory thereto. For to what is itself nothing there can be no accession. If, then, a man's possession is tainted—that is, acquired from his opponent by force, by stealth or by leave—no accession is given. For his own possession profits him nothing. (G. 4, 151.)

Possession is held to include not merely personal possession, but possession by another in our name; and this even though that other is not subject to our power, as when he is a tenant or a lodger. We may possess, too, by means of others with whom we have deposited anything, or to whom we have lent it. This is the meaning of the common saying, that we can keep possession by means of any one that is in possession in our name. Moreover, it is decided that possession may be kept by intention as well: that is, that although we are not in possession, either personally or by means of others acting in our name, yet if we had no intention to abandon possession, but went away with a view to returning, we still keep possession. Possession may be gained, too, by means of others, as we have set forth in the Second Book. But there is no doubt that it cannot be gained by a bare intention only. (J. 4, 15, 5; G. 4, 153.)

The third division of interdicts is this:—They are either simple or double. They are simple when one party is plaintiff and the other defendant, as in all interdicts for restitution or production. For the plaintiff is he that desires restitution or production; the defendant is he from whom such restitution or production is desired. Of interdicts of prohibition, again, some are simple, others double. When, for instance, the Prætor forbids anything to be done in a sacred place, or on a public river or its bank, the interdicts are simple: for the plaintiff is he that desires that nothing be done, the defendant he that tries to do it. Of double interdicts, again, *Uti possidetis* and *Utrubi* are examples. They are called double because both parties to the suit stand on the same footing, neither being specially defendant or plaintiff, but each sustaining both parts alike. (J. 4, 15, 7; G. 4, 156-160.)

The Prætor certainly speaks with both in words to the same effect, for the final form in which these interdicts are framed is this:—"As you now possess, I forbid any violence to be done to hinder you from so possessing" (*Uti nunc possidetis, quominus ita possideatis vim fieri veto*); and again of the other interdict,—"Wherever and with whom this slave in dispute has been during the greater part of this year, I forbid any violence to be done to hinder him from leading him away" (*Utrubi hic homo de quo agitur, parte majore hujus anni fuit, quominus is eum ducat, vim fieri veto*). (G. 4, 160.)

Explanation of some General Maxims.

Nihil commune habet proprietas cum possessione. (D. 41, 2, 12, 1.)
Nec possessio et proprietas misceri debent. (D. 41, 2, 52, pr.)

Possession stands in the Roman Law, alongside ownership, in parallel but independent lines. If there was a doubt whether the person claiming to be owner was not also the possessor, the question must be raised by an independent possessory suit, and the suit must proceed to its termination without raising or deciding any right of ownership. (D. 41, 2, 35.) It was thus incompetent to allege, by way of defence to a possessory action, that the defendant was the true owner; and only, if worsted in that contest, could the defendant bring, as plaintiff, an action to recover the property from the person determined to be possessor. It was even doubted whether a true owner, having once begun an action to recover the property, could drop the action, and proceed by the Interdict *Uti possidetis* to recover the possession. Inasmuch as a petitory action could be brought only against a possessor, it was argued that the bringing of such an action was an implied admission that the defendant was possessor; but Ulpian says (D. 41, 2, 12, 1) that the correct view was that these were alternative modes of proceeding and there was nothing to hinder a person after be-

ginning a petitory action, to drop it and sue for possession. This peculiarity, the self-contained completeness of possessory suits, is retained by those systems of continental law that have been borrowed from the Roman law. There is no conceivable advantage in the duplication of suits that have in substance the same object, and the English law permits a defendant in possession, even wrongfully, to plead that he has a good title to the property, thus disposing in one action of questions, which in the Roman Law would have required first a suit for possession, and afterwards a vindication.

As a matter of fact, however, it was usual in the Roman law to attain the same end by introducing the question of ownership on a suit for possession. "In wagers under interdicts, although there is no question of ownership, but only of possession, still we ought to show not merely that we have had possession, but that what we have possessed is our own."[1]

Adversus extraneos vitiosa possessio prodesse solet. (D. 41, 2, 53.)

In the statement given above an important element of possession has, in order to avoid confusion, been omitted. It has been stated that a possessor is entitled to the protection of interdicts. That proposition is too wide. An *injusta* or *vitiosa possessio* is not protected, except against *extranei.*

A person who has obtained that which immediately before was in the possession of another *vi, clam,* or *precario,* is not entitled to protection as against that person. As against that person the possession is said to be *vitiosa.* But against all other persons (*extranei*) he is entitled to retain the possession. Thus if A is in possession of a farm, and B against his will (*vi*), or without his consent (*clam*) (p. 252) obtains possession, B will be defeated in a possessory suit at the instance of A. But if C, D, or E were to bring a possessory suit, B would succeed in retaining possession. Again, if A had let this land to B on the terms of a *precarium,* and B refused to give up possession, and were ejected by A, B could not succeed in a promissory suit against A, inasmuch as B held from A *precario.*

From this it follows that possession cannot have a legal commencement unless with the consent of the previous possessor,

[1] *In sponsionibus, quae ex interdictis fiunt, etiamsi non proprietatis est quaestio sed tantum possessionis, tamen non solum possedisse, sed etiam nostrum possedisse doceri debeat.* (Quint. Inst. Orat. 7, 5.)

or in cases where the possession is vacant, as, by the abandonment of the possession or death of the possessor.

It is convenient to speak of mere possession as obtaining the protection of law, without incessantly repeating this important qualification; but it must be kept in mind that the Roman law did not protect a man's possession, unless that had a lawful commencement, except against those persons who had no right to complain.

Incertam partem possidere nemo potest. (D. 41, 2, 3, 2.)

A person cannot have possession of an indefinite or undetermined portion of a thing, as if I deliver to you, whatever may be my share of the land, or I wish to possess whatever Titius possessed, not knowing what that was. (D. 41, 3, 32, 2.) But this does not prevent two or more persons from possessing together, in definite shares, any given object. (D. 41, 2, 26.)

Ignoranti possessio non adquiritur.

This maxim has been considered in relation to acquisition by slaves. Here it is important merely to avoid a misconstruction. The meaning of the maxim is that a person cannot without his consent, and therefore not without his knowledge, obtain possession of a thing by means of an agent. Of course, if the possessor himself obtains possession, he has necessarily a knowledge of the fact. This is all that is meant. It does not mean that possession is not acquired through an authorised agent, until the fact of the possession is brought to the knowledge of the principal.

Plures eandem rem in solidum possidere non possunt. (D. 41, 2, 3, 5.)

Two persons may unite, as against all others, to share the possession of a given object; but two persons, claiming against each other, cannot both be possessors of the same thing. This follows from the nature of possession, namely, the occupation of a given object with the intention of excluding all the world from the use and enjoyment of it. Hence, where a previous possession continues, it follows that no new possession can have commenced; and, conversely, where a new possession is admitted, the previous possession must be held to have ceased.

An exception to this rule exists in the case of *precarium*. Pomponius says (D. 43, 26, 15, 4) that both the landlord and the tenant in the case of *precarium* possess the subject of the

tenancy. As appears hereafter, a tenant at will (*precario*) was originally possessor, in the sense of being able to hold adversely to his landlord as well as to the world at large. But when a legal remedy was given to the landlord to enable him to evict the tenant, an illogical but convenient compromise was effected. The tenant was left with possessory rights against the world at large, although no longer able to hold against his landlord, and the landlord was invested with a possessory right, so as to be able to recover the property from third persons.

Nemo sibi ipse causam possessionis mutare potest. (D. 41, 2, 19, 1.)

Gaius 2, 52-61 (p. 269) explains a peculiar case of acquisition by *usucapio* by a *mala fide* possessor. A person possessing *pro herede* acquired the inheritance in one year, although he knew he was not heir. By the above rule a possessor of property belonging to the inheritance in the capacity of owner or buyer or depositee or tenant, could not, by resolving to possess in future in the character of *heres*, obtain the benefit of the short and dishonest prescription. (D. 41, 3, 33, 1.) The rule also prevented a tenant of a farm, resolving on the death of his landlord, to be no longer an occupier, but to possess *pro herede*, from getting the benefit of the prescription. A man cannot change the character in which he occupies or possesses, so as to obtain ownership by *usucapio*. (D. 41, 5, 2, 1.) If, however, such a person left possession and subsequently re-entered on a new title, this rule did not apply. (D. 41, 2, 19, 1.) After the constitution of Hadrian, mentioned by Gaius, abrogating this ancient species of dishonest *usucapio*, the rule ceased to be of any importance, and is rarely mentioned in the Digest.

THE HISTORY OF POSSESSION.

Adverse Possession.—A broad distinction was drawn by the Roman jurists between possession and ownership. Ulpian says the interdict *uti possidetis* was introduced because there ought to be a distinction; for it may happen, as he says, that a possessor may not be owner, or an owner may not be possessor, or that the owner may be possessor. (D. 43, 17, 1, 2.) As applied to ownership, the distinction taken by Ulpian may be expressed thus:—A possessor that is not at the same time owner, is a person that exercises the rights of ownership, although not invested with ownership by any investitive or transvestitive fact (for the sake of brevity, say simply any

investitive fact). An owner that is not at the same time a possessor, is a person invested with ownership by some investitive fact, although he does not exercise any of the rights of ownership. In short, there is a separation between two things that, in contemplation of law, must go together—the exercise of a right and its investitive fact. The person invested does not exercise his rights, and the person exercising the rights is not invested with the ownership. So expressed, the idea of possession is perfectly simple. Whether the person (not invested), but still exercising the rights of ownership, thinks or does not think himself owner, is at present beside the question. He is a possessor, and not an owner, if there really be (whatever he may think) no investitive fact in his favour.

What attitude ought the law to adopt towards a mere possessor? The answer to this must differ according as we consider the relation of the possessor to the owner, and to persons other than the owner. Manifestly as against the owner a possessor can have no right to the thing in his possession. The law specifies certain investitive facts as the condition of ownership. If then it were to treat as owner a person that had not acquired the ownership by any investitive fact, and to refuse to regard as owner the person that had acquired ownership by an investitive fact, it would stultify itself. But as against a person that is not owner, a possessor stands in a very different position. If A enters on land possessed by B, and neither A nor B asserts that the land belongs to him by any investitive fact, there is nothing unreasonable in saying that B should be protected in his possession against A. To use the expression of Paul, as between A and B, B has the better right to the possession. (D. 43, 17, 2.) In a controversy between them, it is immaterial that B does not claim to have any right of property founded on any investitive fact; for A is in the same position.

To a modern jurist, adverse possession—the temporary and abnormal separation of the enjoyment of property from the title to it—is the only possession with which he is concerned; and he, therefore, comes to the consideration of Roman law with the unsuspecting conviction that it was for the benefit of adverse possessors that the Possessory Interdicts were introduced. What is true of modern writers is to a very large extent, if not equally, true of the Roman jurists in the classical period of Roman law. Paul or Papinian had probably no occa-

sion to invoke the aid of Interdicts except for adverse possessors, or for owners who preferred to use the possessory remedy instead of proceeding on their title. If there had never been anything more than this, it would be indeed impossible to understand the crotchets or reconcile the inconsistencies of the Roman law of Possession.

Inconsistency and arbitrariness, however, generally point, in the Roman law, to a historical explanation. It is the fate of many rules and institutions to have a reasonable commencement and a useful career, but long to survive their usefulness. It is the fate of other institutions to be introduced for a distinct object, and when that object ceases to exist, to be utilised for analogous but not identical purposes. In the case of possession, all the peculiarities of the Roman law admit of a satisfactory explanation, if we start with the hypothesis that Interdict possession was not created for adverse possessors, but for a wholly different class of persons. The only case that a modern jurist has to consider is the case of a man who holds innocently against all the world, but wrongfully as against the true owner. But the case for which Interdict possession was brought in was where a man held innocently as against all the world, and wrongfully as against nobody. Interdict possession was introduced for the purpose of securing the enjoyment of property, in cases where by the civil law no title to property could be recognised. Just as the Prætor widened and enlarged the law of Contract, just as he expanded the law of Inheritance and bestowed new powers of Testation, so, in the view I take, did he broaden the law of Property; and the instrument he employed was Interdict possession. Possession was thus not an end in itself; it was a means to an end; and the mode in which it was used cannot correctly be understood unless with reference to the object for which it was intended.

In Rome, owing to the form of civil procedure, questions of possession always took precedence of questions of ownership. (G. 2, 148, p. 358.) The most ancient civil action in Rome was the *sacramentum*. The dramatic and interesting features of that proceeding are set forth under the Law of Procedure. After the dramatic incidents closed, and before the case could go for trial, the Prætor was called upon to decide a preliminary question of high importance. The proceedings involved the affectation, that there was neither a plaintiff nor a defendant before the court, but only two people quarrelling. The first

step, therefore, incumbent on the Prætor was to decide which should be plaintiff and which defendant. This question could not be determined in an arbitrary manner, first, because the burden of proof rested on the plaintiff, and in many cases this was tantamount to a victory for the defendant; and secondly, it was necessary to provide for the custody of the property pending the suit. These circumstances pointed to the fairness of giving the advantageous position of defendant to the possessor—the man actually in possession when the controversy arose.[1]

A common case that would occur would be this: A has occupied a farm for a considerable time. B appears on the scene claiming it as his property and ejects A. A commences an *actio sacramenti* before the Prætor. To which of them ought the Prætor to give the position of defendant? *Prima facie* to B, for he is found in occupation when the legal proceedings commence. But it is an elementary maxim that a man ought not to be allowed to obtain a benefit to the prejudice of another by his own wrong, and it would be an encouragement to lawlessness to give any advantage to B. We may assume, therefore, that A would be made defendant and restored to the occupation until B proved his title. In the technical language of the law, B's possession was *injusta* or *vitiosa*, and therefore undeserving of support. Nor would the position of B be much improved if instead of ejecting A by force, he waited an opportunity when A was from home to take possession of A's land. Thus it was inevitable that the notion of possession should take a definite legal shape in the mind of the Prætor.

When we turn to the latest phase of Roman law we find that the only use ascribed to the Interdicts *Uti Possidetis* and *Utrubi* was to determine a question of possession as preliminary to an action to recover property (J. 4, 15, 4); and the sole effect of a judgment was to determine which of the parties should be plaintiff or defendant in the subsequent proceedings. (D. 41, 2, 35.) But this could not have been the original purpose of those Interdicts: for the question of possession as preliminary to a vindication was the precise question that the Prætor himself decided in the *actio sacramenti;* and no occasion or

[1] So closely was the position of defendant associated with the strict legal notion of possession that certain jurists held that an action for the recovery of property could not be brought against a man who had *detentio* only; but the inconvenience of this view is obvious, and it was condemned by Ulpian. (D. 6, 1, 9.)

necessity existed for the introduction of interdicts for the same purpose. But, if we suppose that in some cases the question of possession was not a mere preliminary to a vindication, but was the sole and final issue between the parties, then the *sacramentum* would be inapplicable, and the Interdicts *Uti Possidetis* and *Utrubi* would be necessary.

Ancient law presents us with two distinct cases in which the question of possession arose. If the dispute was between two persons, either of whom claimed ownership, the question of possession was settled by the Prætor himself in the first stage of the *sacramentum*. But if possession was the only question that could be raised between the parties, and ownership was impossible,[1] the interdicts *Uti Possidetis* and *Utrubi* were employed. In those Interdicts, the question of possession not being a mere prelude to the real controversy, but the only possible issue between the parties, was not decided by the Prætor, but was sent for trial before a *judex* or *recuperatores*. There was nothing unconstitutional in the decision of a preliminary question, like possession, by the Prætor; but it would have been as much at variance with Constitutional Law in Rome for the Prætor to take upon himself to decide a question of possession, if it were the sole and final issue between the parties, as it would be for an English judge of his own motion to deprive the litigants of the right of trial by jury. The mere fact, therefore, that in some cases the Prætor did not adjudicate upon possession, but referred the question for trial in the ordinary way, goes to prove that in those cases the question of possession was the only one that could be raised between the parties, and that a decision upon it put an end to all controversy between them.

Does the history of Rome supply us with any cases that fulfil the conditions required to account for the existence of the Interdicts *Uti Possidetis* and *Utrubi?* In two cases the required conditions seem to be complied with. Those were cases where, according to Roman law, ownership could not exist, but where it was a matter of high policy to give the protection that owners receive from law. If one of the parties to the dispute was a *peregrinus*, the *sacramentum* could not be used; and the question of possession would not be a mere preliminary to a vindication,

[1] *Possessio ab agro juris proprietate distat; quidquid enim adprehendimus, cujus proprietas ad nos non pertinet,* AUT NEC POTEST PERTINERE, *hoc possessionem appellamus.* (D. 50, 16, 115.)

but the sole and final question to be determined. There was another case. Land forming part of the *ager publicus* was occupied and cultivated by private individuals, and transmitted by them to their descendants. But in such land ownership by private individuals could not exist. If, therefore, legal protection was to be given to the holders of public land, it would not be by the *actio sacramenti*. Those cases must now be considered more in detail.

The necessities of private holders of *ager publicus* seem to be completely met by the Interdict *Uti Possidetis*, and to afford a possible explanation of the origin of that Interdict.

Savigny thus sums up his own and Niebuhr's views on this subject. "Originally, and from the earliest times downwards, there were two rights in land, *property* in the *ager privatus* with vindication, and *possessio* in the *ager publicus*, with a similar protection in the form we now see in the Prætor's Interdicts. At a later period the Prætor recognised this legal relation in terms in the Edicts, and thus gave rise to Interdicts as Prætorian remedies, possibly with very little alteration of the law in principle. In the same way it was subsequently found convenient to apply the *possessio*, which had been originally devised for *ager publicus* only, to *ager privatus* also, although there was no very urgent necessity for it, and it probably never would have been applied in the first instance to the latter. Now this subsequent application of *possessio* to *ager privatus* is the only one which remains to us in the law sources, which scarcely take note of *ager publicus*. Whether this extension of the original meaning was previous or subsequent to the adoption of Interdicts into the Edicts, and what the mode of introducing and treating the subject in the Edict was, we are completely ignorant; the only historical knowledge we have is, that possessory Interdicts had been already introduced in the time of Cicero."

If Niebuhr's hypothesis with respect to the character of possession in the *ager publicus* be proved, it would afford an explanation of the Interdict *Uti Possidetis*. Without in any way discrediting his very ingenious reconstruction of a lost chapter in the agrarian history of Rome, we may put forward another case apparently satisfying the conditions of the problem, even more fully than the case of the *ager publicus*. It is at least possible that Interdicts were first introduced to protect the proprietary interests of *peregrini;* in which case, it would

follow that the possessory Interdicts were afterwards extended to private holdings in the *ager publicus*. The proof with regard to the *peregrini* involves three propositions—(1) that at a very early period *peregrini* enjoyed legal protection for their property; (2) that such protection was not afforded by the ordinary actions for the recovery of property; and (3) that possession, which depends on the *jus naturale*, was open to *peregrini*. This last proposition needs no discussion. The second admits of clear proof. Three actions, representing successive stages of development and simplification, were employed to determine questions of ownership. These were *sacramentum*, *sponsio*, and *petitoria formula*. The *sacramentum* being a *legis actio* could not be used except by *cives Romani*. The *sponsio*, which succeeded it, in terms excludes the possibility of its use by *peregrini*; "if the slave in dispute is mine *ex jure Quiritium*" is the hypothesis on which it proceeds. (G. 4, 93.) In the *petitoria formula*, again, it is said, "If it appears that the slave Stichus belongs to A. A. *ex jure Quiritium*." (G. 4, 41; Cic. in Verr. 2, 2, 12.) Thus only a *dominus ex jure Quiritium* could sue by an *actio in rem* up to the close of the Formulary Period in the reign of Diocletian. It now remains to show that *peregrini*, although they could not bring an *actio in rem*, nevertheless had legal protection to their property. The proof is easy.

The appointment of a *Prætor Peregrinus* (B.C. 247) only 120 years after the establishment of the Urban Prætorship, to relieve the Urban Prætor of cases in which a *peregrinus* was a party, is generally considered to attest the extent to which transactions with *peregrini* had, two centuries before the end of the Republic, been multiplied. We know that at an early period the contract of *sponsio* was enlarged into the *stipulatio*, by the authorisation of words that could be used by *peregrini*, such as *fidepromitto*, *do*, *facio*. But the most instructive evidence is derived from a strange solecism in the Roman law of sale. To the very latest period of Roman law, if a buyer, say of a valuable landed estate, discovered before paying the price that the vendor had not a good title to the ownership, he could not refuse to complete the transaction, if the vendor was able to give him a good possessory title (*vacua possessio*). It is true that if the buyer was afterwards evicted by law from the property at the instance of the true owner, he could sue the vendor to recover

back the purchase money. But obviously this was an imperfect remedy, for before the eviction took place, the vendor might be insolvent. But that was not the strangest part of the case. If the vendor by special agreement undertook to do more than give a possessory title and promised to make out a good title as owner, it was held that the transaction was not a sale, and therefore could not be enforced as an executory contract. (D. 12, 4, 16.)

Why should it have been of the *essence* of a contract of sale, that the vendor should give only a possessory title? The object of a contract of sale in Rome, as elsewhere throughout the world, was to make the buyer the owner of what he bought, in exchange for the price he paid. In this, as in other cases, where a rule tenaciously maintained throughout the whole duration of the Roman law is inconsistent with reason and expediency, we ought to look for some powerful deflecting cause in the history of the law. Apparently we find such a cause in the circumstances of the *peregrini*. By requiring only a possessory title in the law of sale, the door was opened to transactions by classes of persons who were not capable of giving a good title to the ownership. Thus the law of sale was made as wide as possible: while, by imposing on the vendor an obligation to repay the price in the event of the buyer being evicted, the requirements of justice were fulfilled as completely as was consistent with the fundamental basis of the law. If, therefore, the law of sale was thus warped in its application even to Roman citizens, through the desire to open the law of contract freely to *peregrini*, we can have no difficulty in believing that the same motive would have been sufficient to lead to the introduction of the interdicts *Uti possidetis* and *Utrubi*, which were the appropriate proceedings for determining the legal validity of a possessory title. The law of sale is interesting from another point. If the account here given be correct, the law of property was opened up to *peregrini* by means of possession as a title, and not, as conceivably it might have been, by giving to aliens fictitious actions to vindicate ownership. The only trace of such actions in connection with aliens is given by Gaius (p. 342); and the actions he mentions were precisely those that were required to supplement the possessory interdicts.

For the purpose of the main argument, it matters little whether we suppose that Interdict Possession was introduced

for the sake of possessors in the *ager publicus*, and was afterwards extended to *peregrini*; or that interdicts were introduced for *peregrini* and extended to the possessors of the *ager publicus*. Either hypothesis will account for the peculiarities of the law of possession. In the present state of our knowledge it would perhaps be rash to express any decided opinion as to priority between those two cases. But it may be pointed out that there is a special difficulty in the view that the first application of interdicts was to the case of the *ager publicus*. That would account for the interdict *Uti Possidetis*, but leave wholly unexplained the interdict *Utrubi*, which applies to moveables only. On the other hand, if we suppose it was the case of *peregrini* that first gave occasion to the interdicts, then both interdicts are accounted for, the *peregrini* requiring protection both for moveables and immoveables.

Those who hold with Savigny and Niebuhr that the sole reason for introducing possessory interdicts is to be found in the circumstances of the *ager publicus*, cannot easily explain why *Utrubi* was established. It is a cardinal maxim of Prætorian intervention, never to create a new action unless where necessary. But as the *Uti Possidetis* fully provided for the wants of the possessors of public land, where was the necessity, or indeed, we may go further and ask, where was the utility of an analogous remedy dealing with moveables? The only answer that has any appearance of probability is that when the *sacramentum* fell into disuse, and the Prætor no longer decided questions of interim possession in vindications, it became necessary to create an interdict for moveables, analogous to *Uti possidetis*, for the purpose of settling who should be defendant in the vindication of moveables. But the terms of the interdict *Utrubi* do not lend themselves to such a suggestion. The singular feature in *Utrubi* is that the litigant succeeded who was in possession during the greater part of the year, not as in *Uti Possidetis*, who was in lawful possession at the time the proceedings began. Now, if the only object of the interdict was to determine which of two persons should be defendant in an action about to be tried, this provision is unmeaning. Even before the time of Justinian, when the Interdict had certainly no other object, this fact was recognised, and the distinction between *Utrubi* and *Uti possidetis* on this point was abolished. Whether the object in dispute was land or moveables, it was the person in possession at the commence-

ment of the action that succeeded on the question of possession. (J. 4, 15, 4A.)

If, however, we suppose that interdicts were brought in for *peregrini*, this ancient feature of the *Utrubi* receives a new light. Considering the facility with which many moveables pass from hand to hand, the *Utrubi* would not have served its purpose, if the right of possession turned on the question who had possession at the time legal proceedings were begun. In the case of land this difficulty does not occur. Land cannot run away or disappear from view; and a rule that adopted possession at the time action was commenced worked very fairly as a mode of settling what was really a question of ownership. At all events this was the case when the rule was finally adopted, that in cases of *clandestina possessio*, no hostile possession commenced until it was brought to the knowledge of the previous possessor. If, therefore, one neglected to take advantage of the *vitium* of his successor's possession, and waited until the property changed hands, he suffered only from his own laches. But it was very different in the case of moveables, which might pass through several hands rapidly without our knowledge. In effect, therefore, the interdict *Utrubi* was based on a short prescription of six months, and, as in usucapion, an *accessio temporis* was allowed. (G. 4, 152.) (p. 358.) All this is easily understood, if we look upon the Interdict *Utrubi* as intended to establish a kind of ownership; but it is unintelligible if *Utrubi* was nothing more than a preliminary to a vindication.

Ownership, in this view, was extended to *peregrini* through the medium of possession. The Prætor could not, consistently with the limits imposed on his powers, venture directly to bestow *dominium ex jure Quiritium* on *peregrini;* but in effect he accomplished the same object by protecting possession. An exact parallel occurs in the case of Inheritance. It was a strict rule of the Roman law that the Prætor could not make an heir (*heres*). But, notwithstanding that rule, the Prætor was almost the sole agency up to the time of the Empire, by which the law of inheritance was altered, and succession taken from those who were entitled by the *jus civile* and given to those who were not entitled by the *jus civile*. To take a single example. A son released from the *potestas* could not be heir to his father, even if his father left no children except himself. This seems, at an early stage of Roman history, to have been considered a

very hard case, and accordingly the Prætor interfered on behalf of the emancipated son. He did not violate the rule prohibiting him from making a new class of heirs; but he said, I will give the emancipated son the *possessio bonorum* of his father. By the *possessio bonorum* the Prætor granted to the emancipated son all the rights, and imposed upon him all the duties of an heir, while he religiously abstained from giving him the name of heir (*heres*). There were technical, but not substantial, differences between *hereditas* and *bonorum possessio;* and until a late period of Roman law the technical distinction remained; but at last, under Justinian, even the technical distinction was swept away.

The conclusions to which a consideration of the necessities of Roman law lead us are corroborated in a striking manner by the peculiarities of interdict procedure. Among interdicts themselves there is a profound difference between the *Uti Possidetis* and *Utrubi* and the other interdicts we have had to consider, such as *Unde vi* or *Quod vi aut clam;* and this difference bears a remarkable analogy to a distinction that exists in the corresponding actions affecting property.

The place of the interdict *Unde vi* in a classification of Roman law is not hard to determine. That interdict may be compared with the *actio furti* or *vi bonorum raptorum* in the case of moveables. It was the remedy open to an owner of land or houses illegally deprived of his possession. Prior to the introduction of this interdict, an owner had no remedy against wrongful ejectment except the *actio sacramenti.*[1] In that action the plaintiff relied upon his title as owner. This was reasonable when he was opposed by another also making a *bona fide* claim to the ownership; but it imposed a great hardship on an undoubted owner evicted by a wrongdoer without any shadow of claim. The interdict *Unde vi* redressed this grievance, and enabled an owner to recover possession without proving his title, and without exposing him to the technical snares and pitfalls of a *legis actio.* We have assumed that the interdict *Unde vi* was brought in for the protection of owners; and, as a general rule, it was owners that benefited by it; but the condition of relief to owners was such as to enable persons who were not owners to have recourse to the interdict. Inasmuch

[1] It must not be forgotten that if a *peregrinus*, at this stage of Roman history, were the wrongful possessor, the owner had no legal remedy, inasmuch as the *actio sacramenti* could not be brought against a *peregrinus.*

as the owner succeeded on proof of possession, without proving his title, it followed that persons who had possession, although not owners, could prove all that was necessary to procure the aid of the interdict. Thus the interdict was open to adverse possessors.

There must have been some different reason for the introduction of the interdict *Quod vi aut clam.* That interdict was the appropriate remedy where immoveables were damaged. But damage to immoveables was provided for by the XII Tables, and also by the *lex Aquilia.* (D. 9, 2, 27, 7; D. 9, 2, 27, 31; C. 3, 35, 2.) The owner, therefore, had an action *jure civile* to recover compensation for injury to his property. Moreover, the owner had the advantage in suing on the *lex Aquilia* of recovering double damages, if the defendant denied his liability, and was found liable. There must, however, have been some reasons not apparent on the surface, why the remedy on the *lex Aquilia* was not used, and was practically superseded by the interdict *Quod vi aut clam.* Whatever the reason, this interdict, as well as the interdict *Unde vi*, was in substance an action for wrong or tort done in respect of immoveables.

The issue raised by the Interdicts *Uti Possidetis* and *Utrubi* is of a different kind. It is simply which of two persons has *possessio*—in other words, which of two persons is entitled to be protected by law in the occupation of the property in dispute. (D. 41, 2, 35.) This is strictly analogous to the question—which of two persons is the owner of a given subject. Looking, therefore, to the issue raised between the parties, it is clear that *Uti Possidetis* and *Utrubi* must be compared, not with actions *ex delicto*, but with the *Vindicatio* or *actio in rem.*

The distinction between those two classes of Interdicts corresponds with a curious and instructive difference in Procedure. Interdicts, says Gaius (G. 4, 156-160) (p. 359), are either *duplicia* or *simplicia.* The examples he quotes of *duplicia interdicta* are the interdicts *Uti Possidetis* and *Utrubi.* All interdicts for restitution (including *Unde vi* and *Quod vi aut clam*) are *simplicia.* An interdict is simple when, from the commencement of the proceedings, one party is plaintiff and the other defendant. An interdict is double when both parties to the suit stand on the same footing, neither being specially defendant or plaintiff, but each sustaining both parts alike. In the double interdicts, the first step to be taken was to offer the interim possession to the highest bidder. The one that bid highest thus

became defendant on the trial of the issue—which of them had possession.

This peculiarity of the double interdicts is obviously an imitation of the *sacramentum*. Now we can understand the false assumption in the *sacramentum*, that, in the beginning of the action, neither party is plaintiff; there are merely two persons quarrelling. It is a relic of the time when the assumption was a fact—when the Prætor acted as a voluntary referee without any coercive jurisdiction. But why should the Prætor reproduce this fiction in a proceeding entirely created and moulded by himself? And why should he imitate the *sacramentum* in the interdicts *Uti Possidetis* and *Utrubi*, and not in the interdicts *Unde vi* or *Quod vi aut clam*?

If we suppose that the intention of the Prætor in the interdicts *Uti Possidetis* and *Utrubi* was to legalise ownership in cases not provided for by the *jus civile*, these questions admit an easy solution. The Prætor, in setting up remedies for a new form of ownership, naturally adopted as his model the proceedings of the civil law in the like case. The interdicts *Uti Possidetis* and *Utrubi* were drawn on the lines of the sacramentum; in like manner, the interdicts *Unde vi* and *Quod vi aut clam* and many others, being in substance actions arising from *delictum*, followed the models of the *actiones ex delicto* according to the civil law. In *Uti Possidetis* there was at first no plaintiff and no defendant, because in the *sacramentum* there was no plaintiff and no defendant; in the *Quod vi aut clam* there was a recognised plaintiff and a recognised defendant from the beginning, because in the action on the *lex Aquilia* and for other delicts there was a recognised plaintiff and a recognised defendant from the beginning.[1] This imitation was part of the traditions of the office of Prætor. The Prætor occupied a singular position as a Reformer of the Law appointed by the Roman Constitution; but his most important and successful changes were those that in appearance departed least from the *jus civile*.

[1] This circumstance may perhaps give us a clue to the date when the Interdicts *Uti Possidetis* and *Utrubi* were first introduced. The Prætor would hardly have imitated the *sacramentum* if he had had any simpler procedure to copy. We cannot conceive that he should have done so after the *petitoria formula* or even the *sponsio* was in use. If a conjecture may be permitted, the date of the introduction of Possessory Interdicts would be prior to the introduction of the Formulary System,—that is, prior to the *lex Aebutia*. The date of this statute is uncertain, some putting it earlier than B.C. 247 (p. 62).

We must now inquire whether the hypothesis of the origin of possessory interdicts in the necessity of establishing a wider basis of ownership is consistent with the characteristic rules of the law of possession.

1. A person who had an *injusta possessio*, but was the true owner, could not plead his title as a defence to a suit for possession. He was obliged by the interdict to surrender the property to the *justus possessor*, who was not owner, and institute a vindication to reclaim the property. No good object can be served by putting a man into interim possession, when his fate is to be turned out by the next proceeding, and the only result of the Roman rule is delay, costs, and damage. Nevertheless, such is the tenacity of legal ideas, the rule obtains to the present day in those countries that have followed the Roman law with more fidelity than intelligence. This is indeed a striking example of a rule having a reasonable commencement, but speedily becoming unreasonable (*cessante causa non cessavit lex*), in that condition seems to be endowed with inextinguishable vitality. When the Prætor introduced the interdicts *Uti Possidetis* and *Utrubi*, a claim of ownership could not be a defence to the interdicts, for the simple reason that the interdicts were intended for cases where ownership was impossible. If a claim of ownership was or could be raised, then the preliminary question of possession was determined by the Prætor himself without any reference to a *judex* or the issue of any interdict. But, afterwards, when the interdicts were used, as they were in later times exclusively, in cases where the real issue between the parties was a question of ownership, the rule that a title could not be raised as a defence to an interdict, was still—such is the power of custom—rigorously enforced.

2. In the Roman law, as we have seen (p. 341), an occupier of a thing could not have possession unless he intended to hold as absolute owner. If he meant to hold only for his life, he was not a possessor, and therefore not entitled to the protection of interdicts. Such was, at the outset, the unquestionable doctrine of Roman law. If the reason for introducing Interdict Possession was to expand the law of ownership, naturally enough, protection was given to those persons only who occupied *animo domini*. Viewed in reference to the circumstances of its origin, the rule that no person should have the protection of Interdicts unless he held *animo domini*, was reasonable and necessary. It was enough for a beginning,

and later on, the Roman law extended the protection of Interdicts to *ususfructus* and to praedial servitudes. But the Roman law never went so far as to give the same protection to a depositee, a borrower (*commodatarius*), or a tenant of a farm. It is easy to understand why the Roman law went so far as it did, and also why it stopped short at the point where it did. The protection of possessory Interdicts was extended to the personal and praedial servitudes, because it was imperative to go so far; but although convenience pleaded strongly for a further extension to the case of depositees, borrowers, and tenants, yet such extension could not be said to be necessary. Here, as in other cases, the Prætor went as far as necessary and no farther.

The necessity of extending Interdicts to personal and praedial servitudes is easy to understand. We shall suppose that a person, declared a possessor of a portion of public land, by his will bequeaths the usufruct of the land to his wife, and, subject thereto, the ownership to his son. The man dies; the widow continues to occupy the land until she is forcibly expelled by an outsider. Can she avail herself of the interdict to recover possession? Clearly not, because she does not hold as owner, but only as tenant for life. The wrongful trespasser remains triumphantly in possession. Such a result would not long be tolerated.

Again, we shall suppose that Titius and Maevius occupy adjoining farms on public land. The farm of Titius is next to the public highway, and Maevius cannot get to the public road except in virtue of a right of way that Titius has granted to him over his farm. If, now, Titius blocks the way, and refuses to allow Maevius access to the public highway, what remedy has Maevius? Clearly he cannot sue for a legal right of way, for that was a *res mancipi*, and could not be created by Titius, who was not an owner, nor in favour of Maevius, who likewise was not an owner. Therefore, as the law stood at first, Maevius had no remedy. But it was impossible for the Prætor practically to sanction the ownership of land in the *ager publicus*, and at the same time to deny legal protection for the servitudes that were essential to the beneficial enjoyment of the property. The concession of ownership to *peregrini* and possessors of *ager publicus* inevitably drew after it in the course of time the concession of personal and praedial servitudes, which are mere fragments of ownership.

Thus it came to pass, in the case of servitudes as in the case of ownership, that there was a complete duplication of remedies, the interdicts being founded on mere use, while the correlative actions raised the question of right.

No similar urgency existed in the case of depositees, borrowers, or tenants. A complete law of property extending down to the smallest servitude, could be created without touching the case of tenants of farms. Consistency did not require any extension of interdicts to them, and, moreover, depositees, borrowers, or tenants, were provided with remedies, although not by interdicts, to the extent to which their interests might be affected by loss of occupation. To refuse possessory rights to tenants was a real defect in Roman law; but it was not a defect resulting in such clamant injury as to compel the Prætor to go out of his way to give them relief.

Many German writers, from too great a deference to the authority of the Roman law, and from a characteristic tendency to over-refinement in juridical speculation, have fallen into two errors. They have erroneously held that *animus domini* is essential to the true notion of possession in the Roman law, and partly in consequence of this mistake, they say that no possession can, on principle, deserve the protection of the State unless the possessor has an *animus domini*. But, in the first place, the Prætor, in requiring *animus domini* in a person seeking the aid of the possessory interdicts, was not thinking of adverse possession at all; and in the second place, although beginning with *animus domini*, the Roman law went far beyond that point. When, therefore, Bruns speaks of the modern statutes that give possessory remedies to tenants as a sacrifice of principle to convenience, he would have been nearer the truth if he had said that the denial of such rights was a sacrifice of the substantial interests of justice to juridical tradition not correctly understood. The English law, which treats the subject of possession free from the bias of a correct or an erroneous understanding of the Roman law, gives possessory remedies to lessees and simple bailees, which latter term includes the depositee of Roman law. In this respect, the English law is in harmony with the dictates of common sense, and there is no reason to believe that the Roman law would have taken a different view, but from the fact that its law of possession was originally a law of ownership. The

point is well put by Mr W. O. Holmes in a recent interesting work,[1] "If what the law does is to exclude others [than the possessor] from interfering with the object, it would seem that the intent which the law should require is an intent to exclude others. I believe that such an intent is all that the common law deems needful, and that on principle no more should be required." The true philosophical basis of possession is *detentio* together with the *animus tenendi* (not the *animus domini*).

3. In the law of possession, agency was admitted fully and explicitly. The chief obstacle to the admission of agency in *mancipatio* or in contract does not exist in the case of possession. It was the Formalism of the Roman law that made it so hard to obtain a recognition of agency. Where the rights acquired depended on the exact observance of certain solemn forms, it was difficult to give such rights to persons who did not themselves participate in the formalities. But possession was a fact; it depended upon no observance of a rigid legal etiquette. While, on the one hand, there was thus less resistance to the admission of agency in cases of possession, such admission was absolutely necessary if the benefit of possessory interdicts was not to be confined within exceedingly narrow limits. If a man could possess, in the legal sense, only objects with which he was in close physical proximity; if he lost possession of his farm when he let it to a tenant or left it in charge of his slaves, the utility of possessory interdicts would have been sadly impaired. If the Prætor's object was to give by means of possessory remedies the practical enjoyment of property, then it was indispensable that a man should be allowed to possess by his slaves or agents as well as in his own person.

Retention by an agent was essential to the usefulness of possession, but *acquisition* of possession in the first instance without the presence of the principal, was not indispensable, and it was long before the Roman law took that step. In the time of Gaius (G. 2, 95), the question whether a man could acquire, as well as retain, possession by an agent, was unsettled. Justinian seems to ascribe the change to a constitution of Severus (A.D. 226) (J. 2, 9, 5; C. 7, 32, 1); but that only confirmed what had already become law through the influence of the jurisconsults. (D. 41, 1, 20, 2.)

Another question that has offered rare temptations to finely-

[1] "The Common Law," p. 220.

spun controversy is, whether possession is a Fact or a Right? The question could not have arisen but for an ambiguity in the word *possessio*. By the term "possessor" is meant one of two things. Sometimes it means "a person entitled to certain rights," which, as we have seen, were at first practically the same as ownership. But by "possession" is often meant the investitive facts that create those rights, namely *detentio* together with the *animus domini*. In the first sense of the word, possession is a right; in the second, it is a fact. To appreciate the evil consequences of the double meaning of such a term, it is only necessary to think what confusion would arise if the same word signified both ownership and title. In speaking of ownership, we have two terms—*dominium*, signifying a collection of rights; and say, *traditio*, the name of an investitive fact.

Impressed with the inconvenience of such an ambiguity in so important a term, I suggested, in the first edition of this work, that while retaining possession, as the proper designation of the investitive fact, PRÆTORIAN or EQUITABLE OWNERSHIP might be employed to name the rights arising from that fact. Thus, as we have Quiritarian Ownership arising from *mancipatio*, and Bonitarian Ownership arising from *possessio ad usucapionem*, so we should have Prætorian or Equitable Ownership arising from *possessio*.

POSSESSION WITHOUT *ANIMUS DOMINI*.

We must now consider with exactness the exceptions recognised in the Roman law to the rule that no one can have the benefit of the Possessory Interdicts who does not hold *animo domini*. A hypothesis put forward to explain *possessio* has not done half its work when it has accounted for the rule; it must equally account for the exceptions. The exceptions in the Roman law fall into two classes. In the first class, possession, both name and thing, is frankly admitted in the absence of *animus domini;* in the second class, possession—the thing is admitted, but the name is strenuously denied. The first class includes, in addition to *pignus* and *precarium* already mentioned (p. 341) *emphyteusis*, *sequestratio*, and (but this is disputed) *superficies*. The second class includes Personal Servitudes and Affirmative Praedial Servitudes. In this case the authorities deny that there is possession, and say there is *quasi-possessio*.

I.—Cases where possession—name and thing—is admitted in the absence of *animus domini*.

In this group the only cases that require explanation are *pignus* and *precarium*. The *sequester*, *emphyteuta* and *superficiarius* belong to the later Roman law; they came into existence long after the theory and practice of possessory interdicts were settled, and they can throw no light upon the origin of possession. At the same time they are not without significance as showing the readiness of the Roman law to extend the application of possessory remedies.

Precarium, and probably, *pignus* stand on a different footing. *Precarium* is at least as old as the first introduction of possessory interdicts, and *pignus* boasts of considerable, if not equal, antiquity. Unexplained, therefore, *precarium* at all events would negative the proposition laid down, that, at first, in every case the Roman law refused to protect a possessor unless he held *animo domini*.

Precarium.—*Precarium* stands, among rights *in rem*, at the opposite end of the scale from *dominium*. Ownership is the largest interest that one can have in things; *precarium*, or tenancy-at-will, is the smallest. Yet, a person holding *precario* had the benefit of the possessory interdicts, and was called a possessor, although according to the rule of Roman law, no one could be a possessor, unless he held *animo domini*. The inconsistency is startling, but that is not all. A tenant for a term of years was, to the latest period of Roman law, held to be no possessor, for he had no *animus domini*, and therefore could not invoke the aid of the possessory interdicts. Viewed from the standpoint of reason, a more glaring inconsistency could not easily be imagined. But looking to the history of *precarium*, we shall find a simple explanation of this extraordinary anomaly.

Precarium, although in later times a rare and insignificant form of tenure, could never have filled the large place it does in connection with the possessory interdicts, if it had not in earlier days been of high importance. It reminds us at once of the copyhold tenure of English law, although the fate of *precarium* was curiously unlike the fate of the English villein tenure. A copyholder remains to the present day in theory, as he originally was in fact, a tenant at will. His emancipation dates from the reign of Edw. IV., when the judges decided that a copyholder could not be evicted, so long as he paid the

customary dues. By this decision, a tenancy-at-will was converted into a tenure in perpetuity. *Precarium*, in the early period of Roman history, appears to have been the tenure on which clients cultivated land belonging to, or in the possession of, their patrons. The client paid no rent, but in theory he held only during the good pleasure of his patron. The singular point, however, is, that the client, if he so willed, could hold the land in defiance of his patron. We are distinctly told by Paul (D. 43, 26, 14), that the interdict *de Precario*, the remedy ultimately given to the landlord or patron to evict his client, was introduced because no remedy was given to the landlord by the *jus civile*. Indeed, if the landlord had exacted security for the surrender of the land, he was not allowed the interdict *de precario*, and was left to enforce his security. (D. 43, 26, 15, 3.) Thus, prior to the remedy introduced by the Prætor, a client was in the position of a modern copyholder,—he could not be evicted. A client, therefore, holding against his patron was, in the strict sense of the word, a possessor; he held *animo domini;* and, although he was unconscientious in refusing to act upon the understanding upon which he was admitted, he was none the less a possessor. The phraseology of the interdicts bears conclusive testimony that at one time *precarium* readily passed into *possessio*. In all the interdicts, the three terms, *vi, clam, precario*, are associated together, as the three *vitia possessionis*. The possession of a client, in a controversy between him and his patron, was stamped as *vitiosa*. But the possession was none the less possession, because it was *vitiosa*, and, as we have seen (*adversus extraneos vitiosa possessio prodesse solet*), such a possession was good and effectual against all the world, except the patron. The privilege of invoking the possessory interdicts against all the world, except the landlord, remained after the interdict *de precario* was allowed; because it was enough to protect the landlord without depriving the tenant of the privilege he had before enjoyed. It is one of many instances supplied by the history of legal rules, where an incident originally attached to a juridical conception from reason or necessity, continues to subsist, although the reason for its existence has disappeared. The history of *testamentum* supplies a remarkable illustration of the same theme. At first wills were made in the *Comitia*, in the ordinary form of legislation, with the authority of the Roman people, and thereby manumissions of slaves, which could not be

effected without the authority of the State, could be accomplished. But after wills had ceased to be made in this public manner, and had become private, and even secret transactions, they still retained the old power of manumission. In the case of *precarium*, justice required that the Prætor should give a remedy to the landlord against a recalcitrant tenant at will, but justice did not require that the position of the tenant should be impaired, so far as third parties were concerned, and thus, to the latest period of Roman law, the tenant at will had the right to possessory interdicts, the only relic of his ancient security and grandeur.

PIGNUS.—The earliest form of mortgage known to the Roman law, was an absolute conveyance of the property to the creditor by *mancipatio* or *cessio in jure*, on condition that, when the debt was discharged, the creditor should reconvey the property to the debtor. The mortgagee became at once owner of the property, but in virtue of the solemn transaction of *mancipatio* was legally bound to restore the property, when the debt was paid. If, however, a borrower delivered property to a lender to secure a loan, but neglected to use the *mancipatio*, what was his remedy if the creditor refused to give back the property after the debt was discharged? He appears to have had no remedy, as no action would lie on a promise to restore the property, when that promise was not made in solemn form. The injustice of such a result led to the interference of the Prætor, who introduced the *actio pigneratitia* to enable a debtor to reclaim his property after he had repaid the loan. In granting this action the Prætor had no purpose except to give redress in a clamant case, where no redress was afforded by the *jus civile*, but the indirect, and probably unforeseen, consequence of his interference, was to make delivery without *mancipatio* as secure a form of mortgage, as delivery with *mancipatio*, and thus the mortgage called *pignus* rapidly superseded the ancient and less convenient form.

Before the *actio pigneratitia* was brought in, a person to whom property had been delivered without *mancipatio* could hold as owner in defiance of the just claims of the mortgager. He was thus a true possessor, or, it might be, even owner; and his possession was not affected with any *vitium*. He held with the express consent of the mortgager, and therefore *nec vi*, *nec clam*, *nec precario*. The *actio pigneratitia* was personal to the mortgager or his representatives, and it did not in any way diminish

the rights of the creditor against third parties, and consequently did not destroy his rights to the possessory interdicts. Thus in *pignus*, as in *precarium*, history enables us to understand why, although *animus domini* was wanting, possessory rights were sanctioned. They were sanctioned because at one time in their history, the *animus domini* did exist, and therefore possession; and when the *animus domini* ceased, no necessity was imposed upon the Prætor to take away the privileges it had bestowed.

Emphyteusis.—This tenure is distinguished from ownership only in respect of the payment of rent, and the consequences deducible therefrom. The *emphyteuta* had actions practically identical with the *vindicatio* for ownership; and he required the interdicts *Unde vi* and *Quod vi aut clam* to protect his rights. For this purpose, at all events, he was a possessor. (D. 2, 8, 15, 1.) But *Uti Possidetis*, as a means of settling the claim of rival possessors, could scarcely be relevant, as the emphyteusis originated in agreement. Where, however, the possession of an *emphyteuta* was constructively assailed, and the *Uti Possidetis* was used to secure the free exercise of the property (p. 253), it would be available.

Superficies is a similar tenure; but the *superficiarius* could not use the interdict *Uti Possidetis* for any purpose. The possessor of the *solum* could alone use it, for *superficies solo cedit.* But the *superficiarius* was protected by a special interdict, and, moreover, could employ *Unde vi* and *Quod vi aut clam.* (D. 43, 16, 1, 5.)

It would, therefore, seem that while the possessory interdicts, in so far as they raised as issue the *jus possessionis*, were not relevant to *emphyteusis* and *superficies*, yet in so far as they took the place of *actiones ex delicto* to give redress in respect of wrongs to immoveables, they were applicable.

Sequestratio.—When an action was brought for the recovery of property which, pending the suit, was deposited with a third party, and it was an object to prevent either party gaining by *usucapio*, while the proceedings were going on it was competent to the parties to agree that the stakeholder (*sequester*) should have not merely the custody, but the possession of the property. (D. 41, 2, 39; D. 16, 3, 17, 1.) Probably the *sequester* could use the possessory interdicts. As a mere depositee, he could not sue even a thief, if the object were a moveable, nor protect himself by the Interdict *Unde Vi*, if it were immoveable.

Necessity required, as the ownership was in dispute, that some protection should be given to the *sequester*, and the Prætor, instead of making a special interdict, as in the *missio in possessionem*, admitted him to the ordinary possessory interdicts.

II.—*Quasi-Possessio.*

Cases where possession without *animus domini* was denied in name but admitted in fact.

In these cases two questions arise: — (1) Upon what principle were possessory rights conferred in the absence of *animus domini?* and (2) why did the jurists, admitting possessory rights, refuse to admit possession? This group includes examples from personal and praedial servitudes.

Personal Servitudes: *Ususfructus.*

The only personal servitude that appears to be mentioned in connection with possession is *ususfructus*, although there is no reason to suppose that possessory remedies were not applicable in the case of the other personal servitudes. The usufructuary could resort to the Interdict *Unde vi* (D. 43, 16, 3, 15), the Interdict *Quod vi aut clam* (D. 43, 24, 12; D. 43, 24, 13, pr.), and the Interdict *Uti Possidetis*. (D. 43, 17, 4.) From this it ought to have followed that a usufructuary was a possessor. A possessor is one entitled to use the possessory Interdicts, and one entitled to use the possessory Interdicts is a possessor. No other use of technical terms can be justified. To say that of two men equally entitled to the Possessory Interdicts, one is a possessor and the other is not, is to employ technical language to produce confusion instead of assisting clearness. Yet this was exactly what the jurists did in the case of *ususfructus*. It is true that the usufructuary has not the *animus domini;* but that element is equally wanting in *pignus* and *precarium;* yet in those cases, as we have seen, the jurists made no scruple to admit the name of *possessio* as well as the fact. Why should it be different in the case of *ususfructus?* That it was different is abundantly clear.[1]

[1] The language of the jurists is, however, by no means uniform; and, in fact, is consistent only in denying *possessio* to a usufructuary. (D. 43, 26, 6, 2; D. 2, 8, 15, 1.) Venuleius adds, the *possessio* of land held in usufruct remains with the owner (*dominus proprietatis nudae.*) (D. 41, 2, 52, pr.) Gaius says the usufructuary has not possession, but only a right of enjoyment (*jus utendi fruendi.*) (D. 41, 1, 10, 5.) Again, Ulpian says that a usufructuary has natural possession (D. 41, 2, 12, pr.), or occupation (*detentio*) merely. (D. 43, 3, 1, 8.)

What, then, is the meaning of this strange inconsistency—the granting to a usufructuary all the rights that constituted possession in a legal sense, combined with a stern refusal of the name? The secret is, that there was a time, perhaps not a short time, when the Roman law rigorously held that possession could not exist except when the *animus domini* was present. This, as has been explained, is consistent with the cases of *pignus* and *precarium*, where at first, if the view suggested in this chapter is right, the jurists recognised the presence of an *animus domini*. The starting point of the Roman law is then universally, no *animus domini*, no possession. Consequently a usufructuary, having no *animus domini*, could not claim possession, neither name nor thing. He could not be a possessor, and he could not use the possessory Interdicts. If we had no information except from Justinian's Digest, this inconsistency would be a hopeless puzzle.

In the Digest the usufructuary is spoken of as entitled to the same interdicts as the possessor. But we learn from a passage preserved in the Vatican Fragments, that there were really two interdicts, one of which applied to possession, the other to *ususfructus*. Venuleius tells us (Vat. Frag., 91) that the Interdict *Unde vi* could not, in its original form, be used by a usufructuary, because he was not a possessor. But the Interdict was modified for his benefit: "If he is alleged to be hindered by force from enjoying the usufruct."—"*Si uti frui vi prohibitus esse dicetur.*" By this means possessory rights were extended to *fructuarii*. We can now understand why the jurists were compelled, by the necessities of their technical language, to deny that the usufructuary was a possessor. The very terms of the Interdict by which he got possessory rights implied that he was not a possessor; for, if he were a possessor, no change in the Interdict would have been required. It was not possession; it was an extension of possessory remedies to a case where there was no possession.[1] The interest of the

[1] A legatee, who, without the consent of the heir, took possession of the object bequeathed, was compelled, at the instance of the heir, to give up possession by the Interdict *Quod Legatorum*. This interdict could be brought against a possessor only, and inasmuch as a usufructuary was not a possessor, a new interdict was required when a usufructuary had entered upon property left to him in usufruct. "Inde ut interdictum Uti Possidetis *utile* hoc nomine proponitur et Unde Vi, *quia non possidet*, etiam *utile* datur quod taliter concipiendum est: *quod de his bonis legati nomine possides, quodque uteris frueris, quodque dolo malo fecisti, quominus possideres, utereris fruereris.*" Venuleius, Vat. Frag., 90. For the meaning of *utile*, see p. 244.

usufructuary was therefore in accordance with usage properly called *quasi possessio.* (D. 4, 6, 23, 2; Vat. Frag., 93.) *Quasi possessio* has a purely adventitious and historical meaning. It means that the Roman law deliberately advanced from the position that a possessor must have *animus domini;* and this advance was marked by a new term (*quasi possessio*). But, after all, the use of *quasi possessio* savoured of legal pedantry; for, where there is no difference in substance, why should there be in name? Accordingly we find that in popular language such nicety was not observed, and even in speeches in Court, great lawyers like Cicero do not scruple to speak of the *possessio* of the usufructuary. (Pro Caecina, c. 32, p.m. 308.)

One consequence of this strictness in language is, however, of too much practical importance to be omitted. Before possessory remedies were extended to a usufructuary, he was regarded in law as an agent holding on behalf of the owner —the *dominus proprietatis nudae.* The owner, therefore, was a possessor, and entitled to the possessory interdicts against any one who might disturb the usufructuary in his possession. In accordance with the conservative instincts of the Roman jurists, it was not deemed necessary to deprive the owner of the advantages he had before enjoyed; he continued to be called possessor, although the usufructuary also had possessory remedies in respect of the same subject-matter. (D. 41, 2, 52, pr.) Thus it happened that two persons in different rights enjoyed possessory remedies in respect of the same object; and the rule *duos eandem possidere non posse* was evaded, by saying that one had possessio and the other not possessio, but quasi possessio. The technical solecism thus served a useful purpose, and this utility may have contributed to the obstinacy with which the jurists adhered to the difference of phraseology.

Praedial Servitudes.—Servitudes are either affirmative or negative (see *postea*). Negative or urban servitudes (*jura urbanorum praediorum*) cannot well be the subjects of anything analogous to possession. Suppose A claims a *jus altius non tollendi* against B. So long as B merely refrains from raising his building, even should it be from fear of A, it can hardly be said that A is in possession of, or exercises, a *jus altius non tollendi.* If B does build higher, A has an action, and that action must necessarily be based on an alleged right to stop the building.

But in the case of affirmative servitudes, there may exist a state of things analogous to possession; namely, the enjoyment of a right, without title. I walk openly over a track in B's field claiming a right of way. If I have no real right of way, but nevertheless B does not forcibly prevent me, I may be said to have the enjoyment without title of a right of way; and this bears an analogy to adverse possession. But the analogy is not very close, and there is no reason, looking at the subject of mere possession, why we should have a duplication of remedies as in the case of property, one set being founded on actual exercise of a right, with or without title, and the other based on title.

It is true that a claim of right exercised for a certain length of time may, by prescription, become a good title. But this is very different from the Roman law. Thus, in the case of a right of way, a possessor of land could, by using a right of way for thirty days in an open manner, without hindrance, establish a claim to the interdict *de itinere actuque privato*. To obtain the assistance of this interdict, all that he requires to prove is that, during thirty days in one year, he in point of fact used the road. For the purpose of prescription, thirty days was ridiculously short, and such use did not establish plaintiff's right but only secured him the use of the right, until the owner, of the servient land, by an *actio negatoria* proved that, notwithstanding such use, his neighbour had no right of way. Long enjoyment ought properly to count as evidence of a true servitude; and this would seem the only way in which possession could be material in a dispute as to a servitude.

The Roman law goes far beyond any legitimate recognition of the actual use of a servitude, and provides possessory interdicts alongside the *actio confessoria* and *actio publiciana in rem*. It introduces in questions of servitude the same duplication of remedies that has been noticed in questions of property. Thus, if an owner is not in possession, but ejects the possessor, he was worsted on the Possessory Interdict, and could not plead his title by way of defence. He had to go out and bring his *vindicatio*, when, on proving his title, he could oust the possessor and recover the land. Similarly, in a question of right of way, if an owner of land had permitted another to use a way under a claim of right for thirty days, he was bound to allow him to continue to use it until, by means of an *actio negatoria*, he had established that the use was without title.

In the first edition of this work, it was suggested that the

function of possessory interdicts was to give a remedy against third parties, who had no rights in the servient land, but obstructed the owner of the dominant land in the enjoyment of the servitude. That these interdicts would be used in such a case we can easily believe; but they could not have been introduced for that purpose; for the *actio confessoria* could be employed against third parties. The only explanation of the existence of such interdicts, which, on their merits, appear to be useless, or at least unnecessary, seems to be that they were introduced for the purpose of completing the legal edifice built by the Prætor for *peregrini* or possessors of *ager publicus*. If possession was brought in to establish ownership in cases not allowed by the *jus civile*, it became necessary to give analogous possessory remedies in servitudes. A *peregrinus* or possessor of *ager publicus*, could not have proved a *jus eundi, aquam ducendi*, or *altius tollendi*; for a *jus* could not be created except by investitive facts inapplicable to these cases. If a remedy was to be given, it must proceed upon not *jus*, but *factum*, not right, but actual user.[1] In this way, the interdicts brought in for praedial servitudes receive an explanation and justification of which they stand much in need.

Savigny on Possession.

The celebrated treatise of Savigny on Possession has justly been considered a landmark. The lucidity of style, the clearness of arrangement, the ingenuity displayed in the elucidation of texts, the skill shown in reconciling passages apparently but not really antagonistic, the reduction of a mass of complicated detail under simple general rules,—all these merits continue to give the treatise a lasting place in the literature of Jurisprudence. But it is singular that while he had in his hand the real clue to all the intricacies and inconsistencies of the Roman law, he did not follow it up. In conjunction with Niebuhr, he

[1] This view derives support from D. 8, 5, 1, 3. Ulpian states that a usufructuary could use the interdict *de itinere* to secure a right of way attached to the land held in usufruct; but that, not being owner, he could not claim a right (*jus*), and, therefore, could not bring an *actio confessoria*. "Alibi enim de *jure*, id est, in confessoria actione; alibi de *facto*, ut in hoc interdicto, quaeritur." As, however, this remedy would not in all cases be sufficient, for the usufructuary might be obstructed before he had had an opportunity of using the way for the prescribed number of days, a *utile interdictum de itinere* was allowed, in which the usufructuary succeeded, if he could show that the person from whom he derived the usufruct had actually used the way for the prescribed period.

established a theory of the origin of *possessiones* in the circumstances of the Public Land that, properly used, would have enabled him to solve the problems of possession. In order to complete the statement of the law of possession, it will be convenient to consider the points on which, as it seems to the present writer, Savigny has fallen into error.

1. "By the possession of a thing," says Savigny, "we always conceive the condition, in which not only one's dealing with the thing is physically possible, *but every other person's dealing with it is capable of being excluded.*" The *power* of excluding others is not a part of the notion of possession. For if "physical" power is meant, then a weak man could not be a possessor, for he could not exclude a stronger man. If "legal" power is meant, then it is begging the question, for the point to determine is, — what is the physical relation that will enable a possessor to invoke the aid of the legal power? To constitute possession, it is enough if one has the power of freely dealing with an object, and the intention to exclude others from dealing with it. Savigny's definition cannot easily be applied to a case like that mentioned above (p. 351), where a man hides treasure in another's land. The possessor of the treasure has the power of freely dealing with it, because the Prætor will compel the owner of the land to admit him to dig for the treasure, on condition of his paying for any damage done to the land: but he has no power of excluding the owner; for the owner has the right to dig in his own land, and, if he does so, may make himself possessor of the treasure.

2. Savigny holds that possession is by itself a mere fact, and not a right entitled to legal support. "As mere possession is not a legal relation, disturbance of it is not a breach of the law, and it only becomes so, when some other right is violated at the same time. But if a disturbance of possession is effected by force, a breach of the law *is* committed, because all violence is illegal, and this is an injury against which redress may be obtained by an interdict." "An independent right is not, in this case, violated with the person, but some change is effected in the condition of the person to his prejudice; and if the injury, which consists in the violence to the person, is to be wholly effaced in all its consequences, this can only be effected by the restoration or protection of the *status quo*, to which the violence extended itself. This is the true ground of possessory suits." This hypothesis is open to several objections.

(1.) It assumes, contrary to Savigny's own opinion, that possessory suits were introduced for the sake of mere possessors. Savigny himself endorses Niebuhr's hypothesis, that possessory suits were brought in for the protection of squatters on the State domain. Whether the Prætor would have been affected by Savigny's scruple that mere possession gives no moral claim to legal protection, if he had created Interdicts for the sake of possessors, is far from certain; but, as a matter of fact, there was no room for such scruples, because the object of the Prætor's intervention was to give the same protection to the squatters, that the *jus civile* gave to the owners of private land.

(2.) Without saying that Savigny's suggestion is far-fetched and fanciful, one may at least point out, that it covers only one of the three *vitia possessionis*. If a person secretly (*clam*) entered on property left vacant, the possessor could oust him by the interdicts in the same way as if possession had been obtained by violence. In this case, the only right that is violated, is the right of possession, for no injury whatever is done to the person of the possessor. Again, in the case of *precarium*, the landlord could evict a tenant, after giving him notice to quit, by force but not by arms. (G. 4, 154-155.) Justinian explains that by arms is meant not only swords and shields, but clubs and stones. (J. 4, 15, 6.) In this case, although violence was done to the tenant, he had no action; but if weapons of any sort were used, he could recover possession. If Savigny's view be right, we should be obliged to hold that violence was not illegal, unless it was aggravated by the use of weapons. Thus, even if we were to suppose, contrary to Savigny's own opinion, that Interdicts were introduced for mere adverse possession, his hypothesis would not be admissible as an explanation of the Roman law. There is no reason to suppose that the Prætors were affected by the philosophical ideas that give so much trouble to modern jurists, or that they would have had the smallest scruple in recognising in mere possession a sufficient reason for affording legal protection. The jurisconsults at all events had no such difficulty. Every possessor, they held, was entitled to protection against disturbers who had no better title. Paul, speaking of the Interdict *Uti Possidetis*, states the Roman view in clear language.[1]

[1] *Justa enim an injusta adversus caeteros possessio sit, in hoc Interdicto nihil refert; qualiscumque enim possessor hoc ipso, quod possessor est, plus juris habet, quam ille qui non possidet.* (D. 43, 17, 2.)

(3.) Savigny's hypothesis fails moreover in the single item with reference to which it appears to have any relevance. If by *vi* was meant a personal assault, he would at least have some basis of fact to begin with; but it did not necessarily imply the slightest assault. A person who refused to admit the possessor had done all that was necessary to enable the possessor to bring the Interdict *Unde vi* (p. 252). (D. 43, 16, 12.)

3. Savigny affirms "of all interdicts universally," that they found themselves on *obligationes ex maleficiis*. The suggestion is that this lends support to the hypothesis just examined; *that*, however, it certainly does not do: for there are *delicta* in respect of things, as well as *delicta* in respect of persons. A *delictum* is simply a violation of an unquestioned right, whether that be a right of person or of property. Even, therefore, if we were to admit that all interdicts were, in substance, actions *ex delicto*, we should be a long way from proving that they were all remedies for wrong done to the *person*.

Actions relating to rights in respect of things, fall under one of two categories, for either the alleged right is denied, or it i admitted, and only the violation of it is denied. Thus an *actio furti* presupposes that the defendant does not claim to be owner, and the question is simply whether the defendant has violated the right of the plaintiff by fraudulently depriving him of possession. The analogy between such an action and the interdict *Unde vi* or *Quod vi aut clam* is manifest. But in the interdicts *Uti Possidetis* and *Utrubi* the question is, which of two persons claiming a right to protection in respect of possession ought to be protected? Either A is in possession and B does something to challenge A's right, in which case A brings the interdict to establish his possession as against B; or B claims the possession as against A. The question is, therefore, not of the violation of an admitted right, but of the existence of the right itself. (See p. 373.)

4. *Derivative Possession.*—Savigny was right in seizing the cardinal feature of the Roman doctrine, that a possessor must have *animus domini;* but he breaks down in his attempt to give a reasonable account of the numerous and important exceptions to the rule. Dealing, in the first instance, with those exceptions where the jurists frankly admit possession—both name and thing—Savigny says they are instances of Derivative Possession. "Thus, for instance, the creditor has the juridical possession of a pledge, although he has no intention of exercising owner-

ship over it, because the debtor who had full possession of the article, transferred to him the *jus possessionis* at the same time as the detention." This amounts to saying that, where mere occupation was transferred, and the possessor wished that the occupier should have the use of the possessory interdicts, in certain cases this wish was complied with. This suggestion of Derivative possession is not to be found in the writings of the jurisconsults. So far from being an explanation, it is a mere statement of the difficulty. There is no difficulty where the possession is transferred, because the new possessor holds *animo domini*. Nor is there any difficulty where the occupation only is transferred to an agent, for in that case, the possessor retains his right to the interdicts. The real difficulty is to explain, consistently with the general rule, how a person, like a creditor in the case of a pledge, who has no *animus domini*, should have possession and possessory remedies, and why the mortgagor, who has still the *animus domini*, has no right to the possessory interdicts. The word "derivative" explains nothing. Moreover, it is not the *jus possessionis*, as in one place Savigny alleges, but the *possessio* itself, that is transferred.

5. *Quasi-Possessio.*—In this case, the jurists have provided Savigny with an explanation, which, although only a verbal explanation, has been without hesitation adopted by him. Speaking of *ususfructus*, Savigny says.—"As true possession consists in the exercise of property, so this *quasi* possession consists in the exercise of a *jus in re;* and, as in true possession, we possess the subject itself (*possessio corporis*), but not the property, we ought not properly to use the term possession of a servitude (*possessio juris*)."

This explanation is connected with the unscientific division of things into *corporales* and *incorporales*. (See p. 287.) We are told by Paul that only corporeal things can be possessed, while an incorporeal right could not be possessed. (D. 41, 2, 3, pr.) *Possessio corporis* is contrasted with *possessio juris*.

The opinion thus set forth by Paul was unquestionably accepted by the Roman jurists; but it proceeds upon an imperfect apprehension of the distinction between ownership and other rights *in rem* to things. Ownership is simply the largest aggregate of rights *in rem* to things, and is as truly incorporeal as a single right *in rem;* as, for example, a private right of way. Servitude and ownership are equally incorporeal in so far as they are rights; they are equally corporeal in the sense

that as rights they exist only with reference to some definite corporeal thing. To say that an estate in land for life is an incorporeal thing, but an estate for ever is corporeal, is an absurdity.

When, therefore, Paul says that corporeal things can be possessed, but not an incorporeal right, he commits himself to a false distinction based upon a blunder. For it is manifest that an incorporeal right (to repeat the tautological language of Paul) may be the object of possession, in precisely the same way as corporeal things may be the object of possession. Possession arises from a disturbance of the normal union in the same person of a right and the appropriate investitive fact. Now, such a separation may exist in respect of any group of rights *in rem* as well as of ownership. A right of way, for example, was created by one of several facts; when, therefore, a person used a way as a right without having obtained it by one of these facts, he stood in precisely the same relation to the right of way as one that occupies land does to the land if it does not belong to him. A possessor is simply one that exercises a right without being invested with it in any manner appointed by law; and this is just as true of a single right *in rem* as of ownership.

Savigny repeats the fallacy in the statement that in true possession we possess the subject itself. There is absolutely no difference whatever in the nature of the physical dealing with an object, whether we act as owners or as using a servitude. The only way in which I can possess land is by standing, walking, cultivating, or otherwise dealing with it. So in a servitude of a right of way, I can only use it by walking over the land. Paul, and after him Savigny, are wrong in suggesting that there is any distinction physically between the possession of (so-called) corporeal things and the possession of (so-called) incorporeal things. There is a difference, but not in regard to the physical basis (*corpus*) of possession; the difference lies in the *animus*. It was not the impossibility of true physical possession that prevented a *fructuarius* suing by the same interdicts as a possessor: it was the absence of *animus domini*. Between the physical possession of a tenant for life and of an owner there is not the shadow of a difference.

either to persons, as usufruct, or to things, as urban and rural servitudes (*servitutes personarum*, *servitutes rerum* or *praediorum*). But for the solecism of attributing servitudes to things (for every servitude must belong to a person), the language might be thus defended. A personal servitude is given to an individual for his enjoyment, and dies with him; a praedial servitude is given to an owner for the better enjoyment of his land, and follows the land. But this distinction does not altogether agree with the difference between indefinite and definite servitudes. It is true that all the indefinite servitudes are personal, but so are some of the definite servitudes. Thus the right of taking water from an artificial reservoir, which is a definite servitude, might either be attached to land or be given to a person unconnected with the adjoining land, in which case it did not go to his heirs. (D. 43, 20, 1, 43.) But we read that a right to pluck apples on another man's ground, or to walk about his ground, or to sup in his house, cannot be granted as a personal servitude. (D. 8, 1, 8.) There is indeed no reason why definite servitudes should not be given to individuals not owners of adjoining lands, although in the Roman law this was very rarely allowed. On the other hand, no indefinite servitude was attached to the ownership of land, and from the nature of the case could hardly be, so that a proper classification of servitudes need not embrace more than three classes.

A. Indefinite Servitudes; *usufructus*, *usus*, *habitatio*, *operae servorum*, [*precarium*].

B. Definite Servitudes.

(A.) Attached to the ownership of adjoining land:—urban and rural servitudes. Rights of way, of water, etc.

(B.) Not so attached. Right to draw water from a reservoir (*ex castello*).

USUSFRUCTUS.

Definition.

A usufruct is the right of using and taking the fruits of anything that is not consumed by use for the lifetime of the person receiving, unless another time is fixed.

Usufruct is the right to use and enjoy what belongs to another; but its substance must remain unimpaired. (J. 2, 4, pr.)

Its exact character, as related, on the one side, to ownership (*dominium*), and on the other to servitude, is the subject of

conflicting statements. Paul says (D. 50, 16, 25, pr.) that an owner is none the less so because another person has got a usufruct in his property, for a usufruct is not a portion of ownership, but is of the nature of a servitude. But the same writer, in another passage (D. 7, 1, 4), observes that for many purposes the usufruct is a part of the *dominium*. Elsewhere usufruct is regarded as a personal servitude; but in the Institutes it is taken separately, and mentioned in a manner that suggests contrast with servitude. (*Haec de servitutibus et usufructu et usu et habitatione dixisse sufficiat.*) (J. 2, 5, 6.)

A person having the ownership of property in which another has a usufruct, is called simply *dominus*, or *dominus proprietatis nudae;* and that other is called *Fructuarius* or *Usufructuarius*. The property is called *res fructuaria*.

Quasi-Usufruct.—The above definition requires modification. It applies to those things only that are not consumed in the use (*salva rerum substantia*); but a modification was allowed, and a sort of usufruct (which after the usual terminology of the Roman law was called *quasi*-usufruct) in things consumed by use was authorised.

A usufruct may be established not only in a field or a house, but also in slaves and beasts, and in fact in everything except what is consumed by the very fact of use; for in this case neither natural reason nor that of the civil law admits a usufruct. In this latter class must be reckoned wine, oil, wheat, and garments; and closely akin to these is coined money, for by the very act of use in continual exchange it in a way disappears. But for convenience sake the Senate resolved that a usufruct even of these things may be established, if only suitable security on that score be given to the heir. If, therefore, a usufruct in money is left as a legacy, the money is paid over to the legatee and becomes his; but he gives security to the heir to restore a like amount in the event of his dying, or undergoing *capitis minutio*. Other property, too, is delivered to the legatee, and becomes his, but only after it is duly valued, and security given that in the event of his dying or undergoing *capitis minutio* a sum of money shall be restored equivalent to the value placed on the property. The Senate, therefore, did not create a usufruct of those things; nor indeed could it; but by exacting security it established a quasi-usufruct. (J. 2, 4, 2.)

The date of this Senatus Consultum is unknown. It is posterior to the time of Cicero (Top. 3, 15), and it existed in the time of Sabinus, who lived in the reign of Tiberius. (D. 7, 5, 5, 1.)

In a quasi-usufruct, the usufructuary was a true *dominus* or owner, subject to the duty of restoring the value of the property at a future time. There was thus no true usufruct, but rather an ownership analogous to the *dos* in the case of *res aestimatae*.

Even debts could, according to Proculus and Cassius, against the opinion of Nerva, be the object of such a quasi-usufruct. When a creditor gave a debtor the usufruct of

his debt, it was tantamount to a remission of interest during the life of the debtor. (D. 7, 5, 3.)

A usufruct of money was terminated only in one of two ways,—by the death or *capitis deminutio* of the quasi-usufructuary. (D. 7, 9, 7, 1 ; D. 7, 5, 9 ; D. 7, 5, 10, pr.)

A quasi-usufruct of a servitude, such as a right of way, could not be created according to the strict principles of the civil law, because there could not be a servitude of a servitude (*quia servitus servitutis esse non potest*) ; but an action was allowed nevertheless (*actio incerti*) ; or the same end might be accomplished in another way, by granting the servitude conditionally, so that if the donee died, or suffered a *capitis deminutio*, the servitude should be surrendered. (D. 33, 2, 1.)

In the text, dress (*vestimenta*) is spoken of as a proper object of a quasi-usufruct ; but Ulpian says that if dress is consumed by ordinary tear and wear, nothing has to be returned by the usufructuary (D. 7, 9, 9, 3) ; and in another passage (D. 7, 1, 15, 4) he treats dress as the object of a proper usufruct, subject only to the condition that if ordinary wearing apparel it must be worn by the usufructuary, and not let for hire. If dress were regarded as the object of a quasi-usufruct, its value would have to be returned ; if as a proper object of a usufruct, nothing would be returned if the dress were fairly worn out. Which view ought to be taken in a particular case would depend wholly upon the intention of the donor.

The *cautio* or security required was the usual one—sureties (*fidejussores*). (D. 7, 5, 8.)

Rights and Duties.

A. Rights of the Usufructuary (*Fructuarius*).

I. Use and Enjoyment.—Generally, the usufructuary has a right to everything fairly included in the words use and produce (*usus*, *fructus*), unless there is some limitation in the instrument under which he claims.

He to whom the usufruct in a farm belongs, becomes owner of the fruits only if he actually gathers them. Although, therefore, the fruits are ripe when he dies, if they are not yet gathered they do not belong to his heir, but are acquired by the owner. Much the same may be said of the tenant-farmer (*colonus*). (J. 2, 1, 36.)

A difference existed on this point between the usufructuary and the *bona fide* possessor. The latter acquired all the fruits that were separated (*separatio*), whether by the hand of man or not ; the usufructuary only those that he, or any one for him, gathered (*perceptio*). (D. 7, 4, 13.)

Hence fallen fruit (*glans caduca*) did not belong to the usufructuary unless gathered. (D. 50, 16, 30, 4.) So if the fruit was stolen, although the usufructuary had an action against the thief (*actio furti*), he was not owner, and the *condictio furtiva* could be brought only by the *dominus*. (D. 7, 1, 12, 5.) Fruit gathered by the usufructuary before it was ripe was nevertheless his property. (D. 33, 2, 42 ; D. 7, 1, 48, 1.)

Apportionment.—A *fructuaria* died in December, the crop having been previously taken off the ground by her tenant (*colonus*) in October. The rent was not due till March. Which was entitled to the rent up to March—the heir of the *fructuaria* or the owner of the farm? The heir of the *fructuaria*. (D. 7, 1, 58, pr.)

Fructus, being a term of wide generality, conveys an imperfect idea unless it is completed by particulars. Generally, we may say, the usufructuary could take the *usus* and *fructus*, and he could not do more. We must now specify, with reference to different objects, what the powers of the usufructuary were.

1. Lands, whether cultivated or not.

1°. Farm Stock.—Ulpian says that unless a contrary intention appeared, the instruments attached to a house or farm were included in the usufruct; as, *e.g.*, the vessels used in the preparation or storing of wine (*dolium*, *capa*, *cadus*, *amphora*, *seria*). (D. 7, 1, 15, 6.) The same jurist states that the usufructuary could only use, not sell, those things. (D. 7, 1, 9, 7.)

2°. *Alluvio.*—Paul says that *alluvio* belonged to the *dominus*, and not to the usufructuary (Paul, Sent. 3, 6, 22); but Ulpian says it goes to the usufructuary; but other accessions, as an island rising in a river, do not. (D. 7, 1, 9, 4.)

3°. Wood and Timber.—The usufructuary cannot cut fruit-trees (D. 7, 1, 13, 4), nor large trees (D. 7, 1, 11); but he may take branches as stakes for his vines, if it can be done without injury to the land. (D. 7, 1, 10.) If the trees are dead or overthrown by the wind, Labeo says the usufructuary can take them for the repair of his house,—not for firewood, unless he cannot get firewood elsewhere. (D. 7, 1, 12, 1; Vat. Frag. 70.) Greater freedom was given him in dealing with *silva caedua*. *Silva caedua* is that which grows, and is cut down periodically; or, according to Servius, what springs from roots or stumps when cut down; he added that such belonged to the usufructuary. (D. 50, 16, 30, pr.) Certainly this was so, if the revenue of the land was derived from osiers (*arundo palus*). (D. 7, 1, 59, 2.) Probably the usufructuary was always entitled to such crops, if he kept up the stock. (D. 7, 1, 9, 7; Vat. Frag. 70.)

4°. Minerals.—The usufructuary can burn lime or dig for gravel for his house. (D. 7, 1, 12, pr.) He can also work in a husband-like manner, quarries, or clay or sand-pits (*lapidicinae*, *cretifodinae*, *arenae*). (D. 7, 1, 9, 2.) Also he can open or use

when opened, mines of gold, silver, copper, iron, etc., even to the prejudice of the agriculture, if such is a better use of the property. (D. 7, 1, 13, 5; D. 7, 1, 9, 3.)

6°. Bees on the land belong to the usufructuary; and he has the right of fishing, fowling, and hunting. (D. 7, 1, 9, 1; D. 7, 1, 9, 5.)

2. Houses.

The usufructuary has complete use of the buildings, subject to the limitations hereafter stated. If they were let when the usufruct began, he is not entitled to the rent (*pensio*); but neither is he bound by the contract with the tenant. If he is obliged to recognise the tenant by the deed of gift, he is then entitled to the rent. (D. 7, 1, 59, 1.) The same rule applies to a farm when let.

The usufructuary must not alter the character of the building. He cannot add a wing (D. 7, 1, 13, 7), nor divide a room into new chambers, nor throw several rooms into one (D. 7, 1, 13, 7), nor convert a private dwelling-house into a shop, or stables, or into a public bath (D. 7, 1, 13, 8), even although that were the most profitable use to put it to. (D. 7, 1, 14.) If, however, the owner used the house for business, so might the usufructuary. (D. 7, 1, 27, 1.) The usufructuary cannot even finish an unfinished house (D. 7, 1, 61, 1), nor put a roof on bare walls. (D. 7, 1, 44.) He may open, but cannot close, windows. (D. 7, 1, 13, 7.) He cannot put up a new building unless it is required for his crops or for guarding the land (D. 7, 1, 13, 6; D. 7, 1, 73); and he cannot pull down any buildings (D. 7, 1, 13, 4), not even those he has himself built. (D. 7, 1, 15, pr.)

3. Slaves.

The responsibility of the master for the delicts of his slave remains unimpaired notwithstanding the usufruct, and the usufructuary may even call upon him to transfer the ownership, or pay damage for any delict done by the slave to him or his. (D. 7, 4, 27.)

The offspring of a female slave is not reckoned among fruits, and so belongs to the owner. For it seemed absurd to reckon a man among fruits, seeing that all the fruits in the world are furnished by nature for man's sake. (J. 2, 1, 37.)

Ulpian tells us that it was an old question, whether the children of slaves formed an exception to the rule that the young of animals were *fructus*, and says that the opinion of Brutus in favour of the exception ultimately prevailed. (D. 7, 1, 68, pr.) Brutus lived before Cicero.

The usufructuary, having a right to the labour of the slave, could inflict moderate chastisement to compel him to work; but he could not put him to the torture, or lash him, or otherwise impair his value as a wealth-making machine. (D. 7, 1, 66; Paul, Sent. 3, 6, 23; Vat. Frag. 72.) He must also use the slave for the work for which he had been trained, and could not, *e.g.*, turn a musician into a major-domo, or an actor into a bath keeper. (D. 7, 1, 15, 1.)

As regards slaves in whom we have a usufruct only, it is the received opinion that all they acquire by means of what is ours or by their own labour is acquired for us; but that all they acquire on other grounds belongs to their owner. If, therefore, such a slave is appointed heir, or has a legacy left or a gift made to him, it is not I but the owner that acquires the profit. (G. 2, 91.)

The question is asked whether we can possess anything or acquire it by use through a slave in whom we have a usufruct, seeing that we are not in possession of him. For, of course, if we possess a man in good faith, we can, without doubt, both possess and acquire by use through him. In regard to both characters, however, we speak in accordance with the distinction that we have just set forth, that only gains made by means of what is ours, or by their own labour, are acquired for us. (G. 2, 94.)

The statement of Labeo (Vat. Frag. 71) substantially corresponds with § 91 from Gaius; but Labeo makes the distinction turn on the intention of the donor; if the donor intended to give to the usufructuary, then he obtained the gift; if to the owner, then the owner gets it; and this distinction is supported by the Digest. (D. 7, 1, 22.)

4. Animals.

Among the fruits of animals are reckoned their young, as well as their milk, hair, and wool. And so lambs, kids, calves and foals become at once, by the *jus naturale*, the property of him that has the usufruct. (J. 2, 1, 37.)

The rights of the usufructuary varied according as he received the animals singly, or in a flock or herd. If he received them as individuals and any of them died, he was not bound to replace them (D. 7, 1, 70, 3); although in that case he was not entitled to their flesh. (D. 7, 4, 30.) But if a flock or herd was given, he was bound to replace them. (Paul, Sent. 3, 6, 20; D. 7, 1, 68, 2.)

But if a man has the usufruct in a flock, he ought out of the young to supply the place of those that die, as Julian held; and also to plant other vines and trees in place of those that die. For he ought to cultivate properly, even as a good *paterfamilias* would. (J. 2, 1, 38.)

He was not, however, bound to plant new trees for those overthrown by wind without his fault. (D. 7, 1, 59, pr.)

II. Alienation by Usufructuary.—Strictly, the usufructuary could not alienate his interest; he could not make another person usufructuary; and probably at first a usufruct was absolutely inalienable. But in later times the usufructuary was entitled

to give to another, in whole or in part, his right of enjoyment, provided that person enjoyed it in the name and on account of the usufructuary. (D. 7, 1, 38.) Diocletian and Maximian (A.D. 292) state it as a proposition clear in law, that the usufructuary could let or sell his usufruct (D. 7, 1, 12, 2 ; Vat. Frag. 41) ; and this, we are elsewhere informed, even against the wishes of the owner. (D. 7, 1, 67 ; D. 7, 1, 13, 2.) If the usufructuary made a gift of his usufruct, he lost it by nonuser if the donee did not use it. (D. 7, 1, 40.) But if the usufruct were sold, the price received was regarded as equivalent to user, and the usufructuary did not forfeit it by the default of the purchaser. (D. 7, 1, 39.)

An owner hires a farm from its usufructuary, and sells the farm to Seius without reserving the usufruct. Does the usufructuary still retain the usufruct in the name of Seius? No, not even if the owner continues to pay the rent ; because Seius gathers the fruit as his own, not in the name of the usufructuary. The remedy of the usufructuary is an action against the owner for breach of contract. The same result follows if the owner lets the usufruct in his own name. But if another than the owner hires the usufruct, and lets it out, the usufruct still subsists. (D. 7, 4, 29.)

B. Duties of Usufructuary to the Owner=Rights *in personam* of the Owner.

1. The Usufructuary must deal with the property as a *paterfamilias*. (J. 2, 1, 38.) The same idea is expressed by saying that the usufructuary must satisfy the judgment of a good man (*arbitratu viri boni*); a phrase which signifies that no very precise rule could be laid down, but that each case must be judged according to circumstances. (D. 7, 1, 9.) The standard of diligence required was at all events equal to the highest known to the Roman law, and not the lower standard admitted in the case of co-owners. (D. 7, 9, 2 ; D. 7, 1, 65, pr.) The usufructuary was compelled to cultivate the land in a husbandlike manner. He was bound to give the slaves food and clothes according to their condition and standing (D. 7, 1, 15, 2), and also medical attendance. (D. 7, 1, 45.)

2. The usufructuary was bound to do ordinary and moderate repairs, or surrender the usufruct. (D. 7, 1, 64.) If the roof of a house had decayed with age, the usufructuary was not bound to renew it ; but if the owner put on a new roof, the usufructuary had a right to use it. (D. 7, 1, 7, 2.) All that the usufructuary could be asked to do was to keep the roof tight; if he spent more than he was obliged, he could demand the excess from the owner. (C. 3, 33, 7.)

3. The usufructuary must pay the burdens on the land, *e.g.*,

tributum (land-tax paid to the Emperor); *stipendium* (land-tax paid to the *aerarium* of the people) (D. 7, 1, 52, pr.); *solarium* (annual payment for use of a public place); *indictio* (temporary tax on land) (D. 33, 2, 28); sewer-rate (*nomine cloacarii*); highway rate (*ad collationem viae*), etc. (D. 7, 1, 27, 3-4.)

c. Rights of Owner.

The rights of the owner are practically in abeyance during the continuance of the usufruct, and he must permit every form of enjoyment of the property that does not injure it. (D. 7, 1, 15, 6.) He cannot pull down any house on the land, nor build upon it, without the concurrence of the usufructuary. (D. 7, 1, 7, 1.) He cannot surrender a servitude, but he can acquire one, without the consent of the usufructuary. He cannot impose a servitude on the land, even if the usufructuary is willing (D. 7, 1, 15, 7), unless it is such as cannot by possibility harm the usufructuary, as a servitude not to raise the house higher. (D. 7, 1, 16.) The usufructuary cannot acquire, but he can retain, a servitude; and if by neglecting to use a servitude he causes it to be lost, he is liable to pay damages. (D. 7, 1, 15, 7.) On the other hand, an owner could with, but not without, the sanction of the usufructuary, make a burial-place on the land. (D. 7, 1, 17, pr.)

A question is raised by the editor of Mr Austin's works (p. 856), whether the owner had a right of entry on the land subject to usufruct. The editor takes the affirmative, and quotes the text (D. 43, 19, 3, 5) concerning the interdict *de itinere actuque privato*. The passage states that in certain circumstances the owner had a right to the use of a servitude (*iter*) over neighbouring land, which he could assert as well against the usufructuary as against others. By implication, if the owner had a right to use a road leading from his own land, he could enter upon that land. But this passage refers to a road that both owner and usufructuary had used; and inasmuch as the interdict in question was open to one that had no right, but had only, in fact, used the road for thirty days during the year preceding the application for the interdict, all that is proved is, that as a matter of fact the owner had used the road. This being stated as a hypothetical fact in the first part of the passage, throws no light whatever on the question whether the owner had a *right* to the servitude. Also a former section (D. 43, 19, 3, 4) informs us that although the use of the servitude by the usufructuary kept it alive for the owner, yet this would not in the absence of actual use by the owner give him a right to the interdict. On the other hand, the use of the servitude by tenants or friends was held to be a use by the owner, and to entitle him to the interdict. While the passage from Ulpian (D. 43, 19, 3, 5) must be considered indecisive, if indeed § 4 does not raise a presumption the other way, there are other texts that introduce great difficulty into the question. Ulpian, speaking of *usus*, which, we shall see, is a much more restricted right than usufruct, says that one having the use of a farm can dwell upon it, and forbid the owner coming there. On the other hand, he must give access to the owner's tenant or his agricultural (but not his household) servants. (D. 7, 8, 10, 4.) In another passage (D. 7, 8, 12, pr.), Ulpian still speaking of *usus*, says that the owner had a right of entry to gather the crops,

and that he could even dwell on the land in harvest. If then an owner, entitled to the *fructus*, and deprived only of the use (*usus*), had no right of entry except for the purpose of preparing the ground and gathering the crops, it would seem to follow that, if he had no right to the *fructus*, he had no right of entry whatever. On the other hand, the owner had a right to see that the boundaries of the land were preserved, and for that purpose could send an *insularius*—a slave employed to look after a house—to a house, or a *saltuarius*—a person employed to watch lands or forests—into a farm or estate. (D. 7, 8, 16, 1.) It would seem, therefore, that the owner had a right of entry so far as to see that his property was not diminished, but whether for other purposes is not at all made out.

Investitive Facts.

A. Modes of Creating Usufruct.

The usufruct, being a fragment of full ownership, might be created in two ways. The owner might give away the usufruct, reserving only the naked ownership (*nuda proprietas*); or he might give away the naked ownership, reserving a usufruct for himself. The former was called *datio* (*dare usumfructum*); the latter *deductio* (*deducto usufructu*). A third course was open: he might give away, at the same time, the usufruct to one person and the naked ownership to another. All these are exemplified in the first mode.

I. Legacy.—Usufruct admits of being separated from ownership, and this happens in many ways. If, for instance, it is left as a legacy, then the heir has the bare ownership, the legatee the usufruct. If, on the contrary, the farm is left as a legacy but the usufruct withheld, then the legatee has the bare ownership, the heir the usufruct. And again, the testator may leave one the usufruct, and another the farm without the usufruct. (J. 2, 4, 1.)

Following the plan hitherto pursued, we shall abstain from dwelling on this point until we come to the subject of legacy.

Mancipation.—Our saying that usufruct admits of *in jure cessio* only was not too hasty. For although a usufruct may be established by *mancipatio*, inasmuch as it can be withdrawn when the property is conveyed, yet it is not the usufruct itself that is conveyed. For it is only withheld in conveying the property, so that one has the usufruct, another the property. (G. 2, 33.)

Paul observes that by mancipation, but not by delivery (even of a *res nec mancipi*), a usufruct could only be reserved (*deducto*), not transferred. A usufruct of a slave delivered to a *peregrinus* could not be reserved. (Vat. Frag. 47.)

III. In jure cessio.—Usufruct admits of *in jure cessio* only. For the owner can thus transfer the usufruct to another, while he himself keeps the bare ownership. (G. 2, 30.) But this of course is so in the case of Italian lands, because those lands admit of *mancipatio* and *in jure cessio*. (G. 2, 31.)

Still, since usufruct can be established both in man and in all other animals, we ought to know that usufruct in those can be established even in the provinces by *in jure cessio*. (G. 2, 32.)

In jure cessio was the mode of creating and transferring incorporeal things by act *inter vivos*. By *in jure cessio* an owner could transfer the usufruct, reserving only the naked ownership (*dare usum fructum*), as well as give the naked ownership, reserving a usufruct (*deducto usufructu*). (Vat. Frag. 47.)

IV. CONTRACT (in the Provinces).—But on landed estates in the provinces, if a man wishes to establish a usufruct, or a right of passage on foot or with beasts, or of bringing water, or of raising a house higher, or not raising it lest a neighbour's lights be obstructed, and the like rights, he can do so by agreements and stipulations. For even the landed estates themselves do not admit of *mancipatio* or *in jure cessio*. (G. 2, 31.)

But if a man wishes to establish a usufruct otherwise than by will, he ought to do so by agreements (*pacta*) and stipulations. (J. 2, 4, 1.)

The pact was an agreement to create a servitude; by the stipulation a penalty was added. The penalty was limited to the heir of the person establishing the servitude. "Per te non fieri, neque per heredem tuum, quominus mihi ire agere liceat." (D. 45, 1, 2, 5; D. 45, 1, 4, 1.)

This is an instance of rights *in rem* being created by the agreement of the parties and nothing more; that is, by contract simply. In dealing with *dominium* a careful distinction had to be kept in view between contract and the investitive facts of *dominium*, because in every instance the Roman law required something more than contract to create ownership. There was no reason in the nature of things why rights *in rem* should not be created by contract; but the Roman legislators, for reasons satisfactory to themselves, chose to require something beyond the assent of the parties in order to transfer ownership. That something more was delivery, a fact that accomplished one important end of the lawgiver—making the ownership notorious. But when the ownership was split up, and it was desired to give a man the usufruct, a difficulty arose; because if delivery were made, the transaction would assume the appearance of a change of ownership, and thus imperil the naked ownership of the donor; and, moreover, as we shall see presently, it would be unsuitable when the usufruct was conditional. Accordingly, in the old civil law, the cumbrous fiction of a lawsuit was adopted in the case of incorporeal things. When the ancient modes of conveyance fell into disuse, there was no ceremony known to the law that could conveniently take their place, and hence incorporeal property came to be created and transferred by mere agreement of the parties. This change appears in Gaius; but he confines it to provincial lands (which were *res nec mancipi*); when, however, we come to Justinian, the old conveyances were obsolete, and the proper mode of creating a usufruct in his day was by pact and stipu-

lation. Justinian, therefore, makes no mention of *mancipatio* and *in jure cessio*.

B. Conditional Usufructs.

Paul says (Vat. Frag. 50, 48) that a usufruct may be created to begin at once, and to terminate at a fixed period prior to the death of the usufructuary, but that it cannot be made to commence at a future day (Vat. Frag, 49); and this, he adds, was an infirmity that it shared in common with all those rights that could be enforced only by the old *legis actiones*. The same passage occurs in the Digest (D. 7, 1, 4, 1), where Paul still stands sponsor, but the voice of Tribonian speaks. In the Digest it is said that a usufruct may commence at a future day. It was also finally established that a usufruct might begin from an uncertain event (*ex conditione*), or be terminated by any event (*ad conditionem*). (D. 7, 1, 51; D. 7, 1, 54).

Titius, whose farm was subject to a usufruct, bequeathed a usufruct of it to Sempronius. Was the legacy valid, seeing that a usufruct already existed? Maecianus said it was, even if the previous usufructuary survived Titius, and enjoyed the usufruct after the heirs of Titius had taken possession. (D. 7, 1, 72.)

C. Securities.

The various modes of creating usufructs just described operate in favour of the usufructuary only when he has complied with an indispensable preliminary. (D. 7, 9, 7.) Every usufructuary must give security, whatever the mode of his appointment. (D. 7, 9, 9, 1.) The form of security was sureties (*fidejussores*). (C. 3, 33, 4.) The object of the security was twofold—(1) that the usufructuary would deal with the property so as to satisfy a fair man (*boni viri arbitratu*) (D. 7, 9, 1, 3); and (2) would give back the property when his interest terminated.[1] In later times these promises were superfluous; the law imposed these obligations upon all usufructuaries: but there was an advantage in getting others as sureties, and for mismanagement an action could be brought on the promise before the usufruct came to an end. (D. 7, 9, 1, 5.)

Divestitive Facts.

But lest the properties should become altogether useless by being always separated from the usufruct, it is held that in certain fixed ways the usufruct disappears, and falls back into the ownership. (J. 2, 4, 1.)

[1] *Usurum se boni viri arbitratu, et cum ususfructus ad eum pertinere desinet, restituturum quod inde exstabit.* (D. 7, 9, 1, pr.)

When the usufruct comes to an end, it falls back into the property, and from that time forward the owner of the bare property-rights comes to have full power over their object. (J. 2, 4, 4.)

I. *In jure cessio.*—The man that has the usufruct can, by making an *in jure cessio* to the owner, detach the usufruct from himself and merge it in the property. (G. 2, 30.)

And again, a usufruct disappears if yielded up to the owner by him that has it. (J. 2, 4, 3.)

II. Merger. (*Consolidatio*, or *comparatio dominii.*)—Or, on the contrary, if he that has the usufruct acquires the ownership. This is called merger (*consolidatio*). (J. 2, 4, 3.)

III. And by not using it (*non utendo*) in the proper way and time,—all these points are settled by our constitution. (J. 2, 4, 3.)

A usufructuary that neither by himself, nor by anyone in his name, availed himself of his usufruct, while the period of *usucapio* elapsed, anciently lost his rights. (Paul, Sent. 3, 6, 30.) It made no difference that the usufructuary was ejected by force from his land. (D. 43, 16. 10.) Justinian preserved the rule, but altered the time to ten or twenty years in accordance with his changes of the period of prescription. (C. 3, 33, 16, 1 ; C. 3, 34, 13.) The question naturally occurs,—How is a usufruct lost by lapse of time, when it cannot be gained in that way? The answer is easy. A usufruct is regarded as simply a burden upon the ownership, and by *usucapio* the owner gets rid of the burden. It is thus, so to speak, the ownership that is regained by *usucapio* (*usucapio libertatis*), rather than the usufruct that is lost.

IV. The expiration of the period for which the usufruct was granted. This never exceeded the life of the usufructuary, or, in the case of a municipality obtaining a usufruct, 100 years, the supposed duration of the longest life. (D. 33, 2, 8; D. 7, 4, 3, 3 ; C. 3, 33, 3.) But it might be terminated sooner, either by a time having been fixed in the creation of the usufruct, or some event designated which was to terminate its existence. (Paul, Sent. 3, 6, 33 ; D. 33, 2, 30, pr. ; C. 3, 33, 5.)

A usufruct is granted to A until B shall attain the age of twenty-one. Suppose B died before reaching that age, is the usufruct at an end? Justinian decided that it should not, but should last for the period mentioned, if A lived so long. (C. 3, 33, 12, pr.)

A grant of a usufruct to A until B shall recover his sanity. In this case the recovery of B destroys the usufruct; otherwise it endures until B dies, if A so long lives. (C. 3, 33, 12, 1.)

V. A usufruct comes to an end, too, by the death of him that has it, or by his undergoing one of two forms of *capitis deminutio*, the *maxima* or the *media*. (J. 2, 4, 3.)

This was the law as settled by Justinian ; but previous to his time even the smallest change of status, as by adoption or arrogation, was fatal. (Paul, Sent. 3, 6, 29.)

VI. Analogous to this was a singular mode of losing usufructs, of which the sting was also taken out by Justinian. According to the rule that a slave can acquire for his master only, not for himself, a slave might become the medium of con-

veying a usufruct to his master. If afterwards the master sold the slave, the usufruct was extinguished. We have spoken of the slave as a conduit-pipe conveying rights to his master. We may now vary the figure, and speak of him as a chain by which the usufruct was anchored in his master's possession. (D. 7, 4, 5, 1.) Justinian enacted that usufructs should not be destroyed by the death, manumission, or alienation of the slaves by whom they were acquired. The same rule was applied to acquisitions through a son under *potestas;* and Justinian, making a deeper change, decided that even if the father died or lost his liberty the usufruct should not be lost, but should survive to the son—for whom, indeed, it must have been from the first intended. (C. 3, 33, 17.)

VII. Destruction or alteration of the essential character of the property. *Interitus* or *mutatio rei.*

Nay, further, it is agreed that if a house is consumed by fire, or falls in either by earthquake or by its own defects, the usufruct is extinguished, nor can any be claimed even in the site. (J. 2, 4, 3.)

For it is a right over an external object; take away that, and the usufruct itself must needs be taken away. (J. 2, 4, pr.)

The owner builds on ground subject to the usufruct. This so alters the character of the place that the usufruct is gone, and the usufructuary is left to his action for damages. (D. 7, 4, 5, 3.)

Usufruct of a pond. The pond dries up. The usufruct is extinguished. (D. 7, 4, 10, 3.)

Legacy of a wood. The trees are cut down, and the land sown. The usufruct is at an end. (D. 7, 4, 10, 4.)

A gift of usufruct of silver. It is made into a vase. The usufruct is at an end. (D. 7, 4, 10, 5.)

VIII. By original defectibility of title. If the estate of the donor was liable to be destroyed by a cause prior to the usufruct, and it so perishes, the usufruct is also extinguished.

A testator leaves a usufruct of a farm to a legatee when a certain condition is fulfilled. Before that time the testator dies, and the heir gives a usufruct of the same land to another. Afterwards the condition is fulfilled: the second usufruct is at once terminated. (D. 7, 4, 16.)

Transvestitive Facts.

But if the man that has the usufruct yields it by *in jure cessio* to a stranger, he still keeps his rights none the less, for the process is inoperative. (J. 2, 4, 3; G. 2, 30.)

The same rule prevailed with Justinian, in whose time pacts and stipulations had taken the place of the *in jure cessio.* But, as has been already explained, the prohibition was more technical than real; because the right of the usufructuary to part with the whole of his enjoyment of the land, with or without a price, was incontestable. Still, in strictness, we must say that there was no transvestitive fact.

Remedies.

A. Rights and Duties.

I. Use and enjoyment. The usufructuary had the same remedies as the owner; as, *e.g.*, the *actio legis Aquiliae* against the owner as well as all the world (D. 9, 2, 12); *utilis actio aquae pluviae arcendae* (D. 39, 3, 22, pr.); the *actio furti* (D. 47, 2, 46, 1); *actio vi bonorum raptorum* (D. 47, 8, 2, 23); *interdict de arboribus caedendis* (D. 43, 27, 1, 4); *interdict de vi et vi armata* (D. 43, 16, 3, 13); *interdict quod vi aut clam.* (D. 43, 24, 12.) Generally, in so far as the usufructuary had rights to the enjoyment of the property as against the owner and all other men, he could use the same actions and interdicts as the owner.

II. Duties of usufructuary to owner. The owner (*dominus*) may sue the sureties of the usufructuary, and has against the usufructuary the same remedy as against other persons. Thus, for misconduct to slaves he may have the *actio servi corrupti*, *actio injuriarum*, or *actio legis Aquiliae.* (D. 7, 1, 66.)

B. Investitive Facts.

I. *Actio confessoria de usufructu.*—This was the action by which a usufructuary could establish his usufruct against the owner or any possessor,—*uti frui jus sibi esse.* (D. 7, 6, 5, pr.) It was also the proper action against the owner of adjoining land if he interfered with the enjoyment of a servitude to which his land was subject in favour of the usufructuary land. Servitudes were attached to the *dominium*, and it was considered a difficulty that a usufructuary, as such, should be entitled to a servitude. The way in which it was accomplished was not by claiming the servitude, but by affirming that the owner of the adjoining land interfered with the enjoyment by the usufructuary of his land. (D. 7, 6, 1, pr.)

The burden of proof rests upon the usufructuary; and if he succeeds he gets a judgment substantially the same as in a *vindicatio.* The judge will order the possessor to give up the land; if he refuses wilfully, or has disabled himself from obeying the judgment, then to pay such a sum as the plaintiff has sworn is the value of the usufruct; if he is unable, through his own carelessness only, not through fraud, then the value of the usufruct is to be settled by the judge.

C. Divestitive Facts.

I. *Actio Negatoria de Usufructu.*—This is the corresponding action by which the owner may establish the freedom of his property from a usufruct, and, if he is not in possession, recover the crops that the possessor has gathered. (D. 7, 6, 5, 6.)

U S U S.

Definition.—Use (*usus*) is a usufruct without the produce (*fructus*) (D. 7, 8, 1, 1; D. 7, 8, 14, 1); and is confined to the personal wants of the usuary (*usuarius*). The exact difference between use and usufruct appears in considering the rights and duties of the usuary.

Rights and Duties.

A. Rights of the Usuary.

I. Use and enjoyment.

1. Fewer rights are implied in use than in usufruct. For he that has the bare use of a farm is understood to have nothing beyond the use, for his daily needs, of the vegetables, fruits, flowers, hay, straw, timber. And he

veying a usufruct to his master. If afterwards the master sold the slave, the usufruct was extinguished. We have spoken of the slave as a conduit-pipe conveying rights to his master. We may now vary the figure, and speak of him as a chain by which the usufruct was anchored in his master's possession. (D. 7, 4, 5, 1.) Justinian enacted that usufructs should not be destroyed by the death, manumission, or alienation of the slaves by whom they were acquired. The same rule was applied to acquisitions through a son under *potestas;* and Justinian, making a deeper change, decided that even if the father died or lost his liberty the usufruct should not be lost, but should survive to the son—for whom, indeed, it must have been from the first intended. (C. 3, 33, 17.)

VII. Destruction or alteration of the essential character of the property. *Interitus* or *mutatio rei.*

Nay, further, it is agreed that if a house is consumed by fire, or falls in either by earthquake or by its own defects, the usufruct is extinguished, nor can any be claimed even in the site. (J. 2, 4, 3.)

For it is a right over an external object; take away that, and the usufruct itself must needs be taken away. (J. 2, 4, pr.)

The owner builds on ground subject to the usufruct. This so alters the character of the place that the usufruct is gone, and the usufructuary is left to his action for damages. (D. 7, 4, 5, 3.)

Usufruct of a pond. The pond dries up. The usufruct is extinguished. (D. 7, 4, 10, 3.)

Legacy of a wood. The trees are cut down, and the land sown. The usufruct is at an end. (D. 7, 4, 10, 4.)

A gift of usufruct of silver. It is made into a vase. The usufruct is at an end. (D. 7, 4, 10, 5.)

VIII. By original defectibility of title. If the estate of the donor was liable to be destroyed by a cause prior to the usufruct, and it so perishes, the usufruct is also extinguished.

A testator leaves a usufruct of a farm to a legatee when a certain condition is fulfilled. Before that time the testator dies, and the heir gives a usufruct of the same land to another. Afterwards the condition is fulfilled: the second usufruct is at once terminated. (D. 7, 4, 16.)

Transvestitive Facts.

But if the man that has the usufruct yields it by *in jure cessio* to a stranger, he still keeps his rights none the less, for the process is inoperative. (J. 2, 4, 3; G. 2, 30.)

The same rule prevailed with Justinian, in whose time pacts and stipulations had taken the place of the *in jure cessio.* But, as has been already explained, the prohibition was more technical than real; because the right of the usufructuary to part with the whole of his enjoyment of the land, with or without a price, was incontestable. Still, in strictness, we must say that there was no transvestitive fact.

Remedies.

A. Rights and Duties.

I. Use and enjoyment. The usufructuary had the same remedies as the owner; as, *e.g.*, the *actio legis Aquiliae* against the owner as well as all the world (D. 9, 2, 12); *utilis actio aquae pluviae arcendae* (D. 39, 3, 22, pr.); the *actio furti* (D. 47, 2, 46, 1); *actio vi bonorum raptorum* (D. 47, 8, 2, 23); *interdict de arboribus caedendis* (D. 43, 27, 1, 4); *interdict de vi et vi armata* (D. 43, 16, 3, 13); *interdict quod vi aut clam.* (D. 43, 24, 12.) Generally, in so far as the usufructuary had rights to the enjoyment of the property as against the owner and all other men, he could use the same actions and interdicts as the owner.

II. Duties of usufructuary to owner. The owner (*dominus*) may sue the sureties of the usufructuary, and has against the usufructuary the same remedy as against other persons. Thus, for misconduct to slaves he may have the *actio servi corrupti*, *actio injuriarum*, or *actio legis Aquiliae*. (D. 7, 1, 66.)

B. Investitive Facts.

I. *Actio confessoria de usufructu.*—This was the action by which a usufructuary could establish his usufruct against the owner or any possessor,—*uti frui jus sibi esse.* (D. 7, 6, 5, pr.) It was also the proper action against the owner of adjoining land if he interfered with the enjoyment of a servitude to which his land was subject in favour of the usufructuary land. Servitudes were attached to the *dominium*, and it was considered a difficulty that a usufructuary, as such, should be entitled to a servitude. The way in which it was accomplished was not by claiming the servitude, but by affirming that the owner of the adjoining land interfered with the enjoyment by the usufructuary of his land. (D. 7, 6, 1, pr.)

The burden of proof rests upon the usufructuary; and if he succeeds he gets a judgment substantially the same as in a *vindicatio*. The judge will order the possessor to give up the land; if he refuses wilfully, or has disabled himself from obeying the judgment, then to pay such a sum as the plaintiff has sworn is the value of the usufruct; if he is unable, through his own carelessness only, not through fraud, then the value of the usufruct is to be settled by the judge.

C. Divestitive Facts.

I. *Actio Negatoria de Usufructu.*—This is the corresponding action by which the owner may establish the freedom of his property from a usufruct, and, if he is not in possession, recover the crops that the possessor has gathered. (D. 7, 6, 5, 6.)

U S U S.

Definition.—Use (*usus*) is a usufruct without the produce (*fructus*) (D. 7, 8, 1, 1; D. 7, 8, 14, 1); and is confined to the personal wants of the usuary (*usuarius*). The exact difference between use and usufruct appears in considering the rights and duties of the usuary.

Rights and Duties.

A. Rights of the Usuary.

I. Use and enjoyment.

1. Fewer rights are implied in use than in usufruct. For he that has the bare use of a farm is understood to have nothing beyond the use, for his daily needs, of the vegetables, fruits, flowers, hay, straw, timber. And he

may stay on that farm only so long as he is not an annoyance to the owner, or a hindrance to those that carry on the farm work. (J. 2, 5, 1.)

In addition to dwelling on the land, the usuary has, within the limits mentioned by Justinian, the right of walking or driving on the land. There was considerable diversity of opinion as to the exact effect of a grant of the use of land. Sabinus and Cassius said the usuary might take wood for ordinary consumption, and the apples, vegetables, and flowers. Nerva added the use of the straw, but not the oil, grain, or fruits. Proculus and Labeo went further. They said he could take the produce of the farm for the maintenance of himself and family, and even for his guests and friends. Ulpian favoured this view as more in harmony with the motives of the donor of the use. (D. 7, 8, 12, 1.) Paul adds that he might take provisions for the year's use, but only in the country; and that he could carry any apples, flowers, or firewood to his town residence. (D. 7, 8, 15, pr.)

2. Again, he that has the use of a house is understood to have rights up to this point only;—he may dwell in the house himself, but he cannot transfer this right to another; and it is scarcely quite admitted that he may receive a guest. But he may dwell there with his wife and children, as well as his freedmen and other free persons that he employs no less than his slaves. And similarly, if it is a woman that has the use of the house, she may dwell there with her husband. (J. 2, 5, 2.)

Although there seems to have been some doubt whether a woman had the same extent of use of a house, yet ultimately it was held that the rights were the same for men and women (D. 7, 8, 6), provided the guests were such as could with a regard to propriety dwell with the women. (D. 7, 8, 7; D. 7, 8, 4, 1; D. 7, 4, 22.)

3. And again, he that has the use of a slave can use his labour and service only in person. But he is not allowed to transfer his rights to another in any way. (J. 2, 5, 3.)

4. The same rule applies to beasts. (J. 2, 5, 3.)

But if it is the use of cattle or of sheep that is left as a legacy, he that has the use can use neither the milk nor the lambs, nor the wool, for all those are reckoned among fruits, but only the cattle to manure his fields. (J. 2, 5, 4.)

II. Powers of alienation.

And he cannot allow another the rights he has, either by selling them, or letting them out, or by giving them for nothing; whereas he that has the usufruct can do all these. (J. 2, 5, 1.)

B. Duties of the Usuary. The usuary was not, as a rule, bound to repair, but only to share the expense of repairs with the owner. If, however, the property gave no *fructus*, and only the use of it could exist, the usuary was bound to repair to the same extent as a usufructuary. (D. 7, 8, 18.) The usuary also was forbidden to change the character of the property, even to improve it. (D. 7, 8, 23.)

Investitive Facts and Divestitive Facts.

In the very same ways in which the usufruct is established, the bare use is

commonly established too. And it comes to an end in those very same ways in which the usufruct also ceases. (J. 2, 5, pr.)

Security is required, as in the case of the usufructuary.

The REMEDIES are precisely similar to those in the case of usufruct.

HABITATIO.

DEFINITION.—Papinian observes that the right of habitation is scarcely to be distinguished from the right of using a house. (D. 7. 8, 10, pr.) Anciently it was supposed to be a grant for one year only, but it was ultimately put on the same footing as usufruct—namely, for life. (D. 7, 8, 10, 3.)

But if *habitatio* is left as a legacy to any one, or is established in any way, it seems to be neither use nor usufruct, but as it were a special right. Those that have this right for their benefit, we have allowed by our published decision, in accordance with Marcellus' opinion, not only to live in the place themselves, but to let out the right to others. (J. 2, 5, 5.)

Another characteristic is that it was not lost through non-user or *capitis minutio*. (D. 7, 8, 10, pr.)

OPERAE SERVORUM.

This also is scarcely distinguishable from the use of slaves. Like *habitatio*, it was not lost by non-user (D. 33, 2, 2) or *capitis minutio*. (D. 7, 7, 2.)

PRECARIUM.

DEFINITION.—Precarium is a tenancy-at-will of land, or of a servitude (D. 43, 26, 15, 2), or of a moveable. (D. 43, 26, 4, pr.; D. 43, 26, 1, pr.) The person to whom a thing was given, *precario*, was entitled to the use and enjoyment of it so long as the owner pleased, but no longer. (D. 43, 26, 12, pr.)

RIGHTS OF TENANT.—The tenant of land was a *possessor*, and as such was protected from all persons, except the owner, in the use and enjoyment of it. (D. 43, 26, 15, 4.) As in the case of the usufructuary, he could not claim the offspring of female slaves. (D. 43, 26, 10.)

DUTIES OF TENANT.—(1.) To retain possession until it is asked back by the owner, and then to give it up. (D. 43, 26, 8, 3.) (2.) To answer for wilful mischief done to the property while in his possession, but not for negligence (*culpa*). Thus if he lost a servitude attached to the land by non-use, he was not

bound to give compensation, unless he wilfully abstained from using it. (D. 43, 26, 8, 5.)

INVESTITIVE FACTS.—All that was required was the possession of the thing with the consent of the owner. (D. 43, 26, 9; D. 43, 26, 2, 3.)

DIVESTITIVE FACTS.—(1.) By the lapse of the time for which the agreement was made, if any time was mentioned. (D. 43, 26, 5.) (2.) By the happening of an event on the occurrence of which it was to be revoked. Thus, if on a sale of land the buyer was allowed to enter as a tenant-at-will until the price should be fully paid, and the buyer failed to pay at the time agreed upon, the seller could revoke the tenancy and turn out the buyer. (D. 43, 26, 20.) (3.) The death of the tenant, but not necessarily of the owner, put an end to the tenancy. (D. 43, 26, 12, 1; D. 43, 26, 8, 1.)

REMEDIES.—A. The tenant's remedies against third parties were the interdicts and actions open to a *bona fide* possessor.

B. For rights of owner. I. Interdict *de precario.*

(1.) This interdict was restitutory—to compel the tenant to give back possession to the owner. (D. 43, 26, 4, 2.)

(2.) It was not limited by a year's prescription. (D. 43, 26, 8, 7.)

II. Also an *actio in factum praescriptis verbis* or *condictio incerti* might be brought by the owner for the same purpose. (D. 43, 26, 2, 2; D. 43, 26, 19, 2.) For the meaning of this form of action see Book II., Div. I., Subdiv. I., Equitable Contracts.

DEFINITE RIGHTS *IN REM* TO THINGS.

III.—*PRAEDIAL SERVITUDES.*

DEFINITION.

A praedial servitude is a definite right of enjoyment of one man's land by the owner of adjoining land; including in the term "land" also houses. The land subject to this right is called *praedium serviens*, and the land to which the right is attached is called *praedium dominans.*

These servitudes are called praedial, because they cannot exist without landed estates (*praedia*). For no one can acquire a praedial servitude in town or country unless he has landed estates; nor yet become subject to one unless he has landed estates. (J. 2, 3, 3.)

The lands must adjoin each other (*vicina praedia*). (D. 8, 3, 5, 1.) The exact degree of proximity, however, is regulated by the nature of the particular servitude.

A servitude, the object of which is to restrict a neighbour from adding to the height of his house, is valid, although there is a house between ; because so long as the intermediate house is not built higher the servitude is effective. (D. 8, 5, 4, 8 ; D. 8, 5, 5 ; D. 8, 2, 36 ; D. 8, 2, 38.)

A waggon road (*via*) is good as a servitude, although it is interrupted by a river, if there is a ford or bridge. (D. 8, 3, 38.)

A right of drawing water (*aquae haustus*) may exist, although between the servient and dominant land there lies a public road or river. (D. 39, 3, 17, 2.) But a right of leading water (*aquae ductus*) could not exist unless all the land through which the water flowed was subject to the servitude. (D. 8, 3, 7, 1.)

A praedial servitude is attached to the land in this sense, that it cannot be transferred by the owner of the dominant land to the owner of any other land. Until extinguished in one of the ways hereafter enumerated, a servitude passes with the land to every possessor. (D. 8, 4, 12 ; D. 8, 5, 20, 1.)

Praedial servitudes are restricted in their enjoyment to the land to which they are attached. Labeo thought that an owner of land having a right to lead water from other land (*aquae ductus*), could allow the owners of neighbouring lands to enjoy it as well. But the opinion of Proculus prevailed, that only as much could be taken as was required for the farm to which the right of water attached. (D. 8, 3, 24.) Similarly, if to a farm is attached the right of taking sand or lime from other land, no more can be taken than is wanted for that farm. (D. 8, 3, 5, 1.)

The owner of two adjoining properties sold the upper one, making it a condition of sale that the buyer should have permission to make a ditch to pass on water from the higher land. The buyer received water from still higher lands, and wished to pass it through his ditch to the lower ground. Could he do so ? No ; he cannot send down more than is necessary to dry his own land. (D. 8, 3, 29.)

All praedial servitudes ought to be capable of enduring as long as the land to which they are attached. Hence, strictly, water can be led only from a fountain, or other permanent source (D. 8, 3, 9) ; not from a pond that is liable to dry up (*stagnum*), or even a pond that does not dry up (*lacus*). (D. 8, 2, 28, pr.) But by a rescript of the Emperor Antoninus it was held that a right to water might exist even from an artificial reservoir. (D. 8, 4, 2, pr. ; D. 8, 3, 9, pr.)

A praedial servitude is indivisible ; it must be enjoyed wholly or not at all. (D. 8, 1, 11.)

If a person to whom a servitude belongs dies, each of his several heirs has a right to the servitude. (D. 8, 1, 17.)

A person alienating part of an estate cannot impose a servitude on it, unless the portion of land or houses is treated as a separate whole. (D. 8, 4, 6, 1.)

If the owner of a servitude acquires only a part of the land burdened with the servitude, or the owner of the land burdened acquires only a portion of the dominant land, the servitude is not extinguished, although it could not have been so created. (D. 8, 1, 8, 1; D. 50, 17, 85, 1.)

Urban and Rural Servitudes.

What is a *praedium rusticum* or *praedium urbanum*?[1] For the purpose of the law of servitudes the distinction seems to be drawn thus:—Land in the country is used chiefly for agriculture, and for building only as subservient to agriculture; land in towns is used chiefly for building, and for cultivation only as an accessory of building. Hence a servitude that affects chiefly or only the soil, and could exist if no houses were built, is called a rural servitude (*jus rusticorum praediorum*); and a servitude that affects chiefly or only houses, and could not exist without houses, although it may also affect the soil, is an urban servitude (*jus urbanorum praediorum*).[2] Hence an urban servitude may exist wholly in the country, and a rural servitude wholly in the town. A right to rest a beam or joist on a neighbour's wall (*jus tigni immittendi*) is an urban servitude, although it be in the country; and a right of way to a house is a rural servitude, although it be in a town. The importance of the distinction is centred in two points, one of which, however, is only of antiquarian interest. Urban servitudes were *res nec mancipi*; rural servitudes in Italy were *res mancipi*. Another difference more lasting will appear when the nature of these servitudes is more particularly considered. Urban servitudes are all, or nearly all, *negative*; rural servitudes are all, or nearly all, *positive*. This makes a difference in regard to the loss of the servitude by non-use. A negative servitude can be lost only by an adverse act of the owner of the land that owes the servitude; the servitude consisting in his not doing such act. An affirmative servitude must be kept alive by the acts of the person entitled to it, and is lost by abstinence from such acts. But this point must be again referred to.

---

[1] *Praedium* at first seems to have meant land mortgaged to the State (G. 2, 61), but later it was a *nomen generale*, and included both ownership (*ager*) and possession (*possessio*). (D. 50, 16, 115.)

[2] *Servitutes praediorum aliae in solo, aliae in superficie consistunt.* (D. 8, 1, 3, pr.)

Rights.

An account of the rights of which servitudes consist is simply an enumeration and statement of the various servitudes.

(A.) Rural Servitudes (*servitutes rusticorum praediorum*).

Over country estates the rights are these :—*iter*, *actus*, *via*, *aquae ductus*. (J. 2, 3, pr.)

Among the servitudes over country lands some think we may rightly reckon the right of drawing water, of driving cattle to water, of grazing, of burning lime, of digging sand. (J. 2, 3, 2.)

I. Rights of way. 1. *Iter;* 2. *Actus;* 3. *Via.*

Iter is the right to pass,—for a man that is to walk ; not to drive a beast or a carriage. *Actus* is the right to drive either a beast or a carriage. Therefore he that has *iter* has not *actus;* but he that has *actus* has *iter* also, and can use the road even when he is not driving a beast. *Via* is the right to pass whether driving or walking; for *via* includes both *iter* and *actus*. (J. 2, 3, pr.)

In the absence of such a servitude, no one had a right to walk or pass over another's land. (C. 3, 34, 11.)

The most extensive right of way (*via*) included the right of drawing stones and wood, and heavy-laden waggons. By the law of the XII Tables, the road must be 8 feet in width and 16 feet at the turnings (D. 8, 3, 8) ; unless the parties agreed upon any other width. (D. 8, 3, 13, 2.) If, however, the road as agreed upon was not of sufficient width, although it was called *via*, it was held to be either *iter* or *actus* according to its dimensions. (D. 8, 1, 13.)

4. A right of passing over (*jus navigandi*) a permanent lake belonging to another person to one's own land or house, was a recognised servitude, analogous to a right of way. (D. 8, 3, 23, 1.)

II. Rights to water.

1. Leading water (*aquae ductus*).

Aquae ductus is the right of leading water through another's land. (J. 2, 3, pr.)

Labeo said this servitude could be established only when there was an existing and known supply of water, but Paul held that a servitude might be created to search for water. (D. 8, 5, 21.) The owner of the servient land could not keep back the water, nor refuse permission to make the necessary constructions for leading it off. (C. 3, 34, 10.) As a rule, the water must be led off in pipes (*fistulae*); but by special agreement stone channels might be allowed. (D. 39, 3, 17, 1.)

The quantity of water that could be taken was determined

in the absence of agreement, by custom, not by the wants of the land for which the servitude was granted (C. 3, 34, 12); but so much could not be taken as to starve the land from which it came. (C. 3, 34, 6.) If custom sanctioned it, the water might be used for irrigation. (C. 3, 34, 7.)

If, at the granting of the servitude, no special track were marked out for the pipes, the owner of the servitude could select his own course (D. 8, 3, 21); but having done so, he could not of his own motion alter it. (D. 8, 1, 9.)

The owner of the servitude had a right also to cleanse and repair the aqueduct. (D. 43, 21, 1, pr.)

The water may be either perpetual (*aqua cottidiana*), or used only in summer (*aqua aestiva*). (D. 43, 20, 1, pr.; D. 43, 20, 1, 29.)

2. Drawing water from a well or fountain (*aquae haustus*). This is a right to go upon another's land, and draw water from his fountain. The right to keep the fountain in repair was included. (D. 43, 22, 1, 6.) In reference to this servitude, an example may be quoted to show that it need not be praedial; and the question whether it was so or not must be determined by the terms of the grant. The presumption was that it was a praedial servitude. (D. 8, 3, 20, 3.)

"Lucius Titius to Gaius Seius, his brother, greeting. From the water flowing into the fountain that my father constructed on the isthmus, I grant and concede to you gratuitously a rill, to be led either into the house you hold in the isthmus, or wherever you please." This was held to be a personal grant, and not to go to the heirs of Gaius Seius, or the purchasers of the house on the isthmus. (D. 8, 3, 37.)

3. Watering one's cattle on another's land (*pecoris ad aquam appulsus*). This, of course, includes the right of leading the cattle on to the servient land (*actus*). In this case, again, the question was one of intention; whether the privilege was confined to the individual to whom it was given, or was attached to his land, so as to go to his heirs or a purchaser of the land. (D. 8, 3, 4.)

4. A right of passing on water—the converse of *aquae ductus*—*aquae educendae*. (D. 8, 3, 29; D. 8, 5, 8, 5.)

III. Right of pasture (*jus pascendi*).

This was a right to put one's cattle to pasture on another's land. It might be either praedial or personal, like the right of drawing water. (D. 8, 3, 4.)

Several owners of separate lands bought a right of pasture on pasture-land. This right was enjoyed by several of their successors; and finally some of them sold their lands. Had the purchasers the right of pasture? in other words, was the servitude

praedial? Yes, if there was no agreement to the contrary. This seemed the proper inference to be drawn from all the facts. (D. 8, 5, 20, 1.)

This right must be carefully distinguished from *compascuus ager*, which is land belonging to a number of owners for the purpose of joint pasture.

IV. Other praedial servitudes.

The instances that have been given were the most common examples of praedial servitudes; but there were many others, which need only be referred to:—1. A right of quarrying stones for the use of one's land from the land of another (*jus lapidis eximendae*). (D. 8. 4, 13, 1.) 2. A right of digging for sand (*jus arenae fodiendae*) or chalk (*cretae eximendae*). 3. A right of burning lime (*jus calcis coquendae*). 4. A right of cutting *silva caedua* for stakes to vines. (D. 8, 3, 6, 1)

(B.) Urban Servitudes (*jura urbanorum praediorum*).

Over town estates the servitudes all attach to buildings. And indeed they are called servitudes over town estates because all buildings are called town estates, even country houses. Now the servitudes over town estates are these: the servitude of supporting the weight of a neighbour's house; of allowing a neighbour to run a beam into one's wall; of receiving or not receiving the raindrops or the water that flows from a neighbour's house into one's own house or yard; and of hindering a man from raising his house too high so as to obstruct a neighbour's lights. (J. 2, 3, 1.)

1. The servitude of support to a building (*oneris ferendi*). This servitude exists when one house rests upon a wall or pillars belonging to another. This is the only case where the duty of repairing was thrown upon the owner of the servient land. (D. 8, 2, 33.)

2. The servitude of supporting a beam or joist (*tigni immittendi*). This is simply inserting beams in the wall of another's house for the purpose of a covering to a walk alongside the wall, or for additional security. It may be established either with reference to existing beams or future constructions. (D. 8, 5, 14, pr.) The owner of the wall cannot be compelled to maintain it in repair. (D. 8, 5, 8, 2.)

3. *Stillicidii vel fluminis recipiendi vel non recipiendi. Stillicidium* is the dropping of water from the tiles of a house; *flumen* is when it is collected and passed on by a gutter. In regard to this water two different rights may exist under different circumstances. The adjoining land may be in want of water for irrigation or the like, and may secure a right to the supply of the rain water from a neighbour's house; or the owner of a house may wish to get rid of the water that falls on his house.

The servitude of receiving the water (*stillicidii recipiendi*) forbids the owner of the servient land from building so high as to interfere with the due reception of the rain water. On the other hand, the house from which the rain falls may be the servient land, and a servitude may exist compelling the owner of it to allow the water to pass on to a neighbour's land. (D. 8, 2, 20, 3; D. 8, 2, 20, 6; D. 8, 2, 41, 1; D. 8, 2, 21.)

4. The servitude *altius non tollendi* prevents a house being increased in height. (D. 8, 2, 12.) This is easily understood, but another servitude, *altius tollendi*, has given great trouble to the commentators.

Every owner had a right to build as high as he pleased, although he thereby shut up his neighbour. (D. 8, 2, 9; C. 3, 34, 8; C. 3, 34, 9.) Where, then, is the room for a servitude or special grant by which an owner should be able to exercise that right? One suggestion is, that a local custom might prevent houses being built beyond a certain height. Thus Augustus enacted that at Rome houses should not exceed 60 feet, and Nero passed a similar law. Severus and Antoninus, in speaking of the building of a bath, say it must not exceed the customary height. (C. 8, 10, 1.) But if by a local or general law houses were restricted to a certain height, it is difficult to see how a dispensation from such a law could be given by one proprietor to another, and such a dispensation the right *altius tollendi* would be.

Another explanation that has been offered is that *jus altius tollendi* was applied to a tenement that had been formerly subject to a *jus altius non tollendi*, and had been relieved from it by prescription (*usucapio libertatis*). According to this view, the expression *jus altius tollendi* is not accurate, for by prescription no *jus* is acquired, only the unfettered dominion is recovered. The *jus altius tollendi*, like the *jus aedificandi*, is merely part of the rights of ownership.

5. Lights and prospect (*lumina*, *prospectus*). In the exercise of his right of building on his own land, one might shut out the light or view of his neighbour. To prevent this, a servitude, the object of which was to prevent such a building, might be created (*ne luminibus officiatur, et ne prospectui offendatur*). (D. 8, 2, 15; D. 8, 2, 4.) This servitude prohibited the shutting out of light by trees as well as by buildings. (D. 8, 2, 17, 1.) It applies not only to existing windows, but to those made subsequently to the creation of the servitude. (D. 8, 2, 23, pr.) *Lumen* is free vision to the sky, *prospectus* is free vision over lower grounds. (D. 8, 2, 16.)

Another kind of right existed that has been the subject of dispute—the right to open windows in a wall where otherwise it would be forbidden. (D. 8, 2, 4.) It is to this that the rescript of Antoninus and Verus refers, which says that when no servitude of lights (*lumina*) exists, the owner can build, leaving the customary space between the erection and the next house. (D. 8, 2, 14.)

6. Right of occupying space above another's land (*jus projiciendi* and *protegendi*). The rule of law was, that to the owner of the soil belonged all the space above the soil, and therefore anything overhanging from a neighbour's house above his land would be, in the absence of a servitude, an infringement of his rights. The projections here referred to are balconies (*maeniana*) and the eaves of houses (*suggrunda*), which do not rest on the wall of the neighbouring proprietor, but simply overhang his ground. The right to have such projections constituted the *jus projiciendi*. (D. 50, 16, 242, 1.) *Protectum* (hence *jus protegendi*) is something projected to cover a wall. (D. 9, 3, 5, 6.)

7. *Cloacae mittendae*, the right of passing a sewer through or below another's ground. The owner of the sewer had the right to cleanse or repair the sewer. (D. 43, 23, 1, pr.)

Investitive Facts.

A. Modes of Creating Servitudes.

Gaius says that servitudes (praedial) are acquired in the same way as usufruct. (D. 8, 1, 5, pr.)

1. Rights over urban estates can be created by *in jure cessio* only; over country estates by *mancipatio* also. (G. 2, 29.)

2. *Usucapio.* In the first place, it is alleged that incorporeal things cannot be acquired by *usucapio*, because they do not admit of physical possession. (D. 41, 1, 43, 1.) But Cicero speaks of the *usucapio* of *aquae ductus*, *iter*, *actus*, etc. A law, however, passed perhaps in the time of Tiberius (*lex Scribonia*), abolished *usucapio* of incorporeal things, unless simply as appurtenances of land so acquired. (D. 41, 3, 10, 1.) The extinction of servitudes by non-use was not, however, taken away by this law. (D. 41, 3, 4, 29.)

3. Prescription. There is no question, however, that at least in the time of Justinian servitudes could be acquired by prescription in the same way as immoveable property. (C. 7, 33, 12.) In the Digest, several passages state that long possession (*bona fide*) gave a good title (D. 39, 3, 26; C. 3, 34, 1; C. 3, 34, 2); and *a fortiori* immemorial possession. (D. 43, 20, 3, 4.) While there can be no doubt that servitudes could be acquired by prescription, it is not so clear what the time was; but, at any rate, after Justinian it may be assumed that servitudes were subject to the same rules as immoveables. The claimant was not bound to show that his exercise of the servitude began with title, but he had a

utilis actio, in which it was only required to prove that he had in fact enjoyed the servitude for so many years neither by force nor by stealth, nor by leave (*nec vi, nec clam, nec precario*). *Bona fides* was not required. (D. 8, 5, 10, pr.)

4. Delivery of possession, reserving a servitude. The owner of two houses, in delivering one to a purchaser, may make it a condition of sale that the unsold house shall have a servitude as against the house sold, or may give a servitude to the house sold against the house not sold. (D. 8, 2, 34; D. 8, 4, 6, pr.) By express agreement, any proper servitude can be reserved (*recipere servitutem.*) (D. 8, 4, 10.)

5. If any one wishes to establish any such right for his neighbour, he ought to accomplish it by agreements (*pacta*) and stipulations. (J. 2, 3, 4.)

As regards negative servitudes, which consist merely in a prohibition of an owner doing something he had a right as owner to do, there could be nothing beyond the mere agreement after the old forms of *mancipatio* and *cessio in jure* fell into desuetude. But in the case of a right-of-way, or the like, the essence of which was the authorisation to the owner of it to do what otherwise he could not lawfully do, an actual user of the right would naturally take place, and was essential in order to enable him to employ the Interdicts (D. 8, 1, 20) or the *actio Publiciana*. (D. 6, 2, 11, 1.) Ulpian, indeed, seems to speak of *traditio* as an alternative mode of constituting praedial servitudes. (D. 6, 2, 11, 1.) By *traditio* he means user of the servitude with the consent of the owner of the servient land. This, however, was clearly not essential to a *jus praediorum*; but only to the employment of Interdicts. When servitudes were established by *cessio in jure*, there was always some risk of failure through mistakes in the formalities, but as the Interdicts depended upon actual use, they were free from all such difficulties.

6. A man can also in his will bind down his heir to raise his house no higher, lest he should obstruct the lights of a neighbour's house; or to suffer that neighbour to run a beam into his wall; or to receive his raindrops; or to suffer him to go across his farm, or to drive beasts, or to lead water from it. (J. 2, 3, 4.)

B. Conditional Servitudes.

Strictly a servitude was absolute; it could not be created to date from a future day or event, nor be limited in its duration; but if such limits were agreed upon, they formed a ground of defence (*exceptio doli mali*) if the servitude were sued for in disregard of them. Practically, therefore, such limits could be imposed. (D. 8, 1, 4, pr.)

The degree of enjoyment (*modus*) was subject to be varied by agreement. Thus, a road might be granted only for a certain kind of vehicle, or for loads not exceeding a certain weight. (D. 8, 1, 4, 1; D. 8, 1, 4, 2.) Also it might be limited to use on alternate days or between specified hours. (D. 8, 1, 5, 1; D. 8, 4, 14.)

c. Restrictions on the Creation of Servitudes.

1. An owner cannot have a servitude over his own land (*nulli res sua servit*). It would be absurd to say that an owner, who as such has every right of use and enjoyment, had in addition through a servitude one definite or particular right of use or enjoyment. The rule is equally applicable to co-owners, although with less convenience: and if any co-owner desires to have some particular kind of enjoyment secured to him, he can do so only by resorting to a partition. (D. 8, 2, 26.)

2. The right contained in a servitude imposes on the owner of the land subject to the servitude only a negative duty. The duty it casts upon the owner is either not to do something, *i.e.*, to abstain from exercising a right, or to forbear hindering another from doing something which otherwise he would have a right to forbid.[1] If the servitude consists in not doing (*in non faciendo*), it is said to be negative (*servitus negativa*); if it consists in forbearance (*in patiendo*), it is said to be affirmative (*servitus affirmativa*), and means permission to do acts that would otherwise be unlawful.

A right of way is an *affirmative* servitude. The owner of the servient land is bound to *suffer* the owner of the dominant land to walk on his land.

A servitude of lights or prospect is *negative*. The owner of the servient land is bound *not to do* anything to shut out his neighbour's lights or view.

In one instance, and in only one, a positive obligation was added to the purely passive conduct required from the owner of land subject to a servitude. A person whose wall or pillars were used to support another man's building, might, if it was agreed upon, be obliged not merely to suffer the superstructure to rest, but also to repair the wall. This result was not reached without controversy. Gallus denied that an obligation to repair could be thrown upon the owner of the wall or other support, because a servitude could not require any positive act (*in faciendo*); but the contrary opinion, supported by Servius, was finally established. (D. 8, 5, 6, 2.) In this case, a right *in personam* is added to, and made to go along with, the servitude. As a relief to the owner of the subject land, he was allowed to surrender the foundations, if he did not wish to repair them. This case is strictly an exception, for in the analogous servitude of inserting joists or beams in another's wall, no such obligation to repair could be imposed. (D. 8, 5, 8, 1.)

3. A servitude cannot be merely burdensome; it must be also beneficial to the possessor of the servitude.

An agreement that A shall not go over a particular part of his own land, or that A shall not search for water in his own land, is void. (D. 8, 1, 15, pr.)

4. There cannot be a servitude of a servitude (*servitus servitutis esse non potest*). This rule would prohibit a person bequeathing to a legatee a usufruct of a right of way; but in

[1] *Servitutum non ea natura est, ut aliquid faciat quis, sed ut aliquid patiatur, aut non faciat.* (D. 8, 1, 15, 1.)

such a case the heir was bound to permit the legatee to enjoy the right of way, if the legatee gave security to renounce all claim to it on his death. The remedy of the legatee was an *actio incerti.* (D. 33, 2, 1.)

Titius has a right of leading water (*aquae ductus*) through several estates. Not any of the owners of those estates, nor any neighbour, can enjoy the right of drawing water (*aquae haustus*) from the channel. By special agreement, however, that right could be granted by Titius; but such a right would not be given to them as owners or neighbours, and therefore would not strictly be a servitude. (D. 8, 3, 33, 1.)

Gaius has the usufruct of land to which is attached a right of way over the land of Maevius. Gaius, inasmuch as his usufruct is itself but a servitude, cannot bring the usual action for the vindication of servitudes, but if Maevius or any one else molests him in the use of the road, he can sue by the interdict *uti possidetis*, on the ground that such molestation is an infringement of his right to the use of his land. (D. 7, 6, 1, pr.)

Divestitive Facts.

A praedial servitude was not lost by the death or *capitis deminutio* of the person to whom it was granted. (D. 8, 6, 3.)

1. Surrender of the servitude (*remissio*). This may have been done in olden times by the *cessio in jure*, but when that mode fell into disuse it was done by simple agreement. (D. 8, 3, 34, pr.) The remission might be tacit, as by permitting any act that destroyed the servitude: *e.g.*, blocking up a wall, or building so high that the raindrops (*stillicidia*) could not fall. (D. 8, 6, 8, pr.)

2. Merger (*Confusio*).—Inasmuch as a servitude was a single detached enjoyment, it followed that when the person to whom a servitude was due became owner of the land on which the servitude was imposed, the greater swallowed up the less. (D. 8, 6, 1.) So complete was the extinction, that even if the lands were afterwards separated and belonged to different owners, the servitude was not revived except by the usual modes of creating servitude. (D. 8, 2, 30, pr.) If, however, the owner of the dominant land acquired only a part of the servient land, the servitude remained intact, because it was indivisible, and could not be partly lost and partly retained. (D. 8, 2, 30, 1.)

3. Non-use (*non-utendo*).—The period of *usucapio* for releasing land from praedial servitudes was two years. (Paul, Sent. 1, 17, 1.) This period was extended by Justinian to ten years if both parties lived in the same province, and twenty years if in different provinces. (C. 3, 34, 13.)

An important distinction existed between urban and rural servitudes. Urban servitudes are negative, rural servitudes

are affirmative. A right of way, to be kept alive, must be exercised; if no one actively uses the way for the period fixed by law, the right of way is destroyed. It is a *discontinuous servitude;* it is kept up by intermittent acts from time to time, and cannot be continuously enjoyed. But in the case of a servitude of lights, the person that enjoys it cannot do anything to keep it alive; it consists in the owner of the servient land not doing something, and so long as that is not done, the servitude is fully alive. The servitude is continuously enjoyed, so long as it is enjoyed at all. The rule, then, may be stated thus:—In continuous servitudes, the period of prescription is reckoned from the time that an act is done by the owner of the servient land that negatives the servitude; in discontinuous servitudes, the period is reckoned from the last time the servitude was used by the owner of the dominant land. (D. 8, 2, 6.)

A servitude is not lost through non-use if the following conditions are complied with:—(1.) A usufructuary, tenant, guest or other person using the road or servitude in the name of the land to which it is attached, exercises such a use as prevents prescription being reckoned. (D. 8, 6, 20; D. 8, 6, 24; D. 8, 6, 5; D. 8, 6, 6, pr.) (2.) The use must be at the times, and in the manner, agreed upon. (D. 8, 6, 10, 1; D. 43, 20, 5, 1.) (3.) The servitude must be used as a servitude belonging to the land to which it is attached, and not, for example, as a public road. (D. 8, 6, 25.)

4. Destruction or change of the property destroys any servitudes attached to it, as when the dominant house is burned down, and not rebuilt. But if another like it is put up, the servitude is preserved. (D. 8, 2, 20, 2.) If a place over which a right of way exists is swamped by a diversion of a stream, but before the period of prescription is gone the way is restored by the deposit of alluvium, the servitude revives; and it seems, even if the time had elapsed, the owner of the servient land could be compelled to re-grant the servitude. (D. 8, 6, 14, pr.)

Remedies.

a. Interdicts.

The actual enjoyment of servitudes was secured by interdict; but the remedy by interdict was given subject to the analogy to corporeal possession. Interdicts existed only for affirmative, not for negative servitudes; and their object was to stop the owners of the several lands from forcibly preventing the performance of the acts constituting the servitudes. Hence two characteristics of these remedies. (1) No

person could demand an interdict who had not previously done the acts permitted by the servitude; and (2) the interdict did not deal with the question of right, but secured undisturbed enjoyment to a person that had, whether with or without title, in point of fact claimed and exercised the right. (D. 43, 19, 1, 2.)

I. Rights of way.

1. An interdict (*de itinere actuque privato*), whose object was to secure free passage over the burdened land, and damages (*quanti ejus interesse*) for interruption. (D. 43, 19, 3, 3; D. 8, 5, 2, 3.)

The Prætor says: When a footpath, a driving road, or a regular road, is in dispute, and you have used it neither by violence, by stealth, nor by leave from another within the preceding year, I forbid any violence to be employed to hinder you from such use.[1]

2. Interdict to obtain permission to repair. Every one having a right of way, had by implication a right to keep the road in repair. (D. 43, 19, 3, 13.)

The Prætor says: When you have used a path or driving-road within the preceding year, neither by violence nor by stealth, nor by sufferance from another, I forbid any violence to be used to hinder you from repairing that path or driving-road, supposing you have a right so to do. He that would use this interdict must give security to the opposite party against any damage that, though yet undone, may be caused by his fault.[2]

To obtain this interdict, the plaintiff must prove more than mere quasi-possession; because the right to repair is not attached to the use or exercise of the servitude, but only to the right to the servitude. (D. 43, 19, 3, 13.) Also the plaintiff must give security against any damage he may do by his repairs. (D. 43, 19, 5, 4.)

II. Rights to water.

1. *Aqua cottidiana* is water that might be used every day of the year (D. 43, 20, 1, 2); it is opposed to *aqua aestiva*, water used only in summer, even if it could be used in winter. (D. 43, 20, 1, 3; D. 43, 20, 6.)

The Prætor says: As within the preceding year you have led the water in dispute neither by violence nor by stealth, nor by sufferance on his part, I forbid any violence to be used in order to hinder you from so leading it. (D. 43, 20, 1, pr.)

This interdict could be claimed by any person that had used the water under the conditions applicable to rights of way; and it may be brought against every one that disturbs the claimant in the use of the water. (D. 43, 20, 1, 25.) The defendant must give security for the free exercise of the servitude, without prejudice to his contention that the servitude was not legally binding. (D. 43, 20, 7.)

2. Interdict for repairs.

There was an interdict to enable the owner of the servient land to repair the channel of the watercourse, or to cleanse it. The Prætor says: I forbid any violence to be used to hinder him from freely repairing and cleaning out the channels, covered ways, or reservoirs, in order to lead the water, provided only he leads it no otherwise than he did last summer, neither by violence, nor by stealth, nor by sufferance on your part. (D. 43, 21, 1, pr.) Its object is to secure freedom for the task of repairs or cleaning (D. 43, 21, 1, 8); and its aid can be obtained by the same persons that have a right to the use of the aqueduct. (D. 43, 21, 3, 7.)

---

[1] *Prætor ait:* "*Quo itinere actuque privato quo de agitur, vel via, hoc anno, nec vi, nec clam, nec precario ab illo usus es, quominus ita utaris, vim fieri veto.*" (D. 43, 19, 1, pr.)

[2] *Ait Prætor:* "*Quo itinere actuque hoc anno non vi, non clam, non precario ab alio usus es, quominus (id) iter actumque, ut tibi jus esset, reficias, vim fieri veto; qui hoc interdicto uti volet, is adversario damni infecti, quod per ejus vitium datum sit, caveat.*" (D. 43, 19, 3, 11.)

3. *Aquae haustus* and *pecoris ad aquam appulsus.*

In this case, as in *aquae ductus*, there are two interdicts—one to secure the use of the water, the other for repair of the fountain or well. (D. 43, 22, 1, pr.; D. 43, 22, 1, 6.)

4. Interdict for water drawn from an artificial reservoir (*ex castello*). The Prætor says: Since from that reservoir he has been allowed to lead water by one that had a right to do so, I forbid any violence to be used to hinder him from leading it as he has been allowed. And when an interdict shall have been given in regard to the doing of the work, I will order security to be given for the damage that may be done.[1] This interdict to enforce a servitude of water (whether personal or prædial) arising from a *castellum* or reservoir that is filled with public water (*aqua publica*) (D. 43, 20, 1, 39), is not merely possessory; it involves the question of right, and is thus a test of the existence of any investitive fact. (D. 43, 20, 1, 45.)

III. Rights in private sewers (*cloacae*).

In this case, again, there are two interdicts, of which the words of one only are contained in the Digest. The plaintiff must give security against any damage he may do by his repairs. (D. 43, 23, 1, 12; D. 43, 23, 1, 14.)

B. Actions.

I. *Actio Confessoria.*—This action tries the right to the servitude (D. 8, 5, 9, pr.); and the form was either, it is my right to do what you have prevented; or, it is not your right to do what you have begun (*jus mihi esse, jus tibi non esse aedificandi*). It can be brought only by the owner of the dominant land (D. 8, 5, 2, 1); or by a person having substantially the same rights, as a mortgagee in possession. (D. 8, 5, 16.) It lies against the owner of the servient land (D. 8, 5, 4, 4), or anyone else that interferes with the enjoyment of the servitude, although in this case the interdict would generally be the preferable remedy. (D. 8, 5, 10, 1.) The burden of proof lay on the plaintiff. (D. 8, 5, 9, pr.)

II. *Actio Negatoria.*—An occasion arises for this action denying the existence or showing the termination of a praedial servitude in two cases; when one, claiming a servitude, forbids an owner to do something that as owner he has a right to do on his own land (D. 8, 5, 4, 7); or when anyone does anything that in the absence of a servitude (whose existence is disputed) he has no right to do. (D. 8, 5, 17, 2; D. 8, 5, 13.) The object of the action is to obtain security against a repetition of the conduct complained of (D. 8, 5, 12); and also damages when the defendant has without right used the land. (D. 8, 5, 4, 2.)

The burden of proof usually rests on the plaintiff. There seems no reason why, in this case, the burden should be shifted, even although it casts on the plaintiff the difficulty of proving a negative. Undoubtedly the burden would rest on the plaintiff in cases where the defendant had previously established an actual user by means of an interdict, and apparently the same rule held in other cases. (D. 8, 5, 6, 1; D. 8, 5, 7, 3.)

III. *Actio Publiciana in rem.*—This action is given to a *bona fide possessor*, whose right will be, but is not yet, perfected by *usucapio*. Usufruct and praedial servitudes may be thus vindicated, when there is *traditio* or *patientia*, by the owner of the servient land. (D. 6, 2, 11, 1.)

---

[1] *Ait Prætor: "Quo ex castello illi aquam ducere ab eo, cui ejus rei jus fuit, permissum est; quominus ita, uti permissum est, ducat, vim fieri veto. Quandoque de opere faciendo interdictum erit, damni infecti caveri jubebo."* (D. 43, 20, 1, 38.)

IV. *Actio oneris ferendi.*—According to some, this servitude, which had the peculiarity of having an obligation to repair added to it, had a special action. (D. 8, 5, 6, 2.)

EMPHYTEUSIS.

Definition.

The tenure afterwards called *emphyteusis* is to be traced to the long or perpetual leases of lands taken in war granted by the Roman State. The rent given for such land was called *vectigal* and the land itself *ager vectigalis*. The advantages of the perpetual lease were appreciated by corporations, ecclesiastical and municipal. Corporate bodies are generally inefficient landlords; and a tenure that practically relieves them from all concern in the management of the land, and gives them simply a right in perpetuity to an annual sum, seems most beneficial for their interests. The same tenure was adopted by private individuals, under a new name, at least after the time of Constantine, and was extended from lands to houses. The State still had its *agri vectigales*, but the perpetual tenure given by private persons and corporations was called *emphyteusis*, the land *fundus emphyteuticarius*, the person to whom it was given *emphyteuta*. It may be defined as a grant of land or houses for ever, or for a long period (D. 6, 3, 3), on the condition that an annual sum (*canon*) shall be paid to the owner or his successors, and that if such sum is not paid the grant shall be forfeited. (D. 6, 3, 1, pr.; D. 6, 3, 2.) The person to whom the grant is made is not owner, but he has Prætorian actions for the property against all possessors, and therefore has a right *in rem*. (D. 6, 3, 1, 1.)

The question whether the emphyteuta is in law owner, appears in the controversy long agitated among the jurisconsults, whether he was a purchaser or a mere hirer. To have regarded him as a purchaser would have made him owner, and the position of the vendor (*dominus emphyteuseos*) extremely precarious. On the other hand, if the emphyteuta were a mere hirer, the rules applicable to hire would be out of place, considering the perpetual nature of his interest. Such are the considerations that may be supposed to have influenced the Emperor Zeno (A.D. 475-491) to terminate the dispute in the manner stated in the Institutes.

So very closely akin are buying and selling to letting and hiring, that in

certain cases the question is usually raised whether the contract is one of buying and selling or of letting and hiring.

[It has been raised, for instance, where anything is let out *for all time*, as is the case with the land of townsmen (*municipes*), let on the express condition that so long as the revenue (*vectigal*) is duly paid, the estate shall not be taken away either from the original tenant (*conductor*) or from his heir. But the prevailing opinion is that this is a case of letting and hiring.]

This is the case, for instance, with lands made over to be enjoyed *for all time;* that is to say, on condition that so long as the rent or income (*pensio, reditus*) is paid for them to the owner, it shall be unlawful to take away an estate of this sort either from the original tenant or his heir, or from any one to whom he or his heir may have sold it, given it as a present or as a dowry, or alienated it in any other way whatever. Now, a contract such as this caused doubts among the earlier writers; and some thought it a case of letting, others of selling. The *lex Zenoniana* was therefore passed, which determined that the contract of *emphyteusis* had a peculiar nature, and must not lean on either letting or selling, but must rest on agreements of its own. It determined further, that if any special agreement were made, it should stand just as if this were the nature of the contract; but that if no special agreement were made in regard to the risk of the property, then if the property wholly perished, the risk thereof should fall on the owner, whereas partial damage should be the tenant's loss. This is the law now in use by us. (G. 3, 145; J. 3, 24, 3.)

Rights and Duties.

A. Rights of *Emphyteuta.*

1. Use and enjoyment (*utendi fruendi*). There can be no doubt that the right of the emphyteuta was larger than the right of the usufructuary, but how much larger? Probably the scantiness of passages bearing on this subject shows that few, if any, restrictions were imposed on the emphyteuta. The emphyteuta must, perhaps, for this purpose, be compared with the *bona fide* possessor rather than with the usufructuary; for the emphyteuta, like the former, and unlike the latter, was entitled to the fruits as soon as they were separated from the land, whether gathered or not. (D. 22, 1, 25, 1.) The emphyteuta was subject apparently to no other restriction than that he must not depreciate the property. Perhaps the strongest evidence of this view is that he was not entitled to compensation for improvements. (C. 4, 66, 2.)

2. Alienation. The emphyteusis passed to the heirs, and, subject to certain restrictions, could be alienated. Hence the greater including the less, it could be hypothecated (D. 13, 7, 16, 2), or burdened with servitudes. (D. 43, 18, 1, 9.)

B. Duties of Emphyteuta = rights *in personam* of *dominus emphyteuseos*.

1. To pay the rent agreed upon (*canon*), without any previous demand, at the time agreed upon, and notwithstanding partial loss of the property. (C. 4, 66, 1.) This could not be increased by the owner (*dominus emphyteuseos*.) (C. 11, 70, 3.) The usufructuary paid no rent.

2. He must manage the property so as not seriously to reduce its value; but he is not to be interfered with on the grounds upon which a usufructuary may be sued, that he does not act like a good *paterfamilias*. (Nov. 120, 8.)

3. He must pay all the burdens attached to the holding of the land; and deliver the receipts (*apochae*) to the owner (*dominus emphyteuseos*). (C. 4, 66, 2; C. 10, 16, 2.)

These were the rules applicable in the absence of special agreement; but if any variation were made, it would be supported. (C. 4, 66, 2.)

Investitive Facts.

I. By agreement in writing (*pactum*). (C. 4, 66, 1.)

II. By prescription (not by *usucapio*). (D. 6, 2, 12, 2.) By analogy to servitudes we may infer prescription; and in the case of a possessor without title, the limit of forty years (negative prescription) seems to be given by Anastasius. (C. 11, 61, 14.)

Divestitive Facts.

I. The total loss or destruction of the property.

II. Prescription—possession by the owner for the requisite number of years (*usucapio libertatis*).

III. Surrender or merger (*confusio*, *consolidatio*).

IV. Forfeiture. In the absence of special agreement, an emphyteusis was forfeited—

1. For deterioration of the property.

2. For non-payment of rent, when the land was held from an ecclesiastical corporation, for two years; in any other case three years. (C. 4, 66, 2; Nov. 7, 3, 2.)

3. If the emphyteuta do not produce to the owner, within three years, the receipts (*apochae*) for public burdens. (C. 4, 66, 2.)

4. If he attempts to transfer the emphyteusis without complying with the rules prescribed. (C. 4, 66, 3.)

If the owner would not receive the rent, with the object of causing a forfeiture, the emphyteuta was empowered, in the

presence of witnesses, to deposit the money in sealed bags; and this tender was equal to payment. (C. 4, 66, 2.)

Transvestitive Facts.

1. By bequest from the emphyteuta. (D. 30, 1, 71, 5.)

2. Alienation by delivery in the lifetime of the emphyteuta. This right was not unqualified. The consent of the *dominus* was necessary, and his acceptance of the new emphyteuta. The owner had the right of pre-emption. The proceedings to be adopted are prescribed by Justinian. (C. 4, 66, 3.) The emphyteuta ought to transmit to the *dominus* formal notice of the sum that a purchaser is willing to give for it. The owner has two months to decide whether he will take the emphyteusis at that sum; and if he wishes it, the transfer must be made to him. If he does not buy at the price named within two months, the emphyteuta can sell to any fit and proper person without the consent of the *dominus*. If such a person is found, the *dominus* must accept him as his emphyteuta, and admit him into possession either personally or by written authorisation, or by attestation, before notaries or a magistrate. For this trouble, the *dominus* was entitled to charge a sum (*laudemium*) not exceeding two per cent. on the purchase-money. If the owner does not make the acknowledgment within two months, then the emphyteuta can, without his consent, transfer his right to another and give him possession.

Remedies.

1. The emphyteuta has an action *in rem* (*utilis*), given after the analogy of the vindication for ownership. 2. If he is only a *bona fide* possessor, he has the *actio Publiciana in rem*. 3. He has all the actions and interdicts requisite to protect his rights of enjoyment, like a usufructuary or owner.

SUPERFICIES.

Definition.

Superficies or *jus superficiarium* is a right to the perpetual enjoyment of anything built upon land, on payment of an annual rent (*pensio*). (D. 6, 1, 74; D. 6, 1, 73, 1; D. 43, 18, 2.)

Rights.

A. Rights *in rem* of *Superficiarius*.—1. Enjoyment and use (*utendi fruendi*). (D. 43, 18, 1, 6; D. 43, 18, 1, 1.) 2. Alienation, pledging, or burdening with servitudes. (D. 20, 4, 15; D. 43, 18, 1, 9; D. 43, 18, 1, 7.)

B. The duties of *Superficiarius* were to pay his annual rent, etc., just as in the case of emphyteusis.

INVESTITIVE AND TRANSVESTITIVE AND DIVESTITIVE FACTS

Same as in emphyteusis.

REMEDIES.

1. *Actio in rem (utilis).* (D. 6, 1, 75; D. 18, 1, 1, 6; D. 43, 18, 1, 3.)

2. The possessory interdicts generally, as an owner or possessor. (D. 43, 16, 1, 5.)

3. Special interdict. The Praetor says: "As under the terms of letting or hiring you enjoy one of the other, the *superficies* in dispute, neither by violence nor by stealth nor by leave, I forbid any violence to be used in order to hinder the enjoyment. If any other action in regard to the *superficies* is demanded, after hearing the case (*causa cognita*), I will give it." (D. 43, 18, 1, pr.) The object of this interdict was to give a right *in rem*; previously to its introduction, the *superficiarius* could only sue on his contract, or, if he were disturbed by third parties, call on the owner to transfer to him his actions against the disturbers. (D. 43, 18, 1, 1.)

This interdict was introduced after the analogy of the interdict *uti possidetis* and is governed by the same rules (D. 43, 18, 1, 2): *causa cognita*, if for a short period, no *actio in rem*; but if for a long period, an *actio in rem* will be given. (D. 43, 18, 1, 3.)

SECOND SUB-DIVISION.

DEPENDENT RIGHTS *IN REM.*

Rights *in rem*, of which the leading groups have been now enumerated and described, may exist either for their own sake—that is, for the benefit they confer, and for no ulterior purpose—or they may be created, not for their utility to the person that enjoys them, but as a means towards another end. Thus rights of ownership may be given to a man as security for rights *in personam*. If A. owes B. money, B.'s only remedy is against A., and if A. fails, his debt is worth nothing; but if A. gives B. property, which can be converted into money on condition that if A. fails to discharge his debt, B. may sell the property and pay himself out of the proceeds, B.'s position is very much strengthened. Such, then, is the aspect of a pawn or mortgage towards a creditor; it is a mode of strengthening the weak point of all mere rights *in personam*, by giving the creditor valuable rights that avail against the whole world.

As regards a debtor, a mortgage may be looked at in another light; it is a way by which he may obtain temporary accommodation without entirely parting with his property. The first device by which this was accomplished in the Roman law was simple. An actual conveyance was

executed by the borrower to the lender, with an agreement (*contractus fiduciae*), that if the purchase-money were repaid by a day named, the lender would re-convey the property to the borrower. The conveyance was formal and effectual in law to vest the ownership in the lender. How long this continued to be the only mortgage known to the Roman law it is not easy to guess; but at some period unknown a revolution in the character of the mortgage was very quietly accomplished by a simple edict of the Prætor. By the old arrangement, the borrower obtained his accommodation at a great risk. He gave up his ownership (*jus in rem*), and got in exchange only an action against the lender (*jus in personam*), who might meanwhile have sold the property, and deprived the borrower of his remedy. The borrower ran a serious risk, and was, in fact, left very much to the honour of the lender. It is curious to observe with what emphasis of vituperation Cicero denounces unjust lenders; because it shows that the instinctive desire of the lawgivers was to strengthen the weak point of the mortgage. Where the law is weak, honour is strong. Thus, a lender who on being paid his money, refused to restore the property, or had deprived himself of the means of doing so, was held to be infamous. (Cicero pro Caecina, 3, 7-9.)[1]

[1] The completeness of our system of laws makes it difficult for us to realise the sentiments of persons in a progressive community, where legal remedies are imperfect. "A debt of honour" is, however, even in these days usually paid in preference to legal debts. If, then, the fear of disgrace makes a man pay such a debt, to which a discreditable odour always clings, we can understand how powerful the same motive was when the debt was held to be binding in conscience by public opinion. In truth, the social sanction, as it precedes in time the sanction of law, so it continues, while the law is imperfect, to afford a substitute by no means inefficient. In very small communities the social sanction is most powerful; and, indeed, the want of legal remedies begins to be keenly felt only when communities become so large as to impair the effective operation of the social sanction. "Customary law," as it is sometimes called not very accurately, rests in small communities upon the solid basis of the social sanction, enforced in case of necessity by exclusion from the society. At this stage, "custom" is more correctly described as "positive morality," in the sense explained by Austin, that is, not the dictates of a man's conscience, but the rules that his neighbours require him to observe on pain of their displeasure.

In Rome, a curious survival existed in the shape of *infamia*, an institution partly legal, partly political. The distinguishing feature of the ancient jurisprudence of Rome is its intense Formalism. Even when tribunals were fully established, and unquestioning obedience was given to the civil jurisdiction, the law hesitated to interfere, except when the transactions were of the most formal and solemn character. To abridge the gulf that thus separated the "positive law" from the "positive morality" of the Romans, power was given to the censor to brand offenders with ignominy in the

The change introduced by the Prætor was one that, without really weakening the security of the lender, gave complete protection to the borrower. It proceeded on the distinction already described between possession and property. Let the

---

Register of citizens, and to degrade a member of the Senate or order of *Equites*, or to remove a man from his tribe, and thus deprive him of the right to be a soldier. In this way, the sanction of public opinion came almost to merge in a legal institution; but the imperfection of the machinery necessarily limited its application to gross breaches of confidence and to offences of a criminal character, that were not yet brought within the scope of the criminal law.

Various instances have been mentioned in which a defendant, in addition to ordinary damages, was subjected to *infamia*. A condemnation for theft, robbery, *injuria*, or fraud, entailed infamy. So a partner, a *mandatarius*, a *depositarius*, *tutor*, a mortgagee (in *contractus fiduciae* only), if condemned for wilful breach of duty, was held to be infamous. (D. 3, 2, 1; Cic. pro Caec., 7-9.)

The exact consequences of *infamia* have been the subject of dispute. The reason appears to be that *infamia* was a republican punishment, carrying with it exclusion from political life; not merely from office (*honores*), but even from the right to vote in elections (*suffragium*). The exclusion from public offices seems to have been continued under the Empire. (C. 12, 1, 2; D. 48, 7, 1, pr.) Another effect of *infamia* was exclusion, under the edict of the Prætor, from the office of attorney. No one could act on behalf of another in a lawsuit, if he were infamous within the meaning of the edict. (D. 3, 1, 1, 5.) This implied that the infamous person could not bring a *popularis actio* (D. 47, 23, 4), unless he had a personal interest in the result of the action. (J. 4, 13, 11.) Again, no infamous person could act as *adsessor* to a magistrate. (D. 1, 22, 2.) When infamy was attached to a man by judgment of a court of law, it could be removed only by the authority of the Emperor. (D. 3, 1, 1, 10.)

Another disability imposed on the *infames* during the Empire was removed by Justinian. The *lex Julia et Papia Poppaea*, while having for its main object the encouragement of marriage, introduced certain restraints on marriage with the object of preventing high-born persons contracting marriage with those beneath their station. It also prohibited freeborn men from marrying certain classes of women. According to the interpretation put upon the *lex Julia* by the jurisconsults, the restriction was extended to all persons declared infamous. But Justinian repealed the *lex Julia* in so far as it imposed restraints on marriage, and thus deprived *infamia* of one of its stings.

It is a moot point whether *infamia* rendered a person incapable of being a witness to a legal transaction or in a court of law. Savigny's opinion is, that infamous persons were not *as such* excluded from giving evidence, but that most of the persons disabled from acting as witnesses by special statutes were at the same time infamous. The XII Tables contain a provision that if a witness to a *mancipatio* refuses to give evidence in support of the transaction, he shall be infamous (*improbus*) and *intestabilis*.[1] The interpretation put upon the word *intestabilis* in later times, was not merely that the infamous person could not be a witness in court (D. 22, 5, 15, pr.), but that he could not take part in any transactions requiring witnesses. (D. 28, 1, 26.) Thus he could not make a will. But it would appear that the special disability expressed by the word *intestabilis* existed only when created by a special statute, and therefore was not in all cases a result of *infamia*.

---

[1] *Qui se sierit testarier librepensve fuerit, ni testimonium faiatur, improbus intestabilis que esto.*

lender in effect, said the Prætor, have the possession of the property; but let the ownership remain with the borrower: let him retain his right *in rem*, and all the benefits (as, *e.g.*, *usucapio*) that are attached to ownership. The lender has the actual possession, and (if so agreed upon) the right of sale (guarded by conditions preventing an improper or wrongful sale), which make him as secure as if he were owner; the borrower is still owner, and has therefore a remedy, not only against the lender, but against the whole world. This then was a typical mortgage, in which the lender obtained as much, and only as much, as was necessary to secure his loan, and the borrower, with the smallest possible loss, obtained the accommodation that he desired. This is the *pignus* of the Roman law.

When first authorised by the Prætor, the *pignus* was constituted on a narrow but instructive basis. The Prætor sanctioned such a security only when the thing in question was actually given into the possession of the lender. Hence the difference between the contract of *fiducia* and that of *pignus:* in the former, there was a formal conveyance by *mancipatio* or *cessio in jure* (G. 2, 59); in the latter, there was no conveyance, but only change of possession. Once the thing was in his possession, the lender had the right of sale; otherwise, he had not.

But although an improvement on the *fiducia*, the *pignus* was still inconvenient. The lender did not always desire the possession of the thing pledged, nor did the borrower always wish to part with the possession. Loss might be inflicted on the borrower without any corresponding benefit to the lender. Plainly, then, a last step remained to be taken,—to dispense with the transfer of possession. The last, or rather the penultimate step, was due to one Servius, of whom nothing seems to be known but the name, and that he lived before Cicero, who introduced an action by which he gave the landlord of a farm a right to take possession of the stock of his tenant for rent due, when the tenant had agreed that the stock should be treated as a pledge. This was the *actio Serviana*. It was extended, under the designation of *Actio quasi-Serviana*, or *hypothecaria*, to all cases in which it was agreed between borrower and lender that anything should be a pledge when possession was not delivered to the lender. Hence arose the *hypotheca*, or pledge of a thing by mere agreement (without any

formality), and without the delivery of possession. The remedy of Servius availed not only against the borrower, but against all other persons, and thus established a true right *in rem*. On the other hand, the borrower kept his property in his possession, and enjoyed it until he made default in the payment of his debt; thus suffering no present inconvenience, and being enabled to borrow on the most advantageous terms.

It must not be supposed that because the three stages marked by the words *Fiducia*, *Pignus*, *Hypotheca*, were successive, that upon the introduction of the higher process the lower disappeared. In point of fact, pledges with and without possession continued to exist, and were subject to precisely the same rules, so that they fall to be considered together, and may in fact be treated as one. (D. 20, 1, 5, 1.) The earliest (*fiducia*) long co-existed with the other two, and may have flourished up to the time of Constantine. That Emperor, however, gave it a death-blow, for he abolished the *lex commissoria*, which was of the essence of the *fiducia;* namely, that if the money borrowed were not repaid by a given day, the pledge would be forfeited, and become the absolute property of the lender. Moreover, when the ancient forms of conveyance, *mancipatio* and *cessio in jure*, fell into disuse, the *fiducia* lost the other pillar upon which it rested; and in the time of Justinian, if not earlier, it had passed into oblivion.

FIDUCIAE CONTRACTUS.

Definition.

A *contractus fiduciae* is when anything is conveyed by *mancipatio* or *cessio in jure*, with the condition that if a certain sum is paid by a certain day, the thing shall be re-conveyed.[1]

Rights.

A. Rights of Creditor. I. Rights *in rem*.

1. The creditor to whom anything is conveyed (*fiduciae causa*) is owner, and may convey the property. Thus, if a creditor bequeaths the thing to some legatee, the debtor who conveyed the property must sue not the legatee for the thing, but the heir of the deceased for damages. (Paul, Sent. 2, 13, 6.)

2. The creditor has an inalienable right to sell. An agree-

[1] *Fiducia est cum res aliqua sumendae mutuae pecuniae gratia vel mancipatur vel in jure ceditur.* (*Isidor. Orig.* V. 25, 28.)

ment that he should not have power to sell, if the debtor made default, is void; but it is valid so far that the creditor must make a formal notification (*solenniter denuntiare*) to the debtor before proceeding to the sale. (Paul, Sent. 2, 13, 5.)

II. Right *in personam.* The creditor is entitled to expenditure on improvements (*si creditor rem fiduciariam fecerit meliorem*). (Paul, Sent. 2, 13, 7.) A second mortgagee has a right to pay off a prior mortgagee and get possession. (Paul, Sent. 2, 13, 8.)

B. Rights of Debtor.

I. Rights *in personam.* 1. He may sell the property if it will yield a surplus, and the creditor is bound, on receiving his money, to remancipate the property, and enable the debtor to give a good title to the purchaser. (Paul, Sent. 2, 13, 3.) But he cannot sell to the creditor, who is in law already owner (D. 13, 7, 40, pr.); nor can the creditor buy it even through or in the name of another person, unless with the consent of the debtor. (Paul, Sent. 2, 13, 4.)

2. If the creditor sells [before the day named for forfeiture (?)], the debtor is entitled to any surplus after discharging the claim of the creditor. (Paul, Sent. 2, 13, 1.)

3. The debtor is entitled to a reconveyance on paying the sum agreed upon within the time agreed upon.

4. All that is gained through a slave pledged, goes to reduce the principal debt. (Paul, Sent. 2, 13, 2.)

INVESTITIVE FACTS.

Mancipatio, Cessio in jure.

DIVESTITIVE FACTS.

1. Fulfilment of condition, default of debtor. (*Fiducia committitur*),—(*Cic. Pro Flacco*, 21, 49-51).

2. *Usureceptio.*

There are still some further grounds on which a man can acquire by *usucapio* what he knows to be another's. For suppose a man has given by *mancipatio* or by *in jure cessio* some property to another *fiduciae causa*, and then himself comes to possess that same property, then he may acquire it by *usucapio* within a year, and that even if it be landed property. This kind of *usucapio* is called *usureceptio*, because that which we once had we now recover by *usucapio*. (G. 2, 59.)

Now every *fiducia* is contracted either with a creditor in right of the pledge, or with a friend, that our property may be in greater safety with him. If, then, it is with a friend, *usureceptio* is certainly open to us in any case. But it with a creditor, it is open to us in any case only if the money is paid. So long, however, as it is not paid, *usureceptio* is open only if the debtor has neither hired the property from the creditor, nor asked to be tenant-at-

will (*precario*). But if not, a gainful *usurceptio* is open to the debtor (G. 2, 60.)

Remedies.

A. Rights *in personam* of Creditor. *Actio fiduciae contraria.* (Paul, Sent. 2, 13, 7.)

B. Rights *in personam* of Debtor. *Actio fiduciae directa.*

This was an action *bonae fidei*, and condemnation involved infamy. (Cic. pro Caecina, 7-9.)

PIGNUS AND HYPOTHECA.

Definition.

Between *pignus* (pledge) and *hypotheca* (mortgage) there is no difference, so far as regards the *actio (quasi-Serviana)* for recovery. For when creditor and debtor agree that any property shall be bound by the debt, then that property is included under both those names. But in other points there is a difference. For under the name *pignus* is properly included, as we say, what is at the time handed over to the creditor, especially if moveable; whereas, that which is not handed over, but is made liable by the bare terms of the bargain, is properly included under the name *hypotheca*. (D. 4, 6, 7.)

The distinction between *Pignus* and *Hypotheca* had nothing to do with the difference between moveables and immoveables; but some jurists thought, erroneously, that *pignus* was confined to moveables. (D. 50, 16, 238, 2.)

Generally a *pignus* or *hypotheca* consisted of rights *in rem* over slaves or things, given as security for rights *in personam*. But it might consist of a right *in personam* that the debtor had against a third party, given as security to the creditor for a sum due by the debtor.

Gaius is a creditor of Titius for 50 *aurei*, and Gaius owes Maevius 20 *aurei*. Gaius may convey to Maevius his (Gaius') right to sue Titius for 50 *aurei*, as a security for the 20 *aurei* he owes to Maevius. If, in enforcing this security, Maevius recovers the 50 *aurei* from Titius, his debt is wiped off, and he must hand the balance to Gaius.

Suppose, instead of 50 *aurei*, Titius owed Gaius a slave on a contract of sale, and that Maevius recovered the slave from Titius. Then Maevius would hold the slave as a pledge for the 20 *aurei* Gaius owed him. (D. 13, 7, 18, pr.)

Again, Titius gives a loan of 100 *aurei* to Gaius to rebuild his house, and, as we shall see, acquires an implied hypothec over the house. It was agreed that the rents of the tenants also should be hypothecated to Titius. Then Titius can sue the tenants (by *utilis actio*), and compel them to pay him over their rents. (D. 20, 1, 20.)

Rights and Duties.

A. Rights *in rem*.

(*a*.) Rights *in rem* of creditor.

1. If the creditor is not in possession, and if he is in a position to sue the debtor for the debt, he can bring an action to recover the possession of the hypothec from him or from anyone in whose hands it is. (C. 8, 14, 18; D. 20, 1, 17; C. 8, 28, 12; C. 8, 14, 15.)

If there is an agreement that the creditor shall not sue for one year, the same period will be applied to the hypothec. (D. 20, 6, 5, 1.) If the obligation is conditional, possession of the hypothec can be demanded only when the condition has occurred and the debt become due. (D. 20, 1, 13, 5.)

II. The right of sale.

On the other hand, a creditor can by agreement alienate a pledge although it is not his property. But perhaps this may seem to be done on the understanding that it is the wish of the debtor that the pledge should be alienated; for he originally made the agreement that the creditor might sell the pledge if the money were not paid.

But lest creditors, on the one hand, should be hindered in pursuing their rights, and lest debtors on the other should too hastily lose the ownership of their property, we have, by our constitution, taken measures and fixed a regular course of procedure in the enforced sale (*distractio*) of pledges, by which sufficient and ample provision is made for the interests of both parties. (J. 2, 8, 1; C. 2, 64.)

The provisions made by Justinian were as follow: — If the parties agreed as to the manner, time, etc., of the sale, their agreement was to be observed; if nothing was said in the contract as to the power of sale and the creditor wished to sell, he must, if he had possession, give formal notice of his intention to the debtor; or, if he had not possession, obtain a judicial decree; and after two years from either of those events he could sell. (C. 8, 34, 3, 1; D. 13, 7, 4; D. 13, 7, 5.)

If the same thing has been hypothecated successively to several persons, only the first of them has the power of sale, unless a subsequent creditor has, in the modes hereafter to be described, put himself in the place of the first. (D. 20, 5, 5, pr.; C. 8, 18, 1; C. 8, 18, 8; C. 8, 18, 5.)

The power of sale being given to secure a debt, cannot be exercised until the debt really exists (D. 20, 5, 4); *i.e.*, until the creditor is in a position to sue the debtor; and it ceases, if the principal and interest are paid. (C. 8, 29, 2.) But the power remains until the *whole* of the debt is discharged; and, therefore, so long as any part of the debt is unpaid (C. 8, 28, 6), or of the interest, or of the expenses necessarily incurred by the creditor, the creditor retains the power of sale. (D. 13, 7, 8, 5.)

A hypothec is made to secure an annual payment, to come into effect only if the money is not paid on each proper day (*nisi sua quaque die pecunia soluta est*). A sale cannot take effect until the last instalment is due and unpaid. If, however, the phrase is that it comes into effect if any of the money is not paid on the proper day (*si qua pecunia sua die soluta non erit*), the property may be sold after default of the first instalment. (D. 13, 7, 8, 3.)

III. The right of foreclosure.

The *Fiducia* was essentially a self-acting foreclosure; if the

debtor did not pay by the day named, the pledge became the absolute property of the creditor. After the analogy of this contract, in all probability, was introduced what is called the *lex commissoria*, or condition that the pledge should be forfeited to the creditor if payment was not made within the time limited. As we have seen, this condition could be inserted in mortgages down to the time of Constantine. (C. 8, 35, 3.) About a century earlier, however (A.D. 230), Alexander introduced a new kind of foreclosure, which was afterwards more fully developed by Justinian. According to Alexander's constitution there must be a public notification of the hypothec and a year's delay. Finally, the ownership could be got by the creditor only by special petition to the Emperor. (C. 8, 34, 1.)

Justinian allowed foreclosure only when the creditor was unable to find a buyer at an adequate price. If the debtor and creditor live in the same province, the creditor must give formal notice after two years from the time that the obligation has accrued. If they live in different provinces, the creditor must apply to the provincial judge, who will serve a notice on the debtor, giving him a certain time to come in and pay the debt. (C. 8, 34, 3. 2.) If the debtor cannot be found, the judgment gives him a certain time to appear; if he does not appear, or appearing does not pay, the creditor will obtain the ownership on petition to the Emperor. After that the debtor has still two years' grace; but if he does not pay all principal and interest within that time, the ownership of the creditor becomes irrevocable. (C. 8, 34, 3, 3.)

IV. Right to hypothecate and to let the thing hypothecated, or to transfer the hypothec to another. (D. 20, 1, 23, pr.)

A. is creditor of B., and has got the Tusculan farm hypothecated to secure the debt. A. can in turn give this farm to C. as security for a debt due by him to C. (C. 8, 24, 2; D. 20, 1, 13, 2; D. 44, 3, 14, 3; C. 8, 24, 1.)

If, however, B. pays off A.'s debt, then C.'s hypothec is at once annihilated. (D. 13, 7, 40, 2.)

A., instead of hypothecating the land, could sell the hypothec, so that another should succeed to his place. (D. 20, 4, 19.)

(*b.*) Rights *in rem* of the debtor.

Subject to the rights of the creditor, the debtor still remains owner (*dominus*), and therefore can sell the thing hypothecated, but without prejudice to the creditor (C. 8, 14, 9); and may, under a rescript of Severus, sell it even to the creditor. (D. 20, 5, 12, pr.; C. 8, 14, 13.) Also, all accessions to the thing

hypothecated belong to the debtor, and he suffers any loss that may arise by injury or evil befalling it. (D. 20, 1, 21, 2; C. 4, 24, 9.) Hence, whatever is acquired by a hypothecated slave goes to reduce the principal or interest of the debt. (Paul, Sent. 2, 13, 2.)

B. Duties (reciprocal) of Creditor and Debtor.

(*a.*) Duties of creditor = Rights *in personam* of debtor.

I. To return the thing hypothecated if in his possession when the obligation for which it was given has been discharged, or tender of payment has been made. (D. 13, 7, 9, 3; D. 13, 7, 40, 2; D. 13, 7, 20, 2.) It would appear that the creditor could retain the pledge unless other money that he lent without hypothec was also repaid him, at least if he had possession. But this was only as against the debtor. (C. 8, 27, 1.)

A creditor, too, that has received a pledge is under an *obligatio re*. For he is liable to an *actio pigneratitia* to make him give up the thing he received. (J. 3, 14, 4.)

II. If the creditor exercises his power of sale, he must give the surplus, after paying himself, to the debtor. (D. 13, 7, 42.) If he has not got the money, the debtor may require him to give his authority to sue the purchaser. (D. 13, 7, 24, 2.)

III. If he is in possession, the creditor gathers the crop and sets it off against the debt. (C. 4, 24, 1; C. 4, 24, 3.) This includes the services of slaves and the rent of houses (C. 4, 24, 2), and generally every benefit derived from the property. Hence also any damages the creditor may have received on account of things stolen must be added, unless the debtor was the thief. (D. 13, 7, 22, pr.; D. 47, 2, 79.)

The creditor, if it were part of the contract, might, however, keep the produce (*fructus*) instead of interest; and this was a well-known arrangement called *antichresis*. (*Ut creditor pro pecuniae debitae usuris, fructus rei pignoratae habeat.*) (D. 20, 1, 11, 1; D. 13, 7, 33.)

IV. Generally, the creditor is answerable for wilful or negligent harm.

But since a pledge is given for the good of both parties—for the debtor's good, because the money is more readily lent him; for the creditor's, because the money he lends is in greater safety—it is held to be enough that the creditor in guarding the property should use all possible (*exacta*) diligence. If he does this, and yet by some chance mishap loses the property, he is not answerable; nor is he hindered from claiming the money lent. (J. 3, 14, 4.)

(*b.*) Duties of debtor = Rights *in personam* of creditor.

I. If he is in possession by gratuitous permission or hire from the creditor, and the creditor sells, he must deliver up possession, and is liable for damages if he does not. (D. 13, 7, 22, 3.)

II. He must pay all necessary expenses incurred by the creditor for the property hypothecated; as, *e.g.*, repairing a house, or medical attendance on a slave, although the slave died and the house afterwards was burned. (D. 13, 7, 8, pr.)

A question arises whether expenses not necessary, but beneficial to the property, ought to be allowed. Paul speaks generally of improvements (Paul, Sent. 2, 13, 7), which would include beneficial expenditure (*utiles impensae*). Ulpian speaks with more hesitation. (D. 13, 7, 25.) He recommends a middle course to the judge: on the one hand, not to be too burdensome on the debtor; and on the other, not to be too fastidious in disallowing beneficial expenditure by the creditor. He puts two cases illustrative of his meaning. A creditor teaches slaves a handicraft or skilled work. If this was done with the consent of the debtor, of course the expenditure must be allowed; also, if the creditor only followed up what had already been begun. Necessary instruction must also be allowed, but further than that Ulpian was not inclined to go. The other case is somewhat different. A large forest or pasture is hypothecated by a man who is scarce able to pay the creditor; this creditor cultivates it, and makes it worth a great deal of money. Ulpian thought it was too hard that the debtor should thereby be improved out of his property.

III. He must pay all damage sustained by the creditor through the use of the thing hypothecated. Thus, if he knowingly hypothecates a slave, a habitual thief, he must pay all damage suffered by the creditor, and cannot escape by surrendering (*noxae deditio*) the slave to the creditor. (D. 13, 7, 31; D. 47, 2, 61, 3.) But if he were ignorant of the character of the slave, he was permitted the indulgent alternative. (D. 47, 2, 61, 1.)

c. Rights of Concurrent and Subsequent Creditors among themselves.

I. When several creditors acquire their hypothec in the same thing at the same time, they have equal rights: one has no preference over the other. (D. 13, 7, 20, 1.)

II. When the same thing is hypothecated at different times to several persons, he that has the first hypothec excludes all the others; he is entitled to be paid in full, and the balance only is distributed among the subsequent creditors in the order of priority.

What is priority in time? The time in question is the date of the contract of hypothec, not of obtaining possession, nor of the debt for which the hypothec is given.

Titius hypothecates his farm to Maevius, and nothing is said about a power of sale; afterwards he hypothecates the same farm to Gaius, giving him an express power of sale, and delivers to him possession. Maevius is prior, and is entitled to be paid in full before Gaius gets anything. (D. 20, 4, 12, 10.)

Marcus gives a loan to Fabius without security, and afterwards Fabius borrows from Gallus, and gives him a hypothec on his estate. Then Fabius gives Marcus a hypothec on the same estate. Gallus is first, because, though his debt is later, his contract of hypothec is earlier. (D. 20, 4, 12, 2.)

Servius promised money to Gaius conditionally, and by way of security at the same time hypothecated his farm. Before the condition was fulfilled Servius accepted a loan from Titus, and hypothecated the same farm to him. Afterwards the sum promised to Gaius became due, the condition having been fulfilled. Which was prior, Gaius or Titus? Gaius is first, because, according to the rule of Roman law, when a condition was fulfilled, the obligation was regarded as taking effect from the moment it was made; and thus Gaius was first with the obligation as well as the hypothec. (D. 20, 4, 11, 1.)

An heir pledges a farm belonging to himself as security for a conditional legacy that he is bound to pay. Afterwards he pledges the same farm for money lent to himself. The condition of the legacy is fulfilled, and it becomes payable. The legatee is preferred to the lender, because of the retroactive effect of a fulfilled condition. (D. 20, 4, 9, 2.)

Priscus hired a bath from Julius from the next kalends, and agreed that his slave Eros should be security for the rent. Before the kalends Priscus borrowed money from Maevius, and hypothecated Eros to him. In this case Julius had priority to Maevius, although there was nothing actually due for rent at the time Maevius made his advance. The reason assigned is, that the hypothec was attached to the contract of hire in such a manner that, without the consent of Julius, it could not be got rid of. Julius had the first hypothec. (D. 20, 4, 9, pr.)

Gallus agrees with Sempronius to lend him money by a certain day, the farm of Sempronius to stand as security. Then, before any money had been advanced, Sempronius borrowed from Titius, and hypothecated the same farm. Gallus afterwards advanced money, under the agreement, to Sempronius. Which has priority, Gallus or Titius? It seems Titius had the priority. The distinction between this and the former case seems to be as follows: When Priscus hired the bath, it was out of his power to prevent the obligation accruing for the security of which the hypothec was granted. Unless he were relieved by Julius from the contract of hire, the rent became due by the mere lapse of time, whether Priscus occupied the bath or not. In the second case, Sempronius certainly was not bound to accept any money from Gallus, even—which is doubtful—if Gallus were bound to advance the money. It lay, therefore, entirely with Sempronius whether any obligation would be incurred towards Gallus or not. This seems to distinguish the case from conditional obligations, in which the condition is out of the power of the debtor; and thus no obligation arose between Gallus and Sempronius until Gallus actually advanced his money. This being posterior to the advance of Titius, the latter, accordingly, had priority. (D. 20, 4, 1, 1; D. 20, 4, 11, pr.)

A farmer (*colonus*) agreed with his landlord, Titius, that the stock brought on the farm should be hypothecated for the rent. Before bringing to the farm part of what would be stock he pledged it for a loan to Maevius. Then he brought it to the farm. Here Maevius has the priority, because the agreement with the landlord did not give him a hypothec until the stock was actually on the farm. (D. 20, 4, 11, 2.)

A person that pays off a prior creditor is entitled to priority.

Seius borrowed from Titius, and hypothecated to him a house. Then he borrowed from Maevius, hypothecating the same house. Gaius now advanced money to Seius

to enable him to pay off Titius, on condition that he should have the hypothec that had been given to Titius. Gaius is prior to Maevius. (D. 20, 4, 12, 8.) But the contract must be clearly on the condition that the same thing should be hypothecated, and that Gaius should take the place of Titius (*ut idem pignus ei obligetur, et in locum ejus succedat*). (C. 8, 19, 1.) In the same case, Maevius had a right to pay off Titius (*jus offerendi*) on tendering the amount of the debt and interest for which the house was hypothecated. (C. 8, 19, 4; D. 20, 4, 20.)

Lucius Titius advanced money on interest on a hypothec; and to the same debtor Maevius advanced money afterwards on the same security. Is Titius entitled to priority for the interest due—not only before, but after the advance of Maevius? He is entitled to the whole of the interest and principal. (D. 20, 4, 18.)

Maevius advanced a sum to Titius on a hypothec of a house, and afterwards Seius lent 50 *aurei* on a hypothec of the same house. Subsequently Maevius made a further advance of 40 *aurei* on the same security. Suppose the house was not worth more than the first advance of Maevius and the 50 *aurei* of Seius. If Seius paid Maevius the first advance and interest, he was entitled to hold the house, and pay himself before Maevius could claim the second advance of 40 *aurei*. (D. 20, 4, 20.)

EXCEPTIONS to the rule of priority.

The Romans had no registration of mortgages, either for moveable or immoveable property. But if a hypothec were made by a public deed—*i. e.*, sealed in the presence of witnesses and prepared by a notary (*tabellio*)—it had priority over hypothecs attested only by private documents. Leo gave the same privilege of priority to a private writing signed by three good and respectable witnesses (C. 8, 18, 11); and Justinian continued and confirmed the privilege. (Nov. 73, 1.) But in certain cases priority in time was postponed to other considerations.

1. The Imperial Exchequer (*Fiscus*) came before all creditors for arrears of fines. (C. 4, 46, 1.)

2. If money was advanced to buy office (*militia*) expressly on the condition of obtaining priority, the loan obtained priority. (Nov. 9, 7, 4.)

3. A married woman has the first preference in suing for the recovery of her *dos*, but she has no preference in respect of the *donatio ante nuptias*. (C. 8, 18, 12, pr.-2.)

We have also given her an implied mortgage (*hypotheca*); and further, we have held that she is to be preferred to other mortgagees, but only when she is trying in person to recover her dower. It is forethought for her alone that has led us to bring in this rule. (J. 4, 6, 29.)

4. An advance of money on the security of any house or property for the purpose of preserving it from destruction, ranks next in order of preference. (D. 20, 4, 5.)

Other privileged hypothecs rank according to their priority in time, but are preferred to all non-privileged hypothecs.

1°. The hypothec of pupils over property bought by their tutors with their money. (D. 20, 4, 7, pr.; C. 7, 8, 6.)

2°. The hypothec of one that advances money, or pays for the rebuilding of a house, on that house. (D. 42, 5, 24, 1.)

3°. The hypothec that one has over a thing bought with his money, if he has specially bargained for it at the sale. (C. 8, 18, 7.)

Other hypothecs took the rank determined by their order in time; and it need hardly be added, that all secured creditors were preferred to those that were not secured by pledge or hypothec. (C. 8, 18, 9.)

Investitive Facts.

A. Modes of Creating a Hypothec.

(A.) By agreement between debtor and creditor.

I. Simple agreement (*nuda conventio*), without any formality, without writing, and without delivery of possession. (D. 13, 7, 1, pr.) This was strictly *hypotheca*. The precise words are immaterial, provided they disclose an undertaking that anything shall be hypothecated to secure the performance of any obligation. (D. 20, 1, 4.) Thus, a person in his absence might hypothecate his property by letter or messenger. (D. 20, 1, 23, 1.) The agreement was generally in writing, but that was not essential. (C. 8, 14, 12.)

II. Simple agreement, with delivery of possession to the creditor (*pignus*). (D. 13, 7, 1, pr.)

III. By last will. If the debt is in existence, the hypothec dates from the death of testator; if not, then from the existence of the debt. (D. 13, 7, 26, pr.)

(B.) By operation of law (*tacita hypotheca*).

Certain persons in respect of certain debts were invested by special enactments with a hypothec over the whole or particular parts of the property of their debtors. We may divide those cases into two groups, according as the creditor had a hypothec over all the property of his debtor, or over particular things only.

(*a*.) Implied hypothec over all the property of the debtor.

1. The hypothec of the Exchequer (*Fiscus*) extended to all the property of its debtors, and even of the sums due to them (*nomina*) if they were ascertained and undisputed (*liquida*), whether the debt was for taxes or contract. (D. 49, 14, 46, 3; C. 8, 15, 1; C. 8, 15, 2; C. 4, 15, 3.)

2. The husband had a hypothec for the *dos*, if he were evicted from the dotal property. (C. 5, 13, 1, 1.)

3. A wife or her heirs had a hypothec over the husband's property for the restitution of her *dos*. (C. 5, 13, 1, 1.)

4. Pupils and minors had a hypothec over the property of tutors and curators, as security against maladministration. (C. 5, 37, 20.)

5. So children under *potestas* over the property of their father in respect of the property coming to them on the mother's side (*bona materna*). (C. 5, 7, 8 ; C. 6, 61, 6, 4.)

6. So also legatees and *fideicommissarii* over the property of the deceased, in security for the payment of their legacy or trusts. (C. 6, 43, 1 ; C. 6, 43, 3 ; Nov. 108, 2.)

(*β*.) Implied hypothec over specified property of the debtor.

1. The most important instance was URBAN HYPOTHEC. This was an implied hypothec that the landlord had over the furniture in the house hired from him, as security for the rent, and all other claims that he might have against his tenant (*inquilinus*) arising out of the contract of letting. (D. 13, 7, 11, 5 ; D. 20, 2, 4, pr.) This hypothec was originally confined to Rome and its suburbs, and was extended to the provinces only by Justinian. (C. 8, 15, 7.) It applied to granaries (*horrea*), inns (*deversoria*), and threshing-floors (*areae*), as well as to dwelling-houses, but not to farms (*praedia rustica*.) (D. 20, 2, 4, 1 ; C. 8, 15, 5.)

In one respect this implied hypothec was peculiar. It did not prevent the manumission of any of the household slaves (D. 20, 2, 6), unless owing to arrears of rent steps had been taken to enforce the hypothec. (D. 20, 2, 9.) The proper mode was to send a public official to the premises to make an inventory, and put a mark on the property, after which the tenant could not deal with it. (D. 19, 2, 56 ; D. 47, 10, 20.)

2. RURAL HYPOTHEC was not of the same extent as urban hypothec. In the case of urban hypothec, all things brought (*invecta et illata*) for use on the premises, even without the knowledge of the tenant, were included in the security ; but in the case of urban hypothec only by special agreement, and then only things brought for permanent use. (C. 4, 6, 5, 5 ; D. 20, 2, 7, 1 ; D. 20, 1, 32.) But the landlord had an implied hypothec over the crops (*fructus*). (D. 20, 2, 7, pr.) The hypothec attaches to the crop (*fructus*) from the moment it is gathered.

3. A person that lent money expressly to rebuild a house, or

paid the cost of rebuilding, had an implied hypothec over the house. (D. 20, 2, 1.)

4. Pupils have a special hypothec over property bought by their tutors with their money. (D. 27, 9, 3, pr.; C. 7, 8, 6.) Justinian gave members of the corporation of bankers (*collegium argentariorum*) a special mortgage on immoveables, bought by their clients with money advanced by them. (Nov. 136, 3.) But generally, a person with whose money anything was bought had no hypothec over it, unless by express agreement. (C. 8, 14, 17.)

B. In respect of what Obligations could a Hypothec be contracted?

Generally, it may be said, every obligation (*jus in personam*) could be reinforced by hypothecation, whether it were conditional or unconditional, and whether past, present, or future. The obligation might be one that could not be given effect to by any action (*naturalis obligatio*) (D. 20, 1, 5, pr.), unless where the result would have been to evade a positive law, such as the *Senatus Consultum Macedonianum* or *Senatus Consultum Velleianum*. (D. 20, 3, 2.) The person that gives the hypothec need not be the debtor; any one may give a hypothec over his own property for an obligation incurred by another, whether that obligation was or was not incurred on his behalf. (D. 20, 1, 5, 2; D. 13, 7, 9, 1.)

C. What Rights may or may not be hypothecated.

The general rule was that whatever could not be sold (because it was not *in commercio*) could not be hypothecated. (D. 20, 3, 1, 2; D. 20, 1, 24.) Hence freemen, or *res divini juris*, could no more be hypothecated than sold. (C. 8, 17, 3; C. 8, 17, 6.) But one that had a power of sale, although not owner, as a tutor or procurator, could hypothecate. (D. 13, 7, 11, 7; D. 20, 1, 11, pr.)

What accedes to anything hypothecated falls under the hypothec, and is added to the security of the creditor. The creditor has thus the same rights over the children of a female slave as he has over the slave herself. (C. 8, 25, 1; D. 20, 1, 29, 1.) So a house built on hypothecated land is subject to the hypothec. (D. 13, 7, 21.)

Divestitive Facts.

I. By the extinction of the obligation to secure which the hypothec was created. The obligation must be *wholly* ex-

tinguished before *any* portion of the hypothecated property can be reclaimed. (D. 20, 1, 19; D. 13, 7, 8, 1; C. 8, 28, 6.) The creditor, as has been observed, could retain the property until all his expenses were paid (D. 20, 6, 1, pr.), and interest, if such had been included in the agreement. (D. 20, 1, 13, 6.) If the creditor refused payment, then by a proper tender of the amount due, *i.e.*, by offering the money deposited in a sealed bag (*deponere consignatum*), the hypothec was released. (C. 8, 25, 2.)

II. By sale of the property hypothecated. Sale extinguishes the hypothec, but does not release the debtor, except in so far as the amount obtained sufficed. (D. 12, 1, 28.)

III. By voluntary release of the things hypothecated (*remissio pignoris*). A release of the creditor might be either express or implied. It was given by implication in numerous ways.

1. By accepting some other security; thus by agreeing that a surety should be taken instead of the pledge. (D. 20, 6, 5, 2.)

2. By consenting to the sale of the thing hypothecated (D. 50, 17, 158), unless the hypothec was expressly reserved. (D. 20, 6, 4, 1.) The mere fact, however, of his knowing that the debtor sold the thing, did not show that the creditor consented (D. 20, 6, 8, 15), unless the sale had been duly advertised, and had taken place with his knowledge and without any objection; in which case his consent was presumed. (C. 8, 26, 6.)

A creditor consented to the sale of a hypothec, if it brought 10 *aurei*. The debtor sold it for 5 *aurei*. As the terms of the consent were not complied with, the hypothec is not lost. On the other hand, if the creditor consented to sell it for 5 *aurei*, and it brought 10, the sale is final, and the hypothec at an end. (D. 20, 6, 8, 14.) If the consent was to a sale within a year, and the thing was sold after the year, the hypothec remained. (D. 20, 6, 8, 18.)

A thing is pledged to Sempronius, and afterwards to Titius. With the consent of Sempronius it is then pledged to Marcus. By this Sempronius loses his hypothec, and if Marcus did not specially bargain to take his place, Titius has priority to Marcus. (D. 20, 6, 12.) But it is really more a question of fact than of law. Did Sempronius intend to give up his hypothec, and did not Marcus intend to take his place? That is the question to be settled by the evidence in each particular case. (D. 20, 4, 12, 4.)

Titius lent money to Seius on the security of a farm, which, however, was already hypothecated to the State. Titius paid off the money due to the State. Maevius appeared claiming a hypothec prior to the State. It appeared, however, that Maevius was a party to the deed of mortgage made by Seius to the State, in which it was warranted that the farm was free from any mortgage. Held that Maevius was estopped from setting up his prior mortgage. (D. 20, 6, 9, 1.)

3. By returning the title-deeds of the property. (C. 8, 26, 7.)

4. By returning the thing pledged to the debtor, not merely for his use during the pleasure of the creditor (*precario*), but with the intention of releasing the pledge. (C. 8, 26, 9.)

IV. By merger (*confusio*). The hypothec is at an end when the debtor becomes the heir of the creditor, or the creditor acquires the ownership of the thing by purchase or otherwise. (D. 20, 6, 9, pr.)

Titius, the *bona fide* possessor of Stichus, pledges him to Maevius, and Maevius gives Titius the temporary use of the slave. Then Gaius, the true owner, dies, leaving Maevius his heir. The hypothecation is at an end, and only the holding at will (*precarium*) exists. (D. 13, 7, 29.)

V. Destruction of the thing hypothecated. If the thing pledged perishes, necessarily all rights in respect of it are at an end. (D. 20, 6, 8, pr.) But the hypothec of raw material was considered to be terminated if that material was converted into a manufactured article; and hence it was usual to insert words to cover the event of specification (*quaeque ex silva facta natave sunt*). (D. 13, 7, 18, 3.) But a mere change in a thing (*mutatio rei*) did not terminate the hypothec. If a house were removed, the ground was still subject to the hypothec (D. 20, 1, 29, 2); or if uncultivated ground were made a vineyard or built upon. (D. 20, 1, 16, 2.)

VI. Prescription. The right *in rem* of the creditor was lost if the thing mortgaged were possessed *bona fide* by anyone (other than the debtor or his heir) for the usual period of ten or twenty years. (C. 7, 36, 1; C. 7, 36, 2.)

Remedies.

A. In respect of Rights *in rem* of Creditor.

I. To obtain possession of the thing hypothecated.

The *actio Serviana* (and also the *quasi-Serviana*, called also *hypothecaria*, for enforcing mortgages) owes its existence to the Prætor's jurisdiction. By the *actio Serviana* a man tries a suit as to the goods of a *colonus* (tenant-farmer) that are held by him as a pledge for the rent of the lands. By the *quasi-Serviana* again, creditors follow up their pledges or mortgages. (J. 4, 6, 7.)

1. This action was *in rem* for the recovery of the thing hypothecated from the debtor, or from any third person having possession of it. (C. 4, 10, 14.)

2. Like other actions *in rem*, it may be brought by the heirs of the creditor. (D. 13, 7, 11, 4.)

3. When the defendant is the debtor, he cannot require the creditor first to sue himself or the sureties for the debt (C. 8, 14, 24); but when another had possession, he could, under the later legislation of Justinian, require the creditor to proceed first against the debtor and his sureties (*beneficium ordinis s. excussionis*). (Nov. 4, 2.)

4. Prescription (negative). This action could be brought against *mala fide* possessors up to thirty years (C. 7, 39, 7, pr.), and prior to A.D. 525, against the debtor and his heirs for ever. In favour of the latter, however, Justinus limited the *actio quasi-Serviana* to forty years. (C. 7, 39, 7, 1.)

II. Possessory remedies.

1. Interdicts for retaining and recovering possession; *Uti Possidetis, Unde Vi, etc.*

2. *Interdictum Salvianum* and *Quasi-Salvianum*, for acquiring possession. "There is an interdict, too, called *Salvianum*, that is a means of gaining possession. It is used by a landlord to gain possession of a tenant-farmer's effects when expressly pledged for the rent." (J. 4, 15, 3; G. 4, 147.) These interdicts correspond precisely to the *actio Serviana* and *quasi-Serviana*. They tested the question of possession as the others did of right. The *Salvianum* was given to the landlord, the *quasi-Salvianum* to any creditor. At first the remedy was confined to the debtor, and the interdict could not be brought against a third party, as when the debtor had sold the thing. (C. 8, 9. 1.) But it seems that even against a purchaser from a debtor, a *utile interdictum* could be brought. (D. 43, 33, 1, pr.) If there are two creditors having a right to the pledge, the proper remedy is the action, not the interdict. (D. 43, 33, 2.)

B. Rights *in personam*.

(a) Of the Debtor. *Actio pigneratitia directa.*

1. The object is to recover the thing pledged on payment of the debt, or, if it is sold, the surplus.
2. It is brought by the debtor or his heirs against the creditor.
3. The burden of proving the debt is on the creditor; of the payment of it, on the debtor. (C. 4, 24, 10.)
4. Prescription. No prescription avails against the debtor or his heirs if they are ready to pay the debt. (C. 4, 24, 12.)

(b) Of the creditor. *Actio pigneratitia contraria.*

The object is to enforce the duties owing by the debtor to the creditor.

BOOK II.

RIGHTS *IN PERSONAM.*

BOOK II.

RIGHT *IN PERSONAM—OBLIGATIO.*

IN Roman law, contract is classified as a branch of *obligationes.* Contract may be defined as consisting of those rights *in personam* that arise from the mutual assent of the parties, and is distinguished from those rights *in personam* that are established by law, irrespective of the wishes of the parties. *Obligatio* is, therefore, correlative to right *in personam.* The duty corresponding to a right *in personam* is an *obligatio. Obligatio* is thus contrasted with *dominium.* "The essence of an *obligatio,*" says Paul, "does not consist in this, that it makes a thing ours, or a servitude ours [*i.e.*, it does not give us rights *in rem*], but that it binds another to give something to us or do something for us." [1]

Obligatio is, however, of wider extent than primary rights *in personam.* It is exactly coextensive with *actiones in personam.* It is thus applied to the obligation imposed upon a person who has violated a right *in rem* to pay compensation or a penalty. Thus, while every right *in personam* was enforced by an *actio in personam,* every right *in rem* was not enforced by an *actio in rem.* Some rights *in rem* were enforced by *actiones in rem,* but other rights *in rem* were enforced by *actiones in personam.* The distinction was that if the existence of a right *in rem* were in dispute, the appropriate proceeding was an *actio in rem;* but if the right was admitted, and the question was whether the right had been violated, the remedy was an *actio in personam.* The distinction is clearly brought out in the Institutes.

Of all actions in which a question between parties is raised on any matter before judges or arbiters, the chief division is into two distinct kinds, namely, *in rem* (for a thing), and *in personam* (against a person).

The actions a man brings against a person under an obligation (*obligatus*) to him, either by reason of contract or of wrong-doing (*ex maleficio*), are

[1] "*Obligationum substantia non in eo consistit ut aliquod corpus nostrum aut servitutem nostram faciat sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum.*" (D. 44, 7, 3.)

actions *in personam* given to meet the case. In them he alleges in his statement of claim that his opponent ought to give or do something, or he puts it in certain other ways.

An action may be brought against a man that is under no legal obligation, but against whom some one is moving about something in dispute. In this case the actions that are given are *in rem*. If, for instance, a man is in possession of some corporeal thing which Titius affirms is his, and the possessor says he is owner, then if Titius alleges in the statement of claim that it is his, the action is *in rem*. Similarly, if a man brings an action to assert a right he claims over a thing—a farm for instance, or a house, or a right of usufruct, or of passage over a neighbour's farm, or of driving beasts, or of leading water from a neighbour's farm—the action is *in rem*. (J. 4, 6, 1.)

It is manifest that a precisely similar distinction may exist in the case of contract; for either the existence of the contract may be the question in dispute, exactly as in the case of property, or the contract may be admitted, and the only question is whether it has been performed. But these two classes of questions were disposed of in the same action, whereas in the case of property, one set of questions was disposed of by *vindicatio*, and the other by actions *ex delicto*. In the case of rights *in rem* the Roman Law distinguished between primary and sanctioning rights, because there were distinctive actions for each class of rights; but in the case of rights *in personam* there were no distinctive actions, and no discrimination was made between primary rights and sanctioning rights. We may classify legal topics from the standpoint of primary rights, or from that of sanctioning rights, but we cannot leap from one to the other without introducing cross-divisions. (See pp. 135-137.)

Obligatio is a legal bond that ties us down so that we must needs do something, according to the laws of our State. (J. 3, 13, pr.)[1]

Adstringimur—"we are bound." An obligation is something that binds a specified person or persons. This is an essential element of a right *in personam*.

Alicujus solvendae rei.—Elsewhere the place of the word *solvere* is taken by three words—*dare, facere, praestare*. *Solvere* was perhaps intended to be substituted as a generic term for those three words; but if so, the selection was not happy. It leads almost inevitably to the tautological language of Theophilus (*καταβαλεῖν τὸ ἐποφειλόμενον*), to pay a debt, thus introducing in the definition the very word to be defined. Moreover, *solvere* is a technical term in the Roman Law, designating one particular mode of terminating an obligation (*solutio*); and it is not well to describe the general object of obligation by a word employed usually for a specific divestitive fact. The intention of the Institutes doubtless is to describe in the most general language the objects of an obligation, and these are either acts or forbearances. The sphere of obligations cannot be made narrower. For an obligation or *jus in personam*

[1] *Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendae rei, secundum nostrae civitatis jura.*

differs from *jus in rem* in this respect, that the duties corresponding to it may be, and most commonly are, positive, whereas rights *in rem* imply duties that are wholly negative, consisting wholly of forbearances.

The expressions *dare, facere, praestare,* given by Paul (D. 44, 7, 3), are taken from the forms of actions in Roman procedure. An action *in personam* was an action to enforce a *jus in personam* (leaving delicts out of account), and the *intentio* of the formula stated that the defendant ought to give, do, or make good (*dare, facere, praestare*). (G. 4, 2.) In some actions the word "give" alone was used *si paret eos dare, oportere*) (G. 4, 41); in others, both to "give" and to "do" (*quidquid paret Numerium Negidium Aulo Agerio dare, facere, oportere*) (G. 4, 47); while in other cases *praestare* seems to have been employed.

Dare has two different meanings. (1.) In its strictest technical sense it means to convey property so as to make the receiver a true owner.[1] This was the meaning ascribed to it when used in the ancient, formal contract of *stipulatio.* (D. 45, 1, 75, 10.) (2.) Often, however, *dare* signifies that the possession of the thing merely, and not the ownership, must be delivered. The obligation of a seller, in the contract of sale, was only to deliver the thing, not to make a good title to it. These two meanings coincide with the distinction between *dominium* and *possessio.*

Facere is a general term, often including *dare.* (D. 50, 16, 218.)[2] It is even used when *dare* would seem to be the better word, as when one is obliged to give up a thing deposited with one for safe keeping. (D. 50, 16, 175.) In the *formulae,* when a definite sum was demanded, *dare* seems alone to have been used; when a sum not ascertained was demanded, then *facere* was added. An obligation may be not to do (*non facere*). A common example is when a person undertakes not to sue for a debt. (D. 45, 1, 75, 7.)

Praestare does not occupy so distinguished a place in the *formulae.* It is found, according to Savigny, in the *formulae* in actions for delicts, as signifying to make good any damage or loss. Von Vangerow suggests that it was the word employed in a certain kind of equitable actions (*actiones in factum praescriptis verbis*), to which the words of the old *formulae* did not apply. For the purpose, however, of the definition of obligation, it is tautological. All that is wanted is a term for acts and forbearances, and the best phraseology would have been to say that all obligations consist in *faciendo* (acts), or in *non faciendo* (forbearances).

The expressions already quoted exhaust all that is really essential to a definition, but there remain several phrases in the text too remarkable to be passed over without notice.

Juris vinculum.—The nature of an obligation, as a tying of two persons together, is deeply fixed in Roman Law. It is implied in the old contract of *nexum.*

Necessitate.—This means that it has not been left to the free choice of the promiser whether he will do what has been agreed upon or not. A debtor is one from whom money can be exacted against his will.[3]

Titius has sold a slave to Gaius, but on the understanding that either party may withdraw from the bargain. There is no obligation between them, as Titius is not bound to deliver the slave unless he pleases. (C. 4, 38, 13.)

Titius sold a slave to Gaius subject to the condition that the slave's accounts should be satisfactory (*si rationes domini computasset arbitrio*). If this were understood to mean to the satisfaction of the arbitrary will of the master, there was no obligation; but the jurists held that the meaning was, if the accounts would satisfy a just man (*arbitrio boni viri*), and if the accounts were such as ought to be accepted, the sale was valid; otherwise not. (D. 18, 1, 7, pr.)

---

[1] *Non videntur data, quae eo tempore quo dantur accipientis non fiunt.* (D. 50, 17, 167.)

[2] *Verbum facere omnem omnino faciendi causam amplectitur dandi, solvendi, numerandi, judicandi, ambulandi.*

[3] *Debitor is intelligitur a quo invito exigi pecunia potest.* (D. 50, 16, 108.)

REUS, CREDITOR, DEBITOR.

The word "*obligatio*" applies equally to both the parties—to him that enjoys the right as well as to him that is subject to the duty; thus we find such language as acquiring an obligation. (D. 45, 1, 126, 2; D. 23, 3, 46, pr.) In modern times, however, the tendency has been to confine "*obligatio*" to the side of the debtor, and to speak of the creditor's interest as *jus* or right. In the English language, obligation has the one-sided meaning, and applies exclusively to the debtor.

Agreeably to this use of *obligatio*, we find that originally there was only one name (*reus*) for the promiser and the person to whom the promise was made. This term indicated the plaintiff and defendant in an action, making no distinction between them. (Fest. v. *Reus*, p. 273.) Afterwards "*actor*" came into general use for the plaintiff. "*reus*" continuing to designate the defendant. In like manner *reus*, as the name of a party to an obligation, was qualified. *Reus promittendo* or *promittendi* was the name of the promiser, the person subject to the duty; *reus stipulando* or *stipulandi* was the name of the *stipulator*, the person to whom the promise was made, and who had the *jus in personam*. (Festus v. *Reus*, p. 273; D. 45, 2, 1.)

Creditor and *Debitor*.—These terms were at first confined to the case of loans (*pecunia credita*); but the necessity for finding suitable names for the parties to an obligation caused them to be extended. A *creditor*, therefore, became every person that could compel the performance of an obligation: a *debitor*, every person that could be compelled to perform an obligation. (D. 5, 1, 20; D. 50, 16, 11; D. 50, 16, 10; D. 50, 16, 108.) Hence a person to whom a wrong (delict) has been done is a *creditor* for damages or a penalty against the wrongdoer, who, in like manner, is a *debitor*. In the case of *naturales obligationes*, by a still further extension, the same words were employed in the same relative sense. (D. 46, 1, 16, 4.)

DIVISION OF *OBLIGATIONES*.

I. Civil and Prætorian.

Of all *obligationes* the chief division is into two kinds; Civil and Prætorian. The Civil are either established by statute, or at all events recognised by the *jus civile*: the Prætorian are established by the Prætor in the exercise of his jurisdiction, and are also called *honorariae*. (J. 3, 13, 1.)

Honorariae obligationes are distinguished from *civiles* by the shortness of the period of prescription. Originally a *civilis obligatio* could not be extinguished by lapse of time; but an *obligatio honoraria*, as a rule, could not be enforced after a year. When the prætor gave remedies in derogation of the *jus civile*, he declined his assistance unless the parties promptly sought his aid, except where the action was for the recovery of property. (D. 44, 7, 35, pr.)

II. *Civilis* and *Naturalis Obligatio*.

An agreement that could not be enforced by action, but was not in other respects destitute of legal effect, was a *naturalis obligatio*. The special importance of such agreements in the Roman Law was due to the manner of its development. The law of contract, like the other departments of Roman Law, seems to have had originally a narrow basis. The steps by which it was widened will hereafter be stated; but after all the innovations of Prætors and Emperors, there remained a considerable number of agreements, even in the time of

Justinian, quite meriting legal recognition, but for which no action was provided. With regard to them a middle course was adopted. The agreement could be used as a defence, or as a basis for other agreements enforceable by action. Numerous instances will occur in the course of the exposition: it will suffice at this stage simply to enumerate the legal effects of a *naturalis obligatio.*

1. If anything due by a simple *naturalis obligatio* were voluntarily paid by the debtor, he could not demand it back by the *condictio indebiti,* on the allegation that it was not due. (See Div. II. *Condictio Indebiti.*)

2. Although no action could be brought upon a *naturalis obligatio,* yet it could be used as a set-off. (Book IV. Proceedings *in jure. Formula* System.)

3. A *naturalis obligatio* could be the basis of an accessory contract. (See Accessory Contracts, *postea.*)

4. A *naturalis obligatio* sufficed to support a mortgage. (See p. 445.)

In those cases the surety could be sued, and the rights of mortgage enforced, although the original debtor could not be sued.

5. A *naturalis obligatio* could be the foundation of a *novatio.* (See Subdiv. II. Transvestitive Facts.)

III. Contract and Delict.

Of *obligationes,* the chief division is into two kinds. For every *obligatio* arises either from contract or from delict. (G. 3, 88.)

In the Digest (D. 44, 7, 1, pr.), Gaius adds an indeterminate source of obligations, "obligationes aut ex contractu nascuntur, aut ex maleficio, aut proprio quodam jure *ex variis causarum figuris.*"

IV. Justinian's division.

Obligationes are next divided into four kinds,—from contract or from quasi-contract; from delict or from quasi-delict. (J. 3, 13, 2.)

As to the distinction between contract and quasi-contract, see p. 138, and between delict and quasi-delict, pp. 150, 153.

V. Modestinus enumerates the following sources:—(1) contract; (2) *Lex;* (3) *Jus honorarium;* (4) *Necessitas;* (5) *peccatum.*

This gives a wider definition of *obligatio* than is usually to be found. An obligation by *lex* means the general obligation to obey the law: *jure honorario,* means the obligation imposed on all to act or forbear in obedience to the order of a magistrate, having the right to issue an edict. In these cases, Modestinus used *obligatio* as equivalent to the duty of obedience to the law. *Necessitas* refers to the obligation of a necessary heir to take the inheritance; but there is in no proper sense of the term, any obligation in this case; for a necessary heir is invested with the inheritance whether he is willing or not.

First Division.

CONTRACT.

Definition.

1. Definition *per genus et differentiam.*

Contract belongs to the division of rights *in personam*, and not to the division of rights *in rem;* and it consists of those rights *in personam* that arise from the acts of individuals, and not of those that arise by operation of law. A contract may be said to exist when one person voluntarily undertakes a duty or duties with the intention of thereby creating in favour of another a right or rights *in personam.* When a duty is imposed on a person, without his assent, express or implied, conferring upon another a right *in personam*, there is no contract, in the proper sense of the word. The correct designation of this class is Quasi-contract.

Titius gave Gaius 20 *aurei* upon an agreement that Gaius would return that amount at the end of a month. Titius has a right *in personam* to 20 *aurei* at the end of that period; and this is a contract, because Gaius accepts the money with the intention of creating this right in favour of Titius.

Julius gives Maevius 20 *aurei* under the false impression that he owes him that sum. Maevius is bound to return the money; but as this duty is not voluntarily undertaken by him, but imposed upon him irrespective of his will, his obligation falls under the class of quasi-contract. (J. 3, 15, 1; J. 3, 27, 6.)

Titius requests Gaius to watch his house during his absence from home. Gaius does so. The relation between Gaius and Titius is one of contract.

Julius goes away from home, leaving no one to look after his house. Bad weather comes on, and Maevius, to prevent the house being spoiled, enters and takes charge of it. Maevius acquires rights *in personam* against Julius, but as it is without the knowledge or consent of Julius, they belong to the head of quasi-contract. (J. 3, 27, 1.)

Stichus, in consideration of being manumitted, promises, in the customary way, to work for his master two days in every week. This is a contract, because the duty is voluntarily undertaken by Stichus, with the intention of giving his master a right to a portion of his services after manumission.

Sempronius manumits his slave Stichus. Sempronius falls into poverty, but Stichus prospers and amasses wealth. Sempronius has a right of maintenance from Stichus. Inasmuch, however, as this right does not arise from any promise of Stichus,

but belongs to Sempronius in consequence of the manumission, it is of the nature of quasi-contract.

Titius, being compelled to go abroad, leaves an imbecile son in the charge of Gaius, who, as a recompense for his trouble, is allowed to take the rents of a farm. This is a case of contract.

Julius by will appoints Maevius *tutor* to his son. Maevius, having no legal ground of exemption, is compelled to accept the office. The rights of the son as against Maevius arise not from contract, but from quasi-contract. (J. 3, 27, 2.)

Julius in his Will said: "I give and bequeath my slave Stichus to Maevius." This is a direct bequest of the ownership, and therefore Maevius has a right *in rem* in respect of Stichus.

Julius in his Will said: "I charge my heir Sempronius to give my house at Capua to Maevius, and to keep it in repair." This gives Maevius a right *in personam* in respect of the house and repairs; but as Sempronius is bound, not by his own will, but by the directions of Julius, the right of Maevius arises from quasi-contract. (J. 3, 27, 5.)

2. Analytical definition.

The following is the definition given in the Indian Code. (Act No. IX. of 1872, § 2.)

When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise.[1]

Every promise and every set of promises forming the consideration for each other is an agreement.

An agreement enforceable by law is a contract.

The three elements of a contract are thus proposal, acceptance, and the additional requirements, if any, to support an action; generally, in English law, a valuable consideration.

Agreements enforceable by action in the Roman Law are called (1) *contractus*, or (2) *Pacta Prætoria*, or (3) *Pacta Legitima*. These terms will be explained more fully hereafter.

An agreement is a *conventio* or *pactum*. *Pactum est duorum consensus atque conventio.* (D. 50, 12, 3, pr.; D. 2, 14, 1, 3.)

Pollicitatio is a proposal, not accepted, as a vow. Such a proposal did not create a legal obligation. (*Ex nuda pollicitatione nulla actio nascitur.*) (Paul, Sent. 5, 12, 9.) But if a promise were made of a gift for the public in consideration of honours bestowed upon the promiser, or a public work was actually commenced, especially if the public incurred expenses on account of the promised gift, the promiser was compelled to perform his *pollicitatio*. (D. 50, 12, 3, pr.; D. 50, 12, 1, 1-5.)

Arrangement of Contracts by Justinian.

And first let us look at those that arise from contract. Of these there are four kinds. For contracts are made by acts (*re*), by words, by writing, or by consent. (J. 3, 13, 2 ; G. 3, 89.)

I. Contracts *re* (acts).
   1. *Mutuum.*
   2. [*Condictio Indebiti.*]. This belongs to Quasi-contract.
   3. *Commodatum.*
   4. *Depositum.*
   5. [*Pignus.*] Should be under the law of property.

II. Contracts *verbis* (words).
   1. *Stipulatio.*

III. Contracts *literis* (writing).

IV. Contracts *consensu* (consent, without writing or acts or special forms).
   1. *Emptio Venditio* (sale).
   2. *Locatio Conductio* (hire).
   3. *Societas* (partnership).
   4. *Mandatum* (agency).

Arrangement of the Law of the Contract.

For reasons to be given hereafter more in detail, the arrangement followed in the present work departs to some extent from Justinian's order. The several contracts are arranged according to the principles upon which they are based. Those principles are three in number :—

First, Formal Contracts. In this class the validity of the contract depends upon the observance of certain formalities.

Second, Equitable Contracts. These are bilateral contracts, that give rise to an obligation only when one of the parties has actually performed his part of the engagement. In this event, the other party is compelled also to perform his promises. This class corresponds to contracts *re*.

Third, Contracts for Valuable Consideration. This corresponds nearly to the class erroneously described by Gaius and Justinian as made by consent alone.

I. Formal Contracts.
   1. [*Nexum.*]
   2. *Stipulatio.*
   3. [*Expensilatio* or *Nomina transcriptitia.*]

II. Equitable Contracts.
   1. *Mutuum.*
   2. *Commodatum.*
   3. *Depositum.*
   4. *Mandatum.*

III. Contracts for Valuable Consideration.
   1. *Emptio Venditio.*
   2. *Locatio Conductio.*
   3. *Societas.*

SUBDIVISION I.

First Part.—Only One Creditor and One Debtor.

First.—*FORMAL CONTRACTS.*

I.—*NEXUM.*

The solemn transaction *per aes et libram*, which in its application to slavery, *patria potestas*, *manus*, and ownership, has been already discussed, is found to occur in contract, and also in wills; so that there is no department of the substantive law in which it fails to occupy a conspicuous place. The fact is certainly noteworthy,—that by one single ceremony, although doubtless not with the same words, a man obtained a wife, bought his slaves, emancipated his children or delivered them up in bondage for their transgressions, gave away or acquired land, made contracts, and finally regulated the devolution of his property to his successors. But of all the uses of the form *per aes et libram*, that concerning contract is the one, not certainly of the least interest, but of which least is known. It is an undoubted fact that a right *in personam* could be created *per aes et libram*, but in what manner and subject to what limitations, the sources do not enable us to say. Varro and Festus have preserved evidence of the bare fact, and Gaius, who gives us some information in respect of the divestitive facts of *nexum*, says nothing as to the way in which a contract *per aes et libram* could be made, nor what were the restrictions placed upon that mode of creating contracts. From what Gaius says of a release *per aes et libram* it may be confidently inferred that the *nexum* applied to something short of the class of fungible things. It applied undoubtedly to things that were dealt with by weight, also to things dealt with by number, if the amount was definite, but it was a moot point whether it applied to things that were dealt with neither by weight nor number, but by measure. (G. 3, 175.)

II.—*STIPULATIO.*

Definition.

A contract made by words is formed by a question and an answer, when we stipulate that something shall be given us or done for us. The name stipulation is used, because *stipulum*, among the ancients, was a word meaning firm—itself, perhaps, derived from *stipes*. (J. 3, 15, pr.)

The derivation of "*stipulatio*" given by Justinian is taken from Paul. (Paul, Sent. 5, 7, 1.) Festus attributes it to *stips* (whence *stipendium*), a small coin. A third derivation is stated by Isidorus (Orig. 5, 24, 30), from *stipula*, a rod. The theory of this derivation is, that it was customary in making a promise for the two parties to lay hold each of an end of a rod, and break it, so that by joining the broken ends together there would be evidence that some contract had passed between them. Such a usage is not unknown, but there does not appear to be any extrinsic evidence in support of it. The question of derivation is not altogether without interest historically. The ancient name of the verbal contract, always called *stipulatio* by the jurists, seems to have been "*sponsio*," and in the early history of the stipulation, "*spondeo*" was the only word that could be employed with efficiency. Paul says that every stipulation was properly called *sponsio*. . (D. 50, 16, 7.)

The person that asked the question, and to whom the promise was made, was called *stipulator*, anciently *reus stipulandi* or *reus stipulando*.

The person that made the promise was called *promittor*, anciently *reus promittendi* or *reus promitte*

1. The stipulation was a formal contract. A promise made in the form of question and answer had legal force: the same promise given without any previous interrogation did not create a legal obligation.

2. The stipulation was not confined to particular transactions, such as buying and selling, or hiring, or the like, but was *co-extensive with the subject-matter of contract*. It was not so much *a contract* as a universal form by which any promise could be made binding in law.

3. The stipulation was *unilateral;* that is, it imposed duties on the promiser, but none upon the person to whom the promise was made. It was therefore unsuitable to the case of *reciprocal* promises, where the promise of each party is the consideration for the promise of the other. Reciprocal promises could, however, be made by two independent separate stipulations.

4. The great utility of the stipulation is worthy of remark. No proof that any consideration was given for the promise need be given; the formal or solemn character of the promise was enough. At the same time, the interrogative form aroused the attention of the promiser; the question put showed very distinctly what he was to undertake, and his answer must be in precise language adopting the question.

Rights and Duties.

A. Duties of Promiser (*reus promittendi*) = Rights *in personam* of *stipulator*.

Nothing can be simpler than the duty of the promiser; namely, to do or to give what he promised to do or to give. No more precise account can be given. The only questions that arose under this head were questions of intepretation.

Investitive Facts.

At this stage it is necessary to state only so much of the investitive facts as are special to stipulation; not those that the stipulation shares in common with all other contracts.

I. Form of stipulation, where only one thing is promised.

1. What words may be used in a stipulation?

The words formerly in traditional use were such as these: Do you undertake that it shall be given? I undertake it (*Dari spondes? Spondeo*). Do you promise? I promise. Do you pledge your credit? I pledge it (*Fidepromittis? Fidepromitto*). Do you become surety? I become surety (*Fidejubes? Fidejubeo*). Will you give it? I will give it. Will you do it? I will do it. (J. 3, 15, 1; G. 3, 92.)

But the obligation made by the words "*Dari spondes? Spondeo*," is peculiar to Roman citizens. The others belong to the *Jus Gentium*, and therefore hold good between all men, whether Roman citizens or aliens. And even though expressed in Greek, they hold good between Roman citizens if only they understand Greek; and conversely, though uttered in Latin, they hold good between aliens if only they understand Latin. But the former is so peculiar to Roman citizens that it cannot properly be even translated into Greek, although it is said to be fashioned after a Greek phrase. (G. 3, 93.)

Hence it is said that in one case an alien too can come under an obligation by using this word; if, namely, our Emperor were to ask the ruler of some alien people about peace in this way, "Do you undertake (*spondes*) that there shall be peace?" or were himself to be asked in the same way. But the saying is over subtle. For if the agreement is violated, no action based on stipulation follows; but redress is claimed by the law of war. (G. 3, 94.)

Now, a stipulation may be entered on in Greek, in Latin, or in any other tongue; for it makes no difference, if only both parties understand that tongue. Nor is it necessary that both should use the same tongue; but it is quite enough if a suitable answer is given to the question. Moreover, two Greeks can contract in Latin; but, formerly, the formal words given above were used. Afterwards, however, a constitution by Leo (469 A.D.) was passed, which took away all verbal formalities, and required only that both parties should know what was meant, and agree in their understanding of the contract, no matter what the words in which it was expressed. (J. 3, 15, 1.)

That a dumb man can neither stipulate nor promise is plain; and this is held to apply to a deaf man too! for the stipulator ought to hear the words of the promiser, and the promiser the words of the stipulator. Hence it is clear that we are speaking not of a man that is very slow of hearing, but of one that cannot hear at all. (J. 3, 19, 7; G. 3, 105.)

The answer must, however, always be in spoken language. Thus:

S. Will you give (*dabis*)? P. Why not (*quidni*)?

This is a good stipulation, but if the promiser had answered only by a sign or nod, it would not have been a stipulation at all. (D. 45, 1, 1, 2.)

2. The question and answer ought to be consecutive; if

anything intervene between them, there is no stipulation. (D. 45, 1, 137, pr.) The parties also must necessarily be within hearing distance of each other.

3. The question and answer must agree, but substantial agreement was enough, although the previous terms of the question were not repeated in the answer. (D. 45, 1, 137, pr.) An advance is to be remarked between the time of Gaius and Justinian.

Again, a stipulation is void if the question and answer do not agree; as when a man stipulates that you shall give ten *aurei*, and you promise five; or *vice versa*. It is void too if he makes a simple stipulation, and you promise conditionally, or *vice versa*; if only you expressly say so; as when a man stipulates under a condition or for a particular day, and you answer, "I undertake for to-day." For if you were to answer only, "I promise," it would appear to be a briefly-worded undertaking for the same day, or under the same condition; since it is not necessary in answering to go again over everything that the stipulator has expressed. (J. 3, 19, 5; G. 3, 102.)

Stipulator. Will you give me 100 *aurei* before the Kalends?

Promittor. I will give you 100 *aurei* on the Ides.—This is void, because the promiser agrees to a longer time than is asked. (D. 45, 1, 1, 3.)

S. Will you give me 10 *aurei* on the Kalends of January or February?

P. I promise.—This is good for February, but not for January. (D. 45, 1, 12.)

S. Will you give me Stichus or Pamphilus?

P. I will give you Stichus. This is void, because it makes a simple categorical instead of a disjunctive promise. (D. 45, 1, 83, 2.)

S. Will you give me 10 *aurei*?

P. If my vessel arrives from Asia I will. This is void. (J. 3, 19, 5; D. 45, 1, 1, 3.)

S. Will you give me 10?
P. I will give you 20.
S. Will you give me 20?
P. I will give you 10.

According to Justinian in the text, these promises are altogether void; but this decision conflicts with the text of the Digest. Generally the rule is laid down in regard to money, that the greater includes the less; and therefore, if one promises 20, the promise is good for 10, if 10 was asked. (D. 50, 17, 110; D. 45. 1, 83, 3; D. 45, 1, 1, 4.)

S. Do you promise to give 10 or 5?

P. I promise.—In this case, according to Pomponius, 5 will be due. (D. 45, 1, 12.)

II. Form of stipulation when more than one thing is promised.

Whenever several things are included in one stipulation, if the promiser answers simply, "I undertake to give," he is liable for all. But if he undertakes to give one of them, or several, then an obligation is contracted as regards those for which he has undertaken. For of the several stipulations only that one (or some) seem complete, since we ought to stipulate and to answer for each thing separately. (J. 3, 19, 18.)

S. Do you promise to give Stichus and Pamphilus?

P. I promise Stichus.—This is held to be a good stipulation for Stichus. (D. 45, 1, 83, 4.)

S. Do you promise Stichus?

P. I promise both Stichus and Pamphilus. This is also good for Stichus. The question and answer are regarded as crowding two stipulations into one; and they are good so far as question and answer agree, bad in so far as they do not agree. (D. 45, 1, 1, 5.)

III. Written stipulations.

A stipulation was essentially an oral contract. Nevertheless, when writing became a general accomplishment, it was usual to make a written record of every important transaction; and such writings necessarily carried great weight with judges. Ultimately, a written stipulation carried with it two great advantages: it fortified the two weak points of the stipulation. These weak points were (1) the necessity of proving the actual presence of the parties, and (2) of proving that the form of question and answer was observed.

1. A stipulation in writing was conclusively presumed to have been made in the interrogative form. (Paul, Sent. 5, 7, 2; D. 45, 1, 30; D. 45, 1, 134, 2; C. 8, 38, 1.)

If it is written in a legal document that a man has promised, this is held valid, just as if a question had first been put, and then he had answered. (J. 3, 19, 17.)

It seems that in agreements that were really not in the interrogative form, a custom grew up of affirming in writing that one put the question and the other the answer (*Rogavit Titius spopondit Maevius*); and it was held that upon such an agreement an action *ex stipulatu* could be brought, unless it was clearly proved to have been the intention of the parties that no stipulation should exist. (D. 2, 14, 7, 12.)

2. A stipulation in writing affords an almost conclusive presumption that the parties were both present. (C. 8, 38, 14.)

Again, an obligation made by words is void if formed between persons not present. But this furnished matter for lawsuits to contentious men who some time after perhaps denied such allegations, and contended that either they or their opponents were not present. A constitution of ours, therefore, written to the advocates of Cæsarea, was brought in to quicken the decision in such suits. By it we have provided (C. 8, 38, 14), that all such writings as bear on their face that the parties were present, are in any case to be believed, unless the party that employs such audacious allegations can show by the most unquestionable proofs, either in writing or by competent witnesses, that the whole of that day on which the document was drawn up either he or his opponent was elsewhere. (J. 3, 19, 12.)

Remedy.

From this two actions proceed; a *condictio* if the stipulation is definite, an *actio ex stipulatu* if it is indefinite. (J. 3, 15, pr.)

1. The *condictio*, here referred to, has a history elsewhere to be described. It was introduced (or profoundly modified) by the *lex Silia* (B.C. 244 (?) p. 62), for the re-

covery of specific sums of money (*certa pecunia*). A few years later (circa B.C. 234 (?)) it was extended by the *lex Calpurnia* to the recovery of any specific thing (*omnis certa res*). At a subsequent period, it was still further enlarged to include indeterminate objects: *i.e.*, where the plaintiff did not demand a specific sum or thing, but in general terms "whatever the defendant ought to do or give" (*quidquid paret dare facere oportere*). When the object was specific, the action was called *condictio certi*; when not specific, *condictio incerti*. Sometimes the latter was called *actio ex stipulatu*, as in the text.

2. When the claim is indeterminate, the measure of damages is the loss sustained by the plaintiff in consequence of the breach of the contract (*quanti actoris interest*). (D. 45, 1, 113, 1.) Of course, when a definite sum has been promised, that is the measure of damages. The time selected for the purpose of estimating the damages, was the last moment that was fixed for the performance of the promise (D. 42, 1, 11); and if no time were fixed, then the *litis contestatio*. The defendant had a right to perform his promise up to the *litis contestatio*, but if he performed it after that, was nevertheless condemned as if he had not. (D. 45, 1, 84.)

Application of Stipulation.

The stipulation was greatly resorted to as a convenient mode of making contracts by private individuals; but it was also extensively employed in judicial processes. This use of stipulations is worthy of notice. The Prætor, for example, instead of giving an order that a person should be responsible, if by the fall of his house his neighbour's property was injured, called upon the owner of the ruinous premises to promise that he would be responsible for any damage that might result. This procedure seems, at first sight, strange. Whether by the direct or by the circuitous process, the free will of the person bound was equally disregarded. He was no more at liberty to refuse to promise to be responsible, than he was to deny such responsibility if it were directly imposed upon him. But it is much easier to get a man to promise not to do some particular thing, than, when it is done, to acknowledge it to be wrong, or to give compensation. The real meaning of the institution of judicial stipulation is—the weakness of the executive. The sovereign goes so far as to make his subjects promise not to misbehave, but he is not strong enough to punish them for acts that they have not themselves condemned beforehand.

Some stipulations are *judiciales*, some Prætorian; some are due to convention, and others are common, being Prætorian as well as *judiciales*. (J. 3, 18, pr.)

Stipulations due to convention arise by agreement between the two parties: that is, neither by order of the *judex* nor by order of the Prætor, but by agreement of those that make the contract. Of these there are as many kinds (I may almost say) as there are of objects of contracts. (J. 3, 18, 3.)

Judicial stipulations are really not contracts at all; they observe the forms but not the spirit of contract. (D. 45, 1, 52.)

Prætorian stipulations proceed from the simple duty of the Prætor; as, for instance, stipulations against doing threatened damage or for the payment of legacies. The term Prætorian ought to be taken so as to include those due to the Aediles; for these too come from a magistrate's jurisdiction. (J. 3, 18, 2.)

1. *Stipulatio Damni Infecti.*—The object of this procedure, of which the stipulation was only a preliminary and not indispensable step, was to secure compensation for damage that might be done by a house falling down, or by any work or construction upon any land, public or private. (D. 39, 2, 19, 1.) The grant or refusal of the stipulation was entirely in the discretion of the Prætor, who paid regard to the probable injury that might be occasioned, and not to the question whether the petitioner was strictly a neighbour or not. (D. 39, 2, 13, 3.) If the threatened damage arises from anything on a man's own land, or on which he has a servitude, it is enough if he promises by stipulation; he need not give security; but if the damage is threatened by the act of a person not owner or *bona fide* possessor, he must also give sureties. (D. 39, 2, 30, 1; D. 39, 2, 13, pr.) The stipulation was usually made for a certain length of time, so that if no damage occurred within that time the promiser would be free. It was not considered fair that a promise of this kind should hang indefinitely over a man's head. (D. 39, 2, 13, 15.) But at the end of that time it could be renewed, if the Prætor thought fit. (D. 39. 2, 15, pr.)

A peculiarity of this judicial stipulation was that it availed not only against the promiser and his heirs (like contracts generally), but against every one that succeeded him in the ownership of the property in respect of which the stipulation was made. If the owner refused to make the stipulation, the petitioner was put in possession, that is, had custody only (*nuda custodia*) (D. 39, 2, 15, 20); but after a time he could apply for possession (*possidere*), such as would ripen by *usucapio* into ownership. (D. 39, 2, 15, 21.)

2. *Stipulatio legatorum servandorum causa* (for security of legacies).

This was a procedure analogous to the former. An heir that was bound to pay a legacy at a future day was compelled to promise by stipulation that he would meet the claim when due, and also to give sureties; if he could not or would not, the legatee was put in possession. (D. 36, 3, 1, 2.)

Stipulationes judiciales are those alone that proceed merely from the duty of a *judex;* as the giving security against fraud, or to follow up a slave that has taken to flight, or to restore his price. (J. 3, 18, 1.)

1. *Stipulatio de dolo.*—When a *bona fide* possessor was sued by the real owner, he was obliged, say in the case of a slave, to promise that he would not wilfully hurt the slave; more especially if, after the suit began, the period of *usucapio* elapsed, and the possessor, being technically owner, could manumit or pledge the slave. (D. 6, 1, 45; D. 6, 1, 18.)

2. *De persequendo servo restituendove pretio.*—Stipulation to pursue a slave or return his price.

A man dies bequeathing a slave to a legatee. Before the slave is delivered he runs away. If the heir was careless, he must pay the legatee the value of the slave; but if he was not in fault, then he simply promises, if the slave should be caught, to give him up, or pay his value. (D. 30, 1, 47, 2.) Gaius, however, in another passage (D. 30, 1, 69, 5), speaks as if the heir were bound to take active measures of pursuit.

Common stipulations are such as this—that the property of the *pupillus* shall be in safety. For both the Prætor and the *judex* (at times) order that such security shall be given if affairs cannot otherwise be cleared. Another instance is the stipulation that certain proceedings shall be ratified. (J. 3, 18, 4.)

1. Stipulation by Tutor. (See *Tutela.*)
2. *Stipulatio de rato* belongs to the subject of Procedure. [See Book IV.]

Other Verbal Contracts.

The stipulation was not the only verbal contract recognised by the Roman Law, although it was immeasurably the most important. There were also the *Dictio Dotis* the and *obligatio operarum.*

Ulpian says a dowry (*dos*) could be given, or promised with or without stipulation. (*Dos datur, vel dicitur, vel promittitur.*) The same language is found in a constitution of Arcadius and Honorius (A.D. 396) preserved in the C. Th. 3, 12, 3, with the additional statement that this triple mode of constituting a *dos* was in accordance with the ancient law.

(1.) In the *dictio* there was no interrogation, and apparently no particular form of words.

(2.) Anyone could promise a *dos* by stipulation, but certain persons only could use the dictio ; namely, the woman about to be married, her father or other ascendant in the male line, or her debtor by her order. (Ulp. Frag. 6, 2.)

Obligatio Operarum was another verbal promise sanctioned by the law. An account of it will be found under the head of Freedmen (Div. II. *Libertini*).

III.—*Expensilatio* or *Nomina Transcriptitia.*

In the old times of republican simplicity, the Romans displayed a religious exactness in keeping their household accounts. According to Dionysius, every Roman was obliged by the censor, at the making of the census, to take an oath that his books were accurately and honestly kept. The custom was to jot down each day the items of income and expenditure as they occurred (*adversaria*), and to transfer these once a month to a permanent book, called *Codex* or *Tabulae accepti et expensi.* (Cic. Pro. Rosc. Com. 1, 1.) The daily entries (*adversaria*) were made without order, and were soon rubbed out; the *codex* was well arranged, like a ledger. (Cic. Pro. Rosc. Com. 3, 6.) Whether the temporary entry in the day-book was sufficient to support an action on contract is not certain ; but an entry in the *codex* charging another as owing a sum of money was a formal investitive fact, and gave the person making the entry a right *in personam* for the amount. It was not necessary that prior to the entry any sum should have been due; it was enough if the intending debtor consented to the entry. Theophilus gives us one form in which the entry was made.[1]

The entry in the *codex* served the same purpose as the interrogative form in stipulation. It created a contract; it was not merely evidence that a contract existed. If an action

[1] "*Centum aureos, quos, mihi ex causa locationis debes, expensos tibi tuli? Expensos mihi tulisti.*" (Theoph. *ad* J. 3. 21. pr.)

were brought for the money, the judge could not go beyond the writing; if the sum were entered, it must be paid. Hence, if, on the promise of a loan, an intending debtor allowed such entry to be made in the *codex* of his creditor, he could not refuse payment on the ground that he had never received the money. Writing that was mere evidence of a pre-existing contract was called *nomina arcaria.*

The case is different with the entries called *nomina arcaria;* for in them the obligation is made by acts (*re*), not by writing; since they hold good only if the money is actually counted out. This counting of the money makes an obligation *re.* We shall therefore be right to say that *arcaria nomina* do not make an obligation, but afford evidence that an obligation has been made. (G. 3, 131.)

Hence it is wrong to say that by *arcaria nomina* even aliens come under an obligation, for they come under it not by reason of the entry in itself, but because the money is counted out. This kind of obligation belongs to the *Jus Gentium.* (G. 3, 132.)

In the case put by Gaius, the obligation to restore the money lent, as will be seen presently, arose from the actual lending, and not from the written attestation; so that if the latter had not existed, the obligation would still have been perfect. It was usual to commit stipulations to writing in the time of Cicero (Top. 25; Rhet. 2, 9), but the obligatory force of the transaction was not altered. It was the stipulation that gave rise to the action, not the writing, which was merely evidence.

The question has been asked, whether an entry in the books of the creditor, without the knowledge or consent of the debtor, made an *expensilatio?* But the answer should not be doubtful. It is absurd to suppose that one man could make another his debtor by contract without his consent. If that had been allowed, it would have put all the honest men in Rome at the mercy of the knaves. There is no exception to the rule, that there can be no contract without consent. No doubt could exist upon this point, but for another and very different question,—Whether an entry in the books of the debtor similar to the entry in the books of the creditor was also necessary? Cicero says it was the practice for the debtor to make a corresponding acknowledgment in his own books, and adds it is not less base to refrain from entering what one owes to another, than it is to enter as due from another what is not due. The absence of such an entry in the books of a debtor deprived the creditor of the simplest and most conclusive proof of the debtor's assent. But he was not shut up

to that; and if he could show by other evidence that the debtor had consented to the written entry, he was entitled to succeed in his action. Cicero does not put the absence of an entry in the debtor's books higher; it is merely evidence worth little or much, according to the character of the alleged debtor.

The *Expensilatio* could not be conditional. It purported to be a statement of a sum *actually* due, and consequently the debt could not depend on the happening of any future event, or be suspended till a future day. (Vat. Frag. 329.)

If we had only the text of Gaius, a serious doubt would arise whether the *expensilatio* was really an original means of creating rights *in personam*, or only a mode of novation. (See *Postea, Novatio, Expromissio.*)

An obligation may be made by writing, as in the case of transferred entries (*nomina transcriptitia*). Now a transferred entry is made in two ways, either from thing to person, or from person to person. From thing to person, if what you owe me by reason of sale, or hire, or partnership, I set down as paid out to you. From person to person, as when what Titius owes me I set down as paid out to you, supposing, that is, that Titius has offered me you as a debtor in his room. (G. 3, 128-130.)

If these were the only uses of the *expensilatio*, it would not rank as an original mode of creating an obligation. But a case related by Valerius Maximus (viii. 2, 2) shows that although perhaps it was usually employed for the purpose of novation, it was not always so. C. Visellius Varro, being dangerously ill, allowed a woman (Otacilia), with whom he had been living, to put down in her books a sum of 300,000 sesterces as due by him (*expensa ferri sibi passus est*), with the intention that if he died she should claim that sum from his heirs. Visellius recovered, and was sued by Otacilia for the money. C. Aquilius Gallus (Prætor, B.C. 65), after consulting with the leading men, refused the claim on the ground of immoral consideration (*libidinosa liberalitas*), not because there was no pre-existing obligation. This case shows that an obligation might be *created* by entry in the *codex*.

Chirographa, Syngraphae.—The *codex* was already becoming obsolete in the time of Cicero, and long before Gaius it had disappeared, except perhaps in the case of bankers or money-lenders (*argentarii*); and the *nomina transcriptitia* consisted of detached written affirmations and acknowledgments of debt.

A *Chirographum* was kept by the creditor only, and was signed by the debtor.

Syngraphae were signed by both parties, and preserved for both.

These forms of contract were of Greek origin, as their names indicate. They were both in common use in the time of Cicero, and the *syngraphae* were known as early at least as the second Punic War (B.C. 210).

What, then, was the relation between the *codex* and the *chirographa* and *syngraphae* that coexisted with it?

The *codex*, like the *stipulatio*, originated in Roman customs; and therefore, like the *stipulatio*, it was confined to Roman citizens. It was disputed whether aliens could use the *nomina transcriptitia*, and the utmost stretch of liberality was, that they might use them for *novatio* only, not for *expromissio*.

Whether aliens incur an obligation by transferred entries is justly questioned. For such an obligation seems in a way to belong to the *jus civile;* and so Nerva held. But Sabinus and Cassius thought that if the entry transferred is from thing to person, then aliens too are bound; but if from person to person, that they are not. (G. 3, 133.)

The aliens were, however, put on complete equality with citizens by borrowing from the Greeks the written contract common to them.

Besides, an obligation by writing can be made by bonds and indentures (*chirographa*, *syngraphae*); that is, when a man gives a written acknowledgment of the debt or promise to pay—provided, however, that there is no stipulation. This kind of obligation is peculiar to aliens. (G. 3, 134.)

It has been doubted whether by these *chirographa* a new obligation could be created, or whether they were simply written evidence of an existing contract. This latter view is inadmissible, unless we suppose that the language of Gaius is inaccurate. He assumes that there is only the writing, and not a stipulation; and that the writing alone sufficed to constitute an obligation. We may, therefore, regard the *chirographa* and *syngraphae* as the exact equivalents of the *nomina transcriptitia;* they were to aliens what the latter were to citizens.

The remedy of a creditor by *expensilatio* was the *condictio certi*.

CAUTIO.—Formerly an obligation was made by writing, or by entries (*nomina*), as the phrase was. But these entries are not now in use. Plainly, however, if a man gives a written acknowledgment of a debt, though the money has not been paid over, he cannot meet it by the plea (*exceptio*) that the money has not been paid, if a long time has elapsed. This has been settled very often. So it happens, as even at the present day, that he is bound by the writing, while he cannot complain; and from that writing arises a *condictio*, though there was no obligation made by words. By long time in this *exceptio* the imperial constitutions formerly understood any time running up to five years. But that creditors might not be too long exposed to the chance of being defrauded of their money, a constitution of ours has narrowed the time, so that an *exceptio* of this sort cannot be brought after the lapse of two years at most. (J. 3, 21, pr.)

A *cautio* was merely a written acknowledgment of a loan, and was not conclusive of the receipt of the money by the borrower; and, what would scarcely be expected, the burden of proving the delivery of the money to the debtor rested entirely on the creditor, if the debtor denied the receipt. (C. 4, 30, 3; C. 4, 30, 1.) Justinian, however, in this respect, gave some compensation to the creditor by subjecting the debtor to a payment of twice the amount of the loan if he falsely denied his own writing or the receipt of the money. (Nov. 18, 8.) The *cautio* does not, therefore, rank as a literal contract; and Justinian rightly says that the literal contract did not exist in his day.

Was there any historical connection between the true literal contract (*expensilatio*, *chirographa*, or *syngraphae*) and the *cautio?* The point is obscure, but some light may be thrown upon it by considering what was the exact difference between *chirographa* and *cautio*. The essence of the chirograph was its constituting an obligation by its own inherent strength; the *cautio* was mere wastepaper but for the pre-existing contract of loan, of which it was the evidence. The difference was great, but still there was an easy descent from the ancient to the modern form. After Aquilius' Prætorship a fraudulent chirograph was void. Thus, if a debtor were induced to give a chirograph to a person that alleged he had deposited money with another for his use as a loan, and no such deposit had been made, the chirograph would have been rendered worthless by the plea of fraud. If, however, the allegation of the creditor was not that he had deposited the money, but that he would do so, say the day after the chirograph was signed, it would probably have been difficult, if not impossible, to employ the defence of fraud. The difficulty of urging this plea lay in the fact that a chirograph was perfectly valid although there was no valuable consideration, and therefore the mere fact that the money had not been lent would not of itself have vitiated the obligation. Still, if a creditor did not give the money for which he had got a chirograph, and afterwards sued the debtor on the writing, he was dishonest, at least in bringing the action, if not in getting the chirograph. This seems recognised in a constitution of Antoninus (C. 4, 30, 3), who speaks of the plea of fraud as substantially identical with the plea of *non numeratae pecuniae* (that the money had not been paid) (*exceptio doli seu non numeratae pecuniae*).

But in order to give complete protection to borrowers, it was necessary to give a remedy when the money had not really been lent, whether that was owing to the fraudulent intention of the lender or not. This was done by the *exceptio non numeratae pecuniae.*

The rule of law is the same, if a man, by pretending he will lend you money, makes a stipulation with you, and then does not pay the money. For that money he can certainly claim from you ; and give it you must, since you are liable under your stipulation. But because it is unfair that you should lose your case on that ground, it is held that you ought to defend yourself by the *exceptio* that the money was not paid over. The time for this, as has been written in an earlier part of these books, has been narrowed by our constitution. (J. 4, 13, 2.)

Like all equitable innovations, the *exceptio non numeratae pecuniae* was regarded as an indulgence, and limited to loans of money; and at first it could be urged only within a year. The time was afterwards extended to five, but finally settled at two years by Justinian. (C. 4, 30, 14, pr.) If the creditor did not sue, the debtor could bring a *condictio* to reclaim the written instrument, or if the creditor were absent, by a formal notification in Court, his *exceptio* was made perpetual. (C. 4, 30, 7 ; C. 4, 30, 14, 4.)

The *cautio* thus appears to have grown out of the *chirographa* by the admission within a limited time of the plea that the consideration for which it professed to be granted had not really been received.

It may be added that if the borrower paid interest or repaid any portion of the loan, he could not afterwards deny receipt of the amount stated in the *cautio.* (C. 4, 30, 4.) Justinian, moreover, extended the remedy beyond money lent—namely, to any *things* alleged to be given (*vel aliae res datae*), thereby considerably enlarging the scope of the *exceptio*, and enabling persons to contest their own written statements. (C. 4, 30, 14, pr.)

Second.—*EQUITABLE CONTRACTS.*

The group of contracts said by Gaius and Justinian to be made *re* introduces a new class of considerations. An obligation arises, not from the observance of an ancient form, but from some act or fact. This fact, or *res*, consisted in the delivery by one person to another of some property, with the intention of imposing duties on the receiver. The formal contracts are the offspring of the *jus civile;* the contracts with

great infelicity called "real," were introduced by the Prætor on purely equitable grounds.

I.—*MUTUUM* (LOAN).

DEFINITION.

An obligation may be contracted *re*, as by giving a loan (*mutuum*). Now a *mutui obligatio* arises when the things lent are weighed, counted, or measured, as wine, oil, corn, money, bronze, silver, gold. These we count, measure, or weigh, and so give them with the intention that they shall become the property of the receivers, and that at some future time we shall have returned to us, not the same things, but others of the same nature and quality. Hence comes the name *mutuum*, because I so give it you that from being *meum* it becomes *tuum*. From this contract arises the action called *condictio*. (J. 3, 14, pr.; G. 3, 90.)

Mutuum is akin to *creditum*, from which it differs only as the species from the genus. (D. 12, 1, 2, 3.) *Creditum* includes other than fungible things. (D. 12, 1, 2, 1.)

RIGHTS AND DUTIES.

I. Duties of the Borrower.

In describing contracts limited to special subject-matter we find that the duties may be divided into two principal classes: (1.) Those that are ascribed to the investitive facts, without special agreement. These are the normal rights and duties giving the special character to the contract. (2.) Those duties that do not regularly form part of the contract, but may be added to it by special agreement of the parties.

1. The receiver was bound to restore the same kind of things he received, equal in quantity and quality (D. 12, 1, 3); but not the identical things. Thus, if it was money, he must restore the same amount, but not the same coins. (Frag. Ulp. Inst. 3, 1.) If corn were given, the borrower must restore corn, not wine, or anything else of equivalent value. (D. 12, 1, 2, pr.) From a text of Pomponius it would seem that the borrower usually promised to return as good as he got (*ut aeque bonum nobis redderetur*), but such a promise was taken for granted. (D. 12, 1, 3.)

2. By special agreement the borrower might be required to pay interest, not exceeding the rate allowed by law, if an agreement were made by stipulation; or even, in a few exceptional cases, by *pactum*, as, in loans by municipalities (D. 22, 1, 30), or loans of corn or fodder. (C. 4, 32, 12; Nov. 136, 4.)

INVESTITIVE FACTS.—No contract of *mutuum* existed unless the things given were actually delivered to the borrower, or

were in his possession before the contract. (D. 12, 1, 9, 9.) The things must be made the property of the borrower; *i.e.*, he must have ownership (*dominium*), and not mere possession (*possessio*). Hence, an owner alone can give things by way of *mutuum*, although a mere possessor can give things so as to create other real contracts. (D. 12, 1, 2, 4.)

This contract might be conditional, like stipulation. (D. 12, 1, 7; D. 12, 1, 8.)

Special Restriction on Mutuum.—Persons under *potestas* were prohibited from accepting a loan (*mutuum*) of *money*.

One peculiar reservation is made in regard to such persons; for the *Senatus Consultum Macedonianum* has forbidden loans to persons in the *potestas* of their parents. He that trusts them is denied an action, not only against the son or daughter, grandson or granddaughter, in person (and that whether still *in potestate*, or now become *sui juris* by the death of the parent or by emancipation), but also against the father or grandfather, whether he has the descendants still *in potestate* or has emancipated them. The reason of this provision by the Senate was, that often sons, loaded with debt for borrowed moneys, which they used to spend in extravagance, plotted against their parents' lives. (J. 4, 7, 7.)

This enactment passed, according to Tacitus, in the reign of Claudius (Ann. 11, 13), or, according to Suetonius, in the reign of Vespasian (Vesp. 11), derived its name either from Macedo, a well-known usurer; or from Macedo, a young debauchee, whose crimes had drawn the attention of the Senate to the perils arising from spendthrift children. The words of the enactment are contained in D. 14, 6, 1.[1] "It is determined that no one that has given money on loan to a *filiusfamilias*, to be paid even after the death of the parent in whose power he is, shall be given any action or claim, that so these money-lenders of the worst sort may know that no *filiusfamilias* can contract a debt that will be good in the event of his father's death."

In form it did not make the loan *null and void*, but only refused an action to the lender. Hence, if the loan were repaid without action brought, the money could not be recovered on the plea that it was not due. (D. 12, 1, 14.)

The act applied to loans of money, but in other respects left the capacity of persons under *potestas* to contract perfectly unrestricted. Thus, a son could buy or sell, or let or hire, and

[1] "*Placere ne cui, qui filiofamilias mutuam pecuniam dedisset, etiam post mortem parentis ejus cujus in potestate fuisset actio petitioque daretur: ut scirent qui pessimo exemplo fenerarent, nullius posse filiifamilias bonum nomen expectata patris morte fieri.*"

if the obligations so arising were changed into a loan (*mutuum*), it was still valid (D. 14, 6, 3, 3), unless the sale or hiring were merely a pretext to evade the statute. (D. 14, 6, 7, 3.)

Exceptions.

(1.) A son (*filiusfamilias*) could borrow upon his *peculium*, and to the extent of it, without exposing himself to the disabilities of the statute. The statute prevented him borrowing upon the strength of his expectations from his father. (D. 14, 6, 1, 3; D. 14, 6, 2.)

(2.) The loan was valid if it were contracted with the father's consent (D. 14, 6, 12; C. 4, 28, 4), or received his subsequent ratification. (C. 4, 28, 7.) If the father paid any portion of the loan, his consent was conclusively presumed. (D. 14, 6, 7, 15.)

(3.) When the loan was made for the benefit of the father's estate; *i.e.*, if it was made by the son with the intention of making his father the real debtor. (D. 14, 6, 7, 12.)

(4.) When the loan was proper or necessary.

A son, being abroad, could borrow to pay such things as his father was accustomed to allow him for his education or official duties. (C. 4, 28, 5.)

A son might also borrow to pay a legal debt. (D. 14, 6, 7, 14.)

(5.) The loan was valid also when the lender was mistaken or misled as to the status of the borrower, provided the mistake was such as a reasonably careful man might make, and was not an error in law. (D. 14, 6, 3.) If the borrower declared he was a *paterfamilias*, it was enough (C. 4, 28, 1), unless the lender either knew or might have known that he was not. (D. 14, 6, 19.)

Remedy.—The *condictio certi*, sometimes called *actio mutui* (C. 7, 35, 5), or *condictio ex mutuo*, was the remedy.

Maritime or Commercial Loans.

Definition.—*Pecunia trajectitia* is money lent at interest (*nautico foenore*) with which merchandise is bought and shipped at the risk of the lender, until the goods arrive at the port of destination. (D. 22, 2, 1.) It is a loan of money (1) to be converted into goods (2) that are to be sent across sea (3) at the risk of the lender.

Rights of Borrower.—1. The borrower was not bound to repay the loan, unless the goods arrived safely at their destination (D. 22, 2, 3; C. 4, 33, 4); or unless they were lost by

other perils than the perils of the sea; as, *e.g.*, if they were seized by the exchequer as illicit. (C. 4, 33, 3.)

2. The interest was not limited. (Paul, Sent. 2, 14, 3.) Latterly, however, Justinian fixed a maximum of 12 per cent. per annum. (C. 4, 32, 26, 1.)

3. Usually the borrower was, by special agreement, bound to pay the expenses of a slave sent to collect the money if it were not repaid within the fixed time. To prevent disputes, it was usual to fix the sum *per diem* to be paid to the slave. (D. 22, 2, 4, 1.)

II.—*Commodatum* (Gratuitous Loan).

Definition.

Again he to whom anything is given to be used, that is lent free, comes under an *obligatio re*, and is liable to an *actio commodati*. But he differs widely from a man that has received a loan (*mutuum*); for the thing is not so given him as to become his, and therefore he is bound to restore the actual thing itself. . . . . A thing is understood to be lent free strictly only if the thing is given you to be used without any reward being received or fixed. But if it is otherwise, and a reward comes in, then the use of the thing is let out to you (*locatur*); for a free loan (*commodatum*) ought to be gratuitous. (J. 3, 14, 2.)

Commodans or *commodator* is the person that lends the thing.

Commodatarius is the borrower.

The *commodatum* is of Prætorian origin. The edict runs thus:[1]—"The Prætor says, If it is alleged that a man has lent another anything free, I will give him a remedy therefor."

As *commodatum* consists in the use of a thing, there could with propriety be no *commodatum* of things consumed in the use. But such articles might be given for the sake of show, not to be used and consumed (D. 13, 6, 3, 6); and even money might be lent for the purpose of a sham payment. (D. 13, 6, 4.)

Usus and *Commodatum*.—In what respect does *commodatum*, which here appears among contracts, differ from *usus*? In one respect they resemble each other. Both are gratuitous; both imply the absence of consideration for the use. But the differences between them are sufficiently marked to justify the arrangement of the Institutes.

We may, however, premise what is *not* the difference. The term of the edict was not "*uti*," but "*commodare*." Labeo said use (*usus*) was the genus of which *commodatum* was the species: that use applied both to moveables and immoveables, while *commodatum* applied only to moveables. But this distinction Cassius denied; and Ulpian agrees with him; adding that even a dwelling-house might be the object of a *commodatum*. (D. 13, 6, 1, 1.)

Both *usus* and *commodatum* effect a separation between the ownership and the actual enjoyment of property; but in *usus* the separation is serious, and lasts generally for the life of the usuary; in the case of *commodatum* the use is more limited and temporary. The usuary had rights *in rem;* he could sue the thief, or anyone that did damage. A borrower (*commodatarius*) could not sue the person that damaged the article borrowed (D. 9, 2, 11, 9); and although he could sue the thief that stole it yet

[1] *Ait Prætor:* "*Quod quis commodasse dicetur, de eo judicium dabo.*" (D. 13, 6, 1.

under Justinian, this was entirely in the option of the owner. The *commodatarius* had not even interdict possession. (D. 13, 6, 8.)

Still more striking is the difference in the investitive facts. *Usus* was created by testament, by *mancipatio*, by *in jure cessio*—all recognised modes of creating ownership. But *usus* could also, as we have seen, in certain cases originate in contract. Is it not the same with *commodatum?* There is a difference in the kind of contract. Whether the *usus* arose from stipulation or not, it certainly arose from a *promise;* but the right of the *commodatarius* begins from the *delivery* of the thing; until that time he has no right whatever.

The external marks correspond with a more essential difference; in *usus*, the law looks to the interest of the usuary; in *commodatum*, to the interest of the lender. There could be no greater mistake than to suppose that the law interfered on behalf of the borrower (*commodatarius*). It did not compel a man to give a loan of anything he had promised: it had no intention of beneficence towards the borrower (although it must be borne in mind, the *commodatum* is gratuitous); but when a lender entrusted anything to a borrower, the Prætor required that he should not abuse the confidence reposed in him, but that he should return the property safe and sound. This was the primary object of the intervention. The *commodatum* is, therefore, in its original scope, a unilateral contract; it imposes duties on the borrower, but none, in the first instance, upon the lender. But the Prætor having once intervened, could not stop there. The borrower might have been put to great and unexpected expense, and it would not be fair to compel him to return the property without giving him compensation. The lender must not expect the equitable intervention of the Prætor, unless he was prepared to "do equity" as well as to receive it. Thus, incidentally, the lender might be subject to duties as well as the borrower; but the duties of the borrower exist in every case; the duties of the lender are occasional, accidental, and indirect. This, then, is the first example of a departure from the strict unilateral contracts of the civil law; for even the "*mutuum*" was purely unilateral. It is a contract unilateral in its origin and scope, but which may, in consequence of circumstances that arise, become bilateral.

Rights and Duties.

I. Duties of the *commodatarius* = Rights *in personam* of *commodator.*

1. To return the thing lent in as good condition as he received it, excepting ordinary tear and wear.

2. To use the thing for the use agreed upon. It is theft, as already explained, if the borrower fraudulently procures the loan of a thing for one purpose intending to use it for a different one, or to use it in a manner that he knows the lender would never have permitted. (J. 4, 1, 6.)

A horse is lent for a journey, the length of which is known to the lender (*commodans*). The distance is too great, and the horse is hurt. The loss falls on the lender. (D. 13, 6, 23.)

A horse is lent to go to battle, and is killed. The owner has no claim against the borrower (*commodatarius*). (D. 13, 6, 5, 7.)

3. The borrower must take as good care of the thing lent as a good *paterfamilias*, if there is no special agreement. (C. 6, 43, 1; D. 13, 6, 5, 7; D. 13, 6, 23.)

He that has received a loan, if by any chance mishap he loses what he received—by fire, for instance, or the fall of a house, or shipwreck, or the onset of robbers or foes—none the less still remains under the obligation. But he that has received a thing to use is in a different position. Undoubtedly, indeed, he is compelled to show all possible diligence in guarding it; and it is not enough for him to employ all the diligence he usually employs in regard to things of his own, if another person of greater diligence could guard the thing safely. But for force too great for him, or for the like mishaps, he is not liable, if only it was not by any fault of his the mishap occurred. But otherwise, as if you choose to take what is lent you free from home with you and then lose it by the onset of foes or robbers or by shipwreck, there is no doubt you are bound to restore it. (J. 3, 14, 2.)

The borrower, in the case of *mutuum*, became owner of the thing lent. He was bound to restore not what he received, but only the same kind of thing in quantity and quality. His obligation, therefore, did not depend on the fate of the things committed to him. These he could use or destroy as he pleased. But the *commodatarius* is not owner of the thing lent to him; he has only the custody and the use of it, and according to the usual rule, accidental loss should not fall upon him, but upon the owner.

Titius borrows plate from Gaius, saying he means to use it for a supper to be given to his friends. He takes it on a journey. The plate is stolen by robbers. Titius must pay Gaius the value of the plate. (D. 44, 7, 1, 4.)

Loss by theft was considered to show a want of due diligence; and accordingly if the thing lost were stolen (even if by the slave of the lender), the borrower was obliged to make good the loss. (D. 13, 6, 21, 1.)

Was the borrower of a slave liable if the slave ran away? This question, we are told, gave rise to much controversy. In some cases the liability of the borrower was beyond dispute, as when the slave was kept in chains, or so young as to require looking after, or the borrower had specially agreed to watch him. (D. 13, 6, 5, 6.)

Exception.—The borrower was required to take good care, as nothing more than a just return for the gratuitous benefit conferred upon him. (D. 13, 6, 5, 2.) Accordingly, when the lender also derived a benefit from the contract, a less degree of care was required.

Two friends agree to give a joint supper—one taking the charge, and the other supplying the plate. Gaius says in this case it was an opinion of some jurists that the friend in charge was responsible only for wilful misconduct (*dolus*), not for the want of ordinary care (*culpa*); but Gaius thinks that he might be made liable as far at least as a husband was for his wife's *dos; i.e.*, not for the care of a *prudent man* (good *paterfamilias*), but only for such as he took of his own affairs. (D. 13, 6, 18, pr.)

A man gives dresses to his betrothed in order that her appearance may be creditable to him. In this case, if the match goes off, and the dresses have to be returned, the betrothed is responsible only for wilful mischief (*dolus*), because the dresses are given as much for the glory of the intending husband as for her gratification. (D. 13, 6, 5, 10.)

II. Duties of *Commodator* = Rights *in personam* of *Commodatarius.*

1. The lender is bound to suffer the borrower (*commodatarius*) to enjoy the use of the thing according to the terms of agree-

ment. This obligation, it must be remembered, arises only when the thing has been delivered to the borrower.

Titius lends to Gaius tablets (*pupillares* or *codex*) in order that a debtor of Gaius' may give him a written security. Titius cannot demand back the tablets until the security is discharged. The reason is that it would be inequitable. If Titius had refused the tablets, another might have given them, or witnesses might have been procured. (D. 13, 6, 5, 8.)

Upon the same principle, if Titius gave Gaius a loan of wood to repair his house, he cannot take it away until the house falls down. (D. 13, 6, 17, 3.)

2. The lender must pay any extraordinary expenses incurred in preserving the thing lent. Thus the money spent on a sick slave, or to catch a runaway slave, must be paid by the lender. (Paul, Sent. 2, 4, 1.) But ordinary expense, which is the natural equivalent for the use of the thing, must be borne by the borrower. The borrower must, therefore, pay the food of the slaves, and even expenses for illness, if they are small in amount. (D. 13, 6, 18, 2 ; Mos. et Rom. Legum Collat. 10, 2, 5.)

3. If the lender has knowingly given in loan, and the borrower unwittingly received, things mischievous or unsuited to the purpose for which they were lent, he must pay any damage that may result.

Titius supplies Gaius with rotten wood to repair his house, and the house falls down. Titius must make good the loss. (D. 13, 6, 17, 3.)

Julius lends vessels to hold wine or oil, knowing that they are leaky or will spoil the liquor. Julius must pay the value of the wine or oil so destroyed or lost. (D. 13, 6, 18, 3.)

Maevius gives to Sempronius the loan of a dishonest slave, who steals from Sempronius. Maevius must make good the loss if he knew, and Sempronius did not know, the slave's character. If Maevius did not know, he may still be sued by a noxalis *actio furti.* (D. 13, 6, 22.)

Investitive Facts.

As in *mutuum*, the rights and duties of *commodatum* arise from the delivery of the thing to the borrower. The borrower is not owner, and has not even *possessio.* (D. 13, 6, 8 ; D. 13, 6, 9.) Hence a person not owner—even a thief or robber—can give a thing in *commodatum.* (D. 13, 6, 15 ; D. 13, 6, 16.)

Remedies.

I. To enforce the duties of the *commodatarius.*

1. *Actio commodati directa.*

This is an action *bonae fidei.* (See Book IV. as to meaning of *actio bonae fidei.*)

If the defendant has lost the thing without blame, he may be required to give security to deliver it up if it should again come into his possession. (D. 13, 6, 13, pr.)

II. To enforce the duties of the *commodator*.

1. *Actio commodati contraria.*

At present no more need be said upon this, than that everything that forms a ground for the *actio contraria* is a good defence to the *actio directa* (D. 13, 6, 18, 4); and that, like other *contrariae actiones*, it can be brought, although the *actio directa* may not have been called into exercise. (D. 13, 6, 17, 1.)

2. *Actio utilis commodati contraria.*

This is to enforce restitution when the lender has carried off the thing lent without the knowledge of the borrower, and has sued the borrower and made him pay the value of it. This action is to compel the lender to restore the price so unjustly obtained. (D. 13, 6, 21.)

III.—*DEPOSITUM* (Deposit).

Definition.

This is a contract in which one person (*depositor*) gives another (*depositarius*) a thing to keep for him gratis, and to return it on demand. (D. 16, 3, 1, 8; D. 16, 3, 1, 45.)

This contract is distinguished from *mutuum*, because the ownership of the thing is not transferred, but both ownership and possession remain with the depositor. (D. 16, 3, 17, 1.) It is distinguished from *commodatum* because the receiver is not allowed to use it.

Titius deposits with Gaius 10 *aurei*, giving him permission to use them if he pleased. Until Gaius actually did use the money, the contract remained one of deposit simply. (D. 12, 1, 10; D. 16, 3, 1, 34.)

Julius deposits with Maevius 10 *aurei*, and afterwards gave Maevius permission to use them. If Maevius accepts this permission, the contract is changed at once into *mutuum*, although he does not actually use the money. (D. 12, 1, 9, 9.) The consent of both parties is required to make a contract. If, then, Gaius accepts a thing on deposit, on the condition that if he should wish to use it he may do so, the agreement is understood as simply giving him power to convert the contract into loan at his own pleasure. On the other hand, when permission is afterwards given and accepted, the contract is at once changed, because an agreement for use, without actual use, suffices to make a *commodatum*.

The contract of deposit belongs to the *Jus Gentium*. The words of the edict are:—"If a deposit is made not in consequence of a sudden outbreak, or fire, or fall of house, or shipwreck, the remedy shall be for the loss simply. But if in consequence of the events above named, double, if the action is brought against the depositee in person. If it is brought against his heir, and it is affirmed that the loss was due to wilful wrongdoing of the deceased, the remedy shall be for the loss simply; but if of the heir, for double the amount."[1]

When the deposit was made in consequence of fire and shipwreck, etc., it was said to be made from compulsion or distress (*necessarium, miserabile*).

---

[1] *Prætor ait:* "*Quod neque tumultus neque incendii neque ruinae neque naufragii causa depositum sit, in simplum* [*ex*] *earum autem rerum, quae supra comprehensae sunt, in ipsum in duplun, in heredem ejus, quod dolo malo ejus factum esse dicetur qui mortuus sit, in simplum, quod ipsius, in duplum judicium dabo.*" (D. 16, 3, 1, 1.)

Rights and Duties.

I. Duties of *Depositarius* = Rights *in personam* of *depositor.*

A. In the Absence of Special Agreement.

1. To keep the thing safe.

He is liable only for acts of wilful fraud ; but on the score of fault—that is, of sloth or negligence—he is not liable. He is not answerable, therefore, although, through his want of diligence in guarding it, the thing is lost by theft. For he that gave a negligent friend a thing to guard, ought to ascribe the loss to his own easy-going ways. (J. 3, 14, 3.)

The contract of deposit is for the benefit of the *depositor* alone, and therefore the *depositarius* is responsible only for wilful destruction of the thing or extreme negligence. The reason mentioned by Justinian can hardly be supported, because in *mandatum*, which was a gratuitous contract, and in some respects scarcely to be distinguished from deposit, a higher degree of care was exacted. The contrast is with *commodatum*, where the benefit of the contract was entirely for the borrower, although the lender also might have an advantage, if he gave the use of the thing in order to induce some one to take better care of it. (Mos. et. Rom. Legum Collat., 10, 2, 1 ; 10, 2, 2 ; D. 13, 6, 5, 2.)

A slave deposits plate with Gaius. Gaius, thinking Titius to be the master of the slave, gives it up to him. The true owner has no remedy against Gaius, who acted honestly, although in mistake. (D. 16, 3, 1, 32.)

Titius deposits some plate with Gaius, and dies, leaving several heirs. Certain of the heirs demand the plate. Gaius was advised that the best course was to go before the Prætor and obtain an order for the delivery of the plate. But even if Gaius did not take that precaution, and gave up the plate to the demandants without any intention of prejudicing the other heirs, he was not liable to them. (D. 46, 3, 81, 1.)

A testament is deposited for safe custody with Titius, who reads the contents aloud to his neighbours. This is gross negligence (*culpa lata*) ; or, if done maliciously, *dolus ;* and in the latter case the *depositarius* was exposed to the *actio injuriarum* as well. (D. 16, 3, 1, 38.)

Sempronius deposits plate with Gaius, and Gaius deposits it with Titius. Titius by his *dolus* causes the loss of the plate. Gaius is not responsible for the loss, but is bound to give Sempronius his right of action against Titius. (D. 16, 3, 16.)

A slave belonging to Titius gives Gaius money to pay to Titius for his manumission. Gaius pays the money. Is he liable to Titius to restore the money deposited, because a deposit by the slave is, in law, a deposit by the master? If Gaius informed Titius with what purpose the money was deposited with him, Titius has of course no ground of complaint. But if Gaius paid the money as if it were his own, he is liable to make good the deposit ; for, in point of fact, he has not returned it ; it is one thing to return a deposit, and another to give a thing as from oneself. (D. 16, 3, 1, 33.)

2. The *depositarius* must not use the thing. Such a use may amount to a theft of the use, or may merely subject the *depositarius* to payment of interest. (C. 4, 34, 3 ; C. 4, 34, 4.)

3. If without his fault the *depositarius* loses the thing deposited, he must give the depositor all his rights of action against the person by whom the loss was caused. (D. 16, 3, 16; D. 16, 3, 1, 47; D. 16, 3, 2-4.)

4. To return the thing on demand, with all its produce and accessions, and without making any charge. (D. 16, 3, 1, 45 D. 16, 3, 1, 24; D. 16, 3, 34.)

Further, he with whom anything is deposited incurs an *obligatio re*, and is liable to an *actio depositi*. For by it he is bound to restore the thing he received. (J. 3, 14, 3.)

If the *depositarius* is in a position to return the thing on demand, and refuses, he must pay interest. (Paul, Sent. 2, 12, 7; C. 4, 34, 2.)

B. By Special Agreement.

I. It was not unusual to make an agreement that the *depositarius* should take as much care of the thing deposited as a good *paterfamilias*. (D. 16, 3, 1, 35; D. 16, 3, 1, 6.) In some cases the *depositarius* might be responsible even for accidental loss.

Titius wishes to buy an estate with borrowed money, but does not wish to raise the money until the sale is accomplished. Gaius, who wants to lend, and is obliged to go abroad, leaves him the money on condition that if the purchase is made, the money shall be a loan. In this case, accidental loss of the money falls on Titius. (D. 12, 1, 4, pr.)

II. Duties of *depositor* = Rights *in personam* of *depositarius*.

1. The *depositor* must pay all the expenses incident to the custody of the thing, as the food of slaves (D. 16, 3, 23; Mos. et Rom. Legum Collat., 10, 2, 5), or the expense of carrying anything to the place where it is to be delivered. (D. 16, 3, 12, pr.; D. 16, 3, 12, 1.)

2. He must make good all damage caused by the thing deposited, if he knew that it was likely to cause damage; as, for example, a slave given to stealing. (D. 13, 7, 31.)

INVESTITIVE FACTS. — As in the other contracts *re*, the investitive fact is the *delivery* of a thing, not mere consent. Hence a written instrument attesting a deposit has no value if the thing has not actually been delivered. (D. 16, 3, 26, 2.)

REMEDIES.

I. To enforce the duties of the *depositarius*.

1. *Actio depositi directa.*

1°. Damages. By the law of the XII. Tables, a penalty of twofold the value of the thing was given against a depository who did not return the thing deposited;

but by the Prætor, the double penalty was retained only when the deposit was compulsory. (Paul, Sent. 2, 12, 11 ; D. 16, 3, 18.)

2°. Condemnation brought infamy (*infamia*) on the *depositarius*. (C. 4, 34, 10 ; Mos. et Rom. Legum Collat, 10, 2, 4.) (See as to *Infamia*, pp. 431-432.)

3°. It is an action *bonae fidei*. (D. 16, 3, 1, 23.) But no set-off was allowed (except probably in respect of expenses incurred on account of the thing deposited) : the *depositarius* must restore the thing without deduction of what the *depositor* may owe him. (Paul, Sent. 2, 12, 12 ; C. 4, 34, 11.)

4°. The oath of the plaintiff as to the value of the thing deposited is taken. (D. 16, 3, 1, 26.)

5°. Although this action is of Prætorian origin, the contract of deposit is of older date, and was enforced by an action of the civil law ; and hence this action is not limited to one year, but is perpetual, subject to the general rules of prescription.

2. *Actio utilis depositi directa.*

This is the action brought by a person to whom the depositor has given his right of restitution (C. 3, 42, 8) ; or by the depositor against a person with whom the *depositarius* has deposited the thing. (Paul, Sent. 2, 12, 8.)

II. To enforce the duties of *depositor*.

1. *Actio depositi contraria*, regarding which nothing special is to be noted.

Pignus.—In the Institutes, pledge (*pignus*) is included among contracts *re*. But in this work it has been placed along with the other forms of mortgage.

IV.—*MANDATUM.*

Definition.

Mandate is a contract in which one person (*is qui mandatum suscipit, mandatarius*) promises to do or to give something, without remuneration, at the request of another (*mandator* or *mandans*), who, on his part, undertakes to save him harmless from all loss.

Lastly, we must know that a mandate (*mandatum*), unless gratuitous, ceases to be a mandate, and passes into business of another kind. For if payment is settled on, it is at once a case of letting and hiring. And (to speak generally) in all cases where the business contract is one of mandate or deposit, if the duty is undertaken without payment, the fact that payment comes in transforms the contract into one of letting and hiring. If, therefore, you give clothes to a fuller to clean and do up, or to a tailor to mend, without settling on or promising a payment, the *actio mandati* is open to you. (J. 3, 26, 13 ; G. 3, 162.)

Mandate is the only gratuitous consensual contract. In no other consensual contract was a promise without consideration binding ; but the peculiarity of mandate is, that it exists only when there is no consideration.

The gratuitous nature of the contract began to be felt as an inconvenience ; and although, strictly, payment could not be recognised, yet a sum might be agreed upon to be paid as a *honorarium* (D. 17, 1, 6) ; and even a salary might in later times be paid. But it could be recovered only by special action, and was not recognised as an element in the mandate. (C. 4, 35, 17 ; D. 17, 1, 56, 3.)

A mandate may exist either for our own sake or for some third person's. For I may give you a mandate to manage business either for me or for some third person, and in both cases there will be an *obligatio mandati*, and we shall be liable to one another in turn,—I for your expenses, you to act in all good faith toward me. (G. 3, 155.)

The contract of mandate may be formed in five ways. For the mandate is given you either for the giver's sake only, or for his and yours, or for that of some third person only, or for the sake of the giver and some third person, or for your sake and that of some third person. But if it is for your sake only that the mandate is given you, it is superfluous. [For what you were going to do for your own sake, and acting on your own opinion, you will not be regarded as doing as the result of a mandate from me.] No obligation, therefore, arises out of it, nor any *actio mandati* between you. (J. 3, 26, pr.; G. 3, 156.)

It is for your sake only that a mandate comes in; if, for instance, a man gives you a mandate to invest your money in the purchase of land rather than to put it out at interest, or *vice versa*. Now a mandate of this sort is rather a piece of advice than a mandate, and therefore is not obligatory; for no one incurs an *obligatio mandati* by giving advice, even though it turns out ill for him to whom it is given. For each man is free to search out for himself whether the advice is good. If, therefore, you have money lying idle by you at home, and some one urges you to buy something with it or to lend it out, even though such buying or lending turns out ill for you, he is not liable to you in an *actio mandati*. And so much so that it has been questioned whether he that has given you a mandate to lend money at interest to Titius is liable to an *actio mandati*. But Sabinus' opinion has prevailed that the mandate in this case is obligatory, for [the mandate was not a general one to lend money on interest, but a special order to lend it to Titius, and] you would not have lent it to Titius but for this mandate. (J. 3, 26, 6; G. 3, 156, as restored.)

The obligation of a *mandator*—*i.e.*, of the person making the request—was to save the other harmless. In giving general advice, a person could never be supposed to undertake that obligation. But the ground of the distinction set forth in the outset may be looked at in another aspect. The contrast drawn by Gaius between general advice to lend money and a request to lend money to a particular person, correctly illustrates the principles of the distinction. It would be absurd to infer an intention to indemnify from loss when no specific act was recommended, but a mere general preference of lending money to buying land was expressed; but it may be reasonable to presume such an intention when a particular act is recommended in respect of a particular person. If, therefore, Sempronius had advised Titius to buy the slave Stichus, instead of lending money to Seius, and Titius had bought Stichus, and been evicted without being able to recover the price from the seller, he would doubtless have had an action against Sempronius. The question really turns on the intention of the parties; did the *mandator* request the *mandatarius* in such a manner as to lead the latter to expect indemnification, and therefore to make an investment, or do something exposing himself to loss that he would otherwise have escaped?

Aurelius Quietus gave a mandate to his medical guest in these terms:—"At your gardens near Ravenna pray set up a tennis court, warm baths, and whatever else is necessary for your health, at my expense." The doctor spent 100 *aurei* on improvements of this nature; but on selling his gardens found that the price was

enhanced only to the extent of 40 *aurei* in consequence of his improvements. He can recover the balance of 60 *aurei* in an action of mandate. (D. 17, 1, 16.)

1. A mandate may come in for the sake of him that gives it,—as when a man gives you a mandate to manage his business, or to buy a farm for him, or to undertake (*spondere*) on his behalf. (J. 3, 26, 1).

Titius requests Seius to buy a certain article for him out of his own money. After the thing is bought and paid for by Seius, Titius refuses to take it: Seius can sue him, not only for the price paid, but for interest. (Paul, Sent. 2, 15, 2.)

An example of a general power of administration is given in D. 17, 1, 60, 4. Lucius Titius committed the administration of his property to his nephew in these terms:—"To Seius, my son, greeting. I indeed hold it according to nature that a brother or brother's children should act for a brother without any express authority; but still if there should be any necessity for your interference, I grant you power to act for me in all my concerns, if you will; to buy, sell, contract, and in all other ways to act as owner of all my property. I authorise all you do, and refuse my sanction to nothing."

2. It may be for the sake of both you and the giver,—as when the man gives you a mandate to lend money at interest to a third person that borrows it for the good of the giver's property; or when you wish to bring an action against him as surety, gives you a mandate to bring the action against the principal at his risk; or gives you a mandate to stipulate at his risk, with a substitute for his choosing, for a debt he had owed to you. (J. 3, 26, 2.)

Seius is about to sue Titius as surety, and Titius requests him to sue the principal debtor at his risk. After the changes made by Justinian, this case could not occur, as the creditor was in every instance obliged to sue the principal debtor before the surety.

Titius owes money to Seius, and Sempronius to Titius. On being sued by Seius, Titius requests Seius to accept from Sempronius a promise by stipulation to pay the amount, on condition that if Sempronius does not pay the money he will.

A dispute regarding an inheritance took place, and claims were advanced on the part—(1) of the heirs named in the will; (2) of a paternal uncle, Maevius; and (3) of several paternal aunts, sisters of Maevius. Maevius wrote to his sisters, saying he would share with them whatever he recovered in a suit he was about to institute against the testamentary heir. No stipulation followed. Maevius compromised the case, and got some lands and other property. Could the sisters compel him to share with them? Yes, because a request was implied on their part to Maevius to take legal proceedings to recover the property to which they all laid claim. (D. 17, 1, 62, pr.)

3. A mandate may come in for the sake of a third person only,—as when he gives you a mandate to manage Titius' business, to buy a farm for Titius, or to become surety for Titius. (J. 3, 26, 3.)

In this case the *mandator* was simply a surety. In what respects suretyship so constituted differed from the verbal contract of suretyship (*fidejussio*) will hereafter be examined. (See Accessory Contracts.)

4. It may be for the sake of the giver and a third person,—as when he gives you a mandate to act in business common to himself and Titius, or to buy a farm for Titius and himself, or to undertake for Titius and him. (J. 3, 26, 4.)

"Titius to Seius. Greeting.—You are aware of the interest I take in Sempronia, and since you are about to marry her in accordance with my wishes, I desire to see you married in a manner suitable to your position. Although I know that Titia, the mother of the girl, will promise you a suitable dowry, still I, the more to win your attachment to my house, do not hesitate also to pledge my word. Wherefore, know that for whatsoever sum you stipulate with her, I will be surety, and will see you paid."

This is an example of a letter of mandate. (D. 17, 1, 60, 1.)

5. It may be for your sake and that of a third person,—as when a mandate is given you to lend Titius money at interest. But if the mandate is to lend him money without interest, then it is for the sake of the third person that the mandate comes in. (J. 3, 26, 5.)

Rights and Duties.

A. Duties of *Mandatarius* = Rights *in personam* of *mandator*.

I. To do what he has promised. (D. 17, 1, 22, 11.)

A mandate anyone may freely refuse to undertake. But if it is once undertaken, it must be fulfilled or renounced as soon as possible, so that he that gave it may carry out the same matter, either in person or through some one else. For unless the renunciation is so made that the whole case is kept untouched for the giver of the mandate to resolve the matter himself, then none the less there is room for an *actio mandati*,—unless, indeed, some good reason comes in for not renouncing, or for renouncing at an unreasonable time. (J. 3, 26, 11.)

Paul gives instances of "good reasons,"—sudden illness, a necessary journey, enmity arising between *mandator* and *mandatarius*, or a mandator's loss of credit, and inability to meet his obligations. (Paul, Sent. 2, 15, 1.)

The obligation on the *mandatarius* is, therefore, not unqualified. A person that has gratuitously undertaken a mandate is not bound to execute it unless he has the means of doing so, and has put the *mandator* in a position where he cannot have the commission executed by any one else. The obligation of the *mandatarius* can therefore be got rid of at any time, if he gives the *mandator* an opportunity of getting another to perform the mandate. It would be unfair, if after having undertaken to do a service, and having made it impossible for any one else to do it, the *mandatarius* were at the last moment to refuse. This would be taking advantage of the confidence reposed to him, to do an injury to the *mandator*.

If a consideration has been promised for a service to be rendered, then the person that undertakes it cannot renounce. Suppose Titius asks Seius to manage his estate during his absence on a campaign. If Titius agrees to pay Seius a salary for his trouble, then Seius cannot refuse the superintendence without exposing himself to an action for damages. But if no

wages are to be paid, Seius can refuse up to the time that Titius goes away, provided he gives him an opportunity to find another. It would be grossly inequitable if Seius were allowed, just at the moment when Titius was obliged to go, to throw up the management; accordingly, in the Roman law, Seius was obliged to execute his promise, or else pay the damage resulting from his refusal. (C. 4, 35, 16; D. 17, 1, 27, 2.) Hence, if no loss is actually suffered, either because there was no necessity for doing what was promised, or another did it, Seius has nothing to answer for. (D. 17, 1, 8, 6.)

II. To execute the commission as it was given, leaving nothing undone, and doing nothing wrong. (D. 17, 1, 5, pr.-1.) If the *mandatarius* does not execute his commission according to its terms, he is not entitled to his counter claim against the *mandator*. (D. 17, 1, 41.)

In the discharge of a mandate one ought not to overstep its bounds. [For if he does, the principal has an *actio mandati* against him for the amount of the principal's interest in its fulfilment—supposing always he could have fulfilled it; while against the principal he has no action in turn.] If, for instance, a man gives you a mandate to spend any sum not exceeding 100 *aurei* in buying a farm, or in undertaking something for Titius, you ought not to buy the farm at a higher price, nor to become surety for a larger sum. If you do, you will have no *actio mandati* against him. Sabinus and Cassius indeed held that, even if you are willing to bring the action for a sum not exceeding 100 *aurei*, it will still be in vain. But the authorities of the opposing school rightly think that you can bring an action for a sum not exceeding 100 *aurei;* and this opinion is certainly milder. But if you buy it for a less sum, you will have an action against him. For he that gives you a mandate to buy him a farm for 100 *aurei* is understood to give you a mandate to buy it for less if you can. (J. 3, 26, 8; G. 3, 161.)

Titius gives Seius a commission to sell a slave for 10 *aurei*. Seius sells the slave for 9. The sale is good; but Seius must make up the price to Titius. (Paul, Sent. 2, 15, 3.) This view is not borne out by the following cases:—

Titius asks Seius to sell his (Titius') farm for 100 *aurei*, and Seius sells it for 90. If Titius sues for his land, he will recover it unless the price is made up to 100. (D. 17. 1, 5, 3.)

Calpurnius requests Attius to buy the house of Seius for 100 *aurei*. Attius instead bought the house of Titius for less, although it was of greater value. Calpurnius is not bound to accept it. (D. 17, 1, 5, 2.)

Titius requests Seius to pay a sum that he owes to Cornelius. Instead of paying it to Cornelius, Seius induces Cornelius to accept him as a substitute in the place of Titius, and afterwards has to pay the money. Although Seius has not observed the exact terms of the mandate, still this is a substantial performance. (D. 17, 1, 45, 4.)

"Lucius Titius to his Gaius. Greeting.—I request and order (*mando*) you to become a surety for Publius Maevius to Sempronius; and whatever sum Publius shall fail to pay you, I hereby inform you by this letter, written with my own hand, that I will instantly pay you." Gaius did not become surety (*fidejussor*), but he gave

a mandate to Sempronius to advance money to Maevius. Inasmuch as, in either way, Gaius made himself responsible if Maevius made default, he had a remedy against Titius upon this letter. (D. 17, 1, 62, 1.)

Titius requests Seius to buy a farm, without stating that he will not accept a part, but only the whole of it. Seius buys a half. This is a good performance. (D. 17, 1, 36, 3.)

III. The *mandatarius* must execute the mandate honestly, and with as much care as a good *paterfamilias*. (C. 4, 35, 13).

A *mandatarius* is guilty of *dolus* when he refuses to give up to the *mandator* what he has got through the mandate, and has in his power (D. 17, 1, 8, 9) ; or when he refuses to sue when it is in his power to sue. (D. 17, 1, 44.) But the *mandatarius* is not liable for accidental loss unless he specially undertakes that responsibility. (D. 17, 1, 39.)

This obligation may be contrasted with the parallel gratuitous contract of deposit. In that contract the *depositarius* answers only for fraud (*dolus*), not for carelessness.

The responsibility of the *mandatarius* is said to arise from the contract being originally made between friends, with no voucher but their honour, and implying a high degree of care. Whether this is a satisfactory reason is somewhat doubtful, when we consider that a less amount of care was required in the non-gratuitous contract of partnership.

Modestinus (Mos. et Rom. Leg. Collat. 10, 2, 3) states that the *mandatarius* answers for *dolus* only, not for *culpa*, and in this respect contrasts him with a *tutor*. The services of *mandatarius* and *tutor* are in each case gratuitous, yet in the former, says Modestinus, only *dolus* is reckoned ; in the other both *dolus* and *culpa*. But the statement of Modestinus was undoubtedly not law ; it is interesting, however, as evidence that there was not complete unanimity among the Roman jurists on the subject of the responsibility of the *mandatarius*.

Calpurnius requests Felix to inquire into the value of an inheritance left him. Felix does so, and reports it worth 500 *aurei*. Upon this representation Calpurnius sells the inheritance to Felix for that sum. Really it was worth 900 *aurei*. Calpurnius cannot set aside the sale on the ground of inadequacy of price, but he can sue Felix for 400 *aurei*, because he misled him to that extent in executing his mandate. (D. 17, 1, 42.)

Titius requests Seius to inquire into the resources of Piso, who has asked him for an advance of money. Seius, willing to do a good turn to Piso, represents him as perfectly trustworthy. Titius advances money to Piso, who is really insolvent. Seius must make good the loss. (D. 17, 1, 42.)

Julius being plaintiff in a suit, appoints Licinius his procurator, who, by collusion with the defendant, allows the claim to be defeated. Licinius must make good the loss ; and if he is insolvent, an action for fraud (*actio de dolo*) lies against the defendant. (D. 17, 1, 8, 1.)

Titius requests Seius to buy Pamphilus for him at an auction. Seius did not bid for the slave, from a desire to please a rival bidder. Seius is answerable to Titius for the loss. Suppose, however, Seius bought Pamphilus, and the slave escaped. Is Seius liable? Only if the escape was due to his connivance (*dolus*) or want of care. (D. 17, 1, 8, 10.)

Sempronius requests Gaius to buy a slave, and Gaius in doing so neglects to make the seller warrant the absence of defect or disease. If Sempronius suffers any loss by this neglect, Gaius must make it good. (D. 17, 1, 10, 1.)

IV. The *mandatarius* must give up to the *mandator* all the produce of the things committed to his care (D. 17, 1, 10, 2),—the money or other property acquired by him as *mandatarius* (D. 17, 1, 10, 9), and all rights of action against third parties. (D. 17, 1, 43.) If the *mandatarius* is unable to do so in consequence of his own misconduct or fault, he must make good the loss.

Titius lends money to Calpurnius, and afterwards at his request Seius stipulates for the amount from Calpurnius. The effect of this is that the loan ceases to exist, and is transformed into a debt due by stipulation. Titius dies, and his heirs demand from Seius his right of action against Calpurnius, because they have no remedy upon the loan. If Titius did not intend to make a gift of the debt to Seius, Seius must allow the heirs of Titius to sue Calpurnius in his name. (D. 17, 1, 59, pr.)

B. Duties of *Mandator* or *mandans* = Rights *in personam* of *mandatarius.*

1. To pay the *mandatarius* what he has properly expended in executing the mandate. (D. 17, 1, 12, 9.) This includes not only the money spent in obtaining produce (*fructus*), but personal expenses (unless included in salary), as for travelling. (D. 17, 1, 10, 9.) But luxurious expenditure is not allowed. Anything, however, of the nature of ornament added by the *mandatarius* may be taken away by him, if it does not injure the *mandator,* unless the latter is willing to pay for it. (D. 17, 1, 10, 10.)

Titius requests Seius to buy Stichus for him. After the purchase, Stichus steals from Seius. Can Seius sue Titius for damages or the surrender of the slave to him? Yes, if the theft was not due to his fault. If Titius knew the character of Stichus, and did not forewarn Seius, he is liable to pay to Seius the total loss sustained, even if that exceeds the value of the slave. (D. 17, 1, 26, 7; D. 47, 2, 61, 5.)

II. To accept whatever the *mandatarius* has bought, and indemnify him against all obligations that he has undertaken in execution of the mandate. (D. 17, 1, 45, pr.; D. 17, 1, 45, 5.) In a word, the obligation of a *mandator* was to see that the *mandatarius* suffered no loss from executing the mandate. As the *mandatarius* got nothing, so he ought to lose nothing. But this obligation was conditional; it depended upon whether he properly performed the mandate. (D. 17, 1, 41.) If he faithfully executed his commission, and spent money or subjected himself to obligations, it would have been a manifest breach of faith, if the *mandator* had refused to release him from the obligations, or to reimburse him what he had spent. The *mandatarius* acted for the *mandator,* not for himself. It follows that until the mandate was executed no action lay against the *mandator.*

(D. 17, 1, 45, 1.) The obligation of the *mandator* has thus an affinity with the duties arising from contracts *re*. Since I have acted for you, and incurred certain expenditure, you are bound to indemnify me. This performance of the mandate is analogous to the delivery of a *res* in *mutuum* or *depositum*. The principle in both cases is the same.

On the other hand, the obligation of the *mandatarius* to execute the contract is not absolute; it is limited to the case where the *mandator* has, in consequence of the promise of the *mandatarius*, not done something he would otherwise have done, and has thereby sustained loss. (D. 17, 1, 8, 6.) In this respect the position of the *mandator* is unique. He acquires a right against the *mandatarius*, not from any act (as in the other cases of equitable contracts, and the corresponding right of the *mandatarius* against the *mandator*), but from a forbearance to do what his interests required him to do, and what he would have done but for the confidence he reposed in the promise of the *mandatarius*. Hence mandate may, without impropriety, be assigned a place in the class of Equitable Contracts.

Investitive Facts.—A mandate does not require to be made in any set form of words, and it may be implied from the conduct of the parties. (D. 50, 17, 60; D. 17, 1, 62, pr.)

Special Divestitive Facts.

1. But a mandate, although properly entered into, may be revoked so long as it had not been acted on in any way; and thereupon is at an end. (J. 3, 26, 9; G. 3, 159.)

It would be inequitable to allow a *mandator* to revoke a mandate after it had been partially fulfilled, so as to escape his obligations to the *mandatarius*. (D. 17, 1, 15.)

2. Renunciation of the *mandatarius*. The limits within which this could be done have been already mentioned (p. 485).

3. Again, if while a mandate has not as yet been acted on in any way, one of the parties—either the principal or the agent—dies, the contract of mandate is dissolved. But for convenience' sake it is a received opinion that if your principal dies, and you in ignorance of his death carry out the mandate, then you can bring an *actio mandati*. For were it not so, a lawful and reasonable ignorance would bring loss upon you. And similarly it is held that if Titius' steward is manumitted, and his debtors through ignorance pay the freedman, then they are clear; although otherwise, in the strict account of law, they could not be clear, because they paid another, and not the person they ought to have paid. (J. 3, 26, 10; G. 3, 160.)

Remedies.

I. *Actio mandati* (*directa*). By the *mandator* against the *mandatarius*.

Condemnation involves infamy. if the breach of duty has been wilful. (D. 3, 2, 1.)

II. 1. *Actio mandati* (*contraria*). By the *mandatarius* against the *mandator*.

2. *Persecutio extra ordinem* for salary (*honorarium*) promised. (C. 4, 35, 1.)

THIRD.—*CONTRACTS FOR VALUABLE CONSIDERATION.*

The fourth group of contracts enumerated by Justinian is distinguished from the others by the absence of any special form; they are said to be created by consent alone.

The contracts made by consent are those of purchase and sale, letting and hiring, partnership, and mandate. (J. 3, 22, pr.; G. 3, 135.)

In those forms the obligation is said to be contracted by consent, because neither a form of words nor writing nor the presence of the parties is at all needful; nor need anything be given to make the obligation actually binding, but the consent of those that are doing the business is enough. (J. 3, 22, 1; G. 3, 136.)

And hence such business contracts are even made between persons not present, by a letter for instance, or by messenger. [But in no other way can an *obligatio verbis* be formed if the parties are not present.] (J. 3, 22, 2; G. 3, 136.)

Again, in those contracts each incurs an obligation to the other to render what is fair and just; whereas in contracts made by words one party stipulates and the other promises. (J. 3, 22. 3; G. 3, 1, 37.)

In the case of entries, one binds the other by entering the money as paid out, and that other is bound in turn. Against a man not present an entry of debt may however be made, although no verbal contract can be made with one not actually present. (G. 3, 138.)

The circumstances dwelt upon in the text are that the consensual contracts are bilateral (not unilateral, like stipulation), that they are *bonae fidei* (not *stricti juris*), and that they may be completed in the absence of the parties. But mandate is not any more bilateral than deposit; the equitable contracts are *bonae fidei;* and, as Gaius points out, the *expensilatio* does not require the presence of the parties. The mark that distinguishes this class of contracts from all others—namely, the presence of valuable consideration, the Institutes were not at liberty to mention, if for no other reason, on account of the position assigned to the gratuitous contract of mandate.

I.—SALE (*EMPTIO-VENDITIO*).

DEFINITION.

Sale is a contract in which one person (*venditor*, seller) promises to deliver a thing to another (*emptor*, buyer), who on his part promises to pay a price (*pretium*).

To constitute a sale, three things were required:—(1) a thing; (2) a price; and (3) an agreement between two persons to give one for the other. In regard to two of these elements—the consent and the thing—there is nothing peculiar or distinc-

tive, and the observations to be made upon them will find a place in the Second Subdivision. The other element—price—requires some explanation.

1. The price must be coin.

And further, the price ought to be fixed. For there can be no sale without a price. (J. 3, 23, 1 ; G. 3, 140.)

Again, the price ought to be in money. For whether anything else—a slave for instance, a robe, or a farm—can be the price of another thing, is much disputed. Sabinus and Cassius think it can ; and hence the common saying that barter is sale, and its oldest form. For proof they used the Greek poet Homer, who in one place says that the army of the Greeks got wine for itself by bartering certain things. His words are :—"And thence too wine was got by the long-haired Achaeans, some bartering for it bronze, and others the glistening steel, some hides, and some the cows themselves, and some again slaves." But the authorities of the opposite school thought differently, and held that barter was one thing, sale another. For how else, said they, could it be made clear in a sale which was the thing sold and which the price. And it would be absurd to regard each as at once the thing sold and the price paid. [Caelius Sabinus says that if you have a thing for sale, say a farm, and I come and give a slave as its price, then the farm is the thing sold, and the slave is given as the price for receiving the farm.] But the opinion of Proculus, who says that barter is a kind of contract distinct from sale, has deservedly prevailed. For he both backs up his view by other lines from Homer, and argues for it by very strong reasons. Former Emperors too have allowed it ; and it is more fully shown in our Digest. (J. 3, 23, 2 ; G. 3, 141.)

It is enough, however, if part of the consideration is a price.

Titius sells a house to Gaius for 2 *aurei*, and on consideration that Gaius repairs another house. It was held that an action of sale (*ex vendito*) would lie against Gaius for the repairs ; but not if the only consideration was the repairs. (D. 19, 1, 6, 1.)

Although the contract must be for a *price*, the payment may be in goods. There is nothing to hinder the seller, after the contract is made, agreeing to take goods for the price. (C. 4 44, 9.)

2. The price must be definite.

The price ought also to be definite. But if instead of this the parties agree that the thing is to be bought at the value to be put upon it by Titius, then among the ancients there were debates enough and to spare whether this constituted a sale or not. [Labeo said the transaction had no force ; and Cassius approved of this view. But Ofilius declared it was a sale ; and his opinion was followed by Proculus.] But our decision has settled the question in this way :—Whenever a sale is agreed for at a price to be fixed by a third person, the contract is to stand, but under this condition. If the person named fixes a definite price, then in any case his valuation must be followed, the price fully paid, the thing delivered, and so the sale fully accomplished. For the buyer can proceed by the *actio ex empto ;* the seller by the *actio ex vendito*. But if the person named is either

unwilling or unable to fix a definite price, then the sale goes for nothing, as if no price had been determined on. And since this is held by us to be the law in the case of sales, it is only consistent to extend it to the case of letting and hiring. (J. 3, 23, 1; G. 3, 140.)

The constitution referred to is C. 4, 38, 15.

There was no contract if the determination of the price was left to the purchaser, thus, "for as much as you think fit or please." (D. 18, 1, 35, 1.)

3. The price must be real, and not merely colourable (*imaginaria venditio.*) (D. 50, 17, 16.) The price may be made less as a favour to the buyer (D. 18, 1, 38), but if it is not intended to be demanded, there is no sale. (C. 4, 38, 3).

4. In the absence of fraud, the Prætor refused to cancel a sale on the ground of mere inadequacy of price. (D. 4, 4, 16, 4.) But it is stated in a rescript of Diocletian and Maximian, that when a thing was sold for less than half its value, the seller could recover the property, unless the buyer chose to make up the price to the full amount. (C. 4, 44, 2.) Although the language of the rescript is perfectly general (*rem majoris pretii si tu vel pater tuus minoris distraxerit*), some authors contend that this rescript applies only to land, because the example mentioned is a farm. It is a moot point whether, if the price were excessive, the buyer could withdraw from his bargain, unless the seller consented to take a fair price.

Rights and Duties.

Duties of Seller (*Venditor*)=Rights *in personam* of Buyer (*Emptor*).

A. *In the Absence of Special Agreement.*

The distinction here followed is recognised by the Roman jurists. Ulpian (D. 19, 1, 11, 1) observes that in a contract *bonae fidei*, the first principle is to carry out the intentions of the contracting parties. If the parties are silent, then the duties are such as naturally pertain to the contract. This statement is rendered more explicit by another text from Ulpian, which puts the distinction on its proper basis, that the parties when silent are presumed to abide by the recognised custom. (*Ea enim quae sunt moris et consuetudinis, in bonae fidei judiciis debent venire.*) (D. 21, 1, 31, 20.) This points to the true origin of the group of duties now to be described. When the parties are silent, custom speaks.

I. The seller is bound to deliver the thing sold (*præstare, tradere rem*) to the buyer. (D. 19, 1, 11, 2.) If the thing sold were

a *res mancipi*, the seller must transfer it by *mancipatio*. (Paul, Sent. 1, 13, 4.) The seller was not bound to make a good title and vest the ownership in the buyer (D. 18, 1, 25, 1 ; D. 19, 4, 1, pr.), but he must give the buyer such possession as would enable him to triumph in a possessory suit. (D. 19, 1, 11, 13.) Hence a person could make a valid contract of sale, although he was not the owner, if he had *possessio*. (D. 18, 1, 28.) Indeed, if the vendor, by special agreement, promised to make the buyer owner, as well as possessor, it was held that the transaction was not a contract of sale, but an exchange. (See p. 369. D. 12, 4, 16.) In exchange or barter, the obligation on both sides was to give a good title to the ownership (*dominium*), and not merely to the *possessio*. (D. 19, 4, 1, 3.) From the circumstance that upon the sale of a *res mancipi*, the vendor must convey the thing sold by *mancipatio*, it may be inferred, not altogether without probability, that the rule in Barter obtained at first in Sale. It is the natural and the reasonable rule, since the purpose of the contract of sale is the exchange of the ownership of a thing for coin.

The meagreness of the obligation imposed upon vendors was supplemented by an obligation, in later times implied by law, to warrant the buyer against eviction. At first this duty arose only from express stipulation ; and it is probable that the obligation to give a mere possessory title originated in the same way (*vacuam possessionem tradi*). (D. 19, 1, 3, 1 ; D. 22, 1, 4.) A probable explanation of this anomaly has been already offered (p. 369). To the latest period, the rule was strictly maintained, and the only concession that appears to have been made is that, if a person, other than the vendor, attacked the title before the price was paid (whether the thing sold had been delivered or not), the buyer was not obliged to pay the price, unless substantial sureties were given to guarantee him the restitution of his money, in case he were evicted. (Vat. Frag. 12 ; C. 8, 45, 24.)

An heir sells to Gaius an estate of which Titius has been put in possession to secure a legacy. The heir cannot fulfil his obligation although he is owner. (D. 19, 1, 2, 1.)

Titius has a usufruct of Gaius' farm. Gaius sells the farm to Maevius. Gaius must redeem the farm before he can give Maevius free possession. (D. 19, 1, 7.)

Julius sells a farm over which a right of way exists to a neighbouring farm. This is not inconsistent with the delivery of the free possession. (D. 18, 1, 59.)

Titius, heir of Sempronius, sold a farm to Septicius in these terms :—"The land of Sempronius, and all his rights thereon, you will buy for so much." The land was delivered ; but its boundaries were not pointed out. Can Titius be compelled to produce the title-deeds of the inheritance, and show what rights Sempronius had, and

what are the boundaries? Certainly; and if no such title-deeds exist, Titius must still point out the boundaries, as fixed by usage. (D. 19, 1, 48.)

A creditor to whom a farm was mortgaged, and who had possession of the receipts of taxes (*chirographa tributorum*), sold it to Maevius, with a condition that Maevius should pay any tribute that might be due. The same land, on account of alleged arrears of taxes, is sold by the contractor of the district, and Maevius buys it and pays the price. Maevius can compel the creditor to deliver up to him the receipts for the taxes that have been paid. (D. 19, 1, 52, pr.)

In the absence of any agreement to the contrary, a sale of a house included all that was commonly regarded as part of it, or was intended for the permanent better enjoyment of the house. (D. 19, 1, 13, 31; D. 19, 1, 17, 7.) For details, see D. 19, 1, 38, 2; D. 19, 1, 17, 8; D. 19, 1, 15; D. 19, 1, 18, 1; D. 18, 1, 78; D, 18, 1, 40, 6; D. 18, 1, 76; D. 50, 16, 245, 1.

The sale of a farm included the crop on the ground and fixtures in the soil, but not living animals, as fishes in a pond. (D. 19, 1, 17, 1; D. 6, 1, 14; D. 19, 1, 15; D. 19, 1, 16.) It did not include what was ordinarily called *ruta-caesa* (D. 18, 1, 66, 2), *i.e.*, things dug up (*eruta*), as gravel, lime, etc.; or cut, as trees. (D. 19, 1, 17, 6.)

The sale of slaves did not carry with it the slave's *peculium*, unless specially agreed upon. (D. 18, 1, 29.)

The obligation to deliver was conditional upon the payment of the price. The seller was not obliged to part with the thing sold until he had got his money, and the whole of his money. (D. 19, 1, 50; D. 18, 4, 22.) The vendor keeps the thing *quasi pignus*. (D. 19, 1, 13, 8.)

Titius sells wheat to Gaius for 10 *aurei*, and Gaius, before the wheat is delivered to him, dies, leaving two heirs. One of the heirs cannot, by offering 5 *aurei*, get the half of the wheat. Titius is not bound to part with any of it until he gets the whole price. (D. 18, 1, 78, 2.)

II. Prior to the delivery of the thing sold to the buyer, the seller must take as much care of it as a good *paterfamilias*. (D. 18, 1, 35, 4.) He is responsible for *custodia* and *diligentia*. (D. 19, 1, 36.)

This obligation might be diminished or enlarged. It was diminished if the buyer refused to accept the thing, or neglected to take it away after he was bound to do so. (D. 18, 6, 17; D. 18, 6, 12.) If no time were agreed upon, the seller ought, after a reasonable time, to give notice to the buyer to remove the goods. (D. 18, 6, 4, 2.) If both buyer and seller made delay (*mora*), it was the same as if the buyer alone were in delay. (D. 19, 1, 51.) When the buyer made delay (*mora*), the seller was responsible only for wilful misconduct or extremely gross negligence (*dolus*), as in the case of a depositee. (D. 18, 6, 17.) On the other hand, if the seller refused to give up the thing at the proper time, and was thus in delay (*mora*), he was responsible not only for due care (*diligentia*), but for accidental loss.

Titius sells a house to Gaius. The adjoining house is in a ruinous condition and threatens to fall. Titius does not require the owner of the dangerous property to give security (*cautio damni infecti*), and before the house sold is delivered to Gaius, it is injured by the fall of the next house. On account of his negligence in not requiring security, Titius must pay for the damage sustained. (D. 19, 1, 36.)

Sempronius sells a house to Septicius, but before the time for delivery, it is burned down by the carelessness of a slave belonging to Sempronius, and employed to watch the property. Does the loss fall upon Sempronius or Septicius? If Sempronius showed ordinary care in selecting the slave to watch the house, he was not responsible. (D. 18, 6, 11.)

Titius sells a slave to Gallus. After the sale, Titius orders the slave to do some dangerous work, and the slave breaks his leg. Is Titius responsible for the damage? Labeo said if Titius ordered the slave to do what he was accustomed to do before the sale, and what he would have ordered him to do if the sale had not taken place, he is not responsible. Paul took a different view, and said the question was whether the work was so dangerous that a prudent man would not have ordered it to be done either before or after the sale. (D. 19, 1, 54, pr.)

III. The seller must compensate the buyer in the event of his being evicted by law from the whole or part of the thing bought. (D. 41, 3, 23, 1; C. 4, 52, 5; C. 8, 45, 6.)

This obligation was often created by express agreement. The technical phrase was *habere licere*, that the buyer should have undisturbed possession of what he bought. To the stipulation a penalty was added, in Rome, generally of twice the price of the thing sold, elsewhere, varying according to local custom. (D. 21, 2, 6.) The stipulation was kept up for the sake of the penalty, long after the obligation to pay for eviction was recognised as a duty of the seller. Hence the obligation to answer for eviction presents itself under three aspects. (1.) The buyer stipulates for a penalty in the event of his being evicted. (2.) If no penal stipulation was made, the buyer could at any time, prior to eviction, call upon the seller to make it. (3.) If neither the stipulation nor any demand for it was made, and the buyer was evicted, the seller was bound to give compensation. These three cases will be examined separately.

1. A stipulation is made, on this condition, that the seller promises to the buyer twice the price paid by him if he is evicted by law from the thing sold. If the promise were that the buyer should have undisturbed possession (*habere licere*), the seller was bound to pay the penalty if the buyer was evicted by any one; if, however, the promise were that the seller and those claiming under him would not disturb the buyer, the penalty could not be exacted if an eviction were made by any other than those persons. (D. 19, 1, 11, 18.) If an eviction

took place, the penalty became due (*stipulatio committitur*). In order that the penalty should become due, five things must concur.

1°. The seller must have promised absolutely. Thus, if he declined to guarantee for eviction in certain cases, the penalty was not due.

In selling a slave, the owner guaranteed against eviction, unless the eviction took the form of the freedom of the slave. If the slave were free at the time of sale, or were a *statuliber*, the buyer could not recover the penalty. (D. 21, 2, 69, pr.)

2°. The ground of the eviction (*causa evictionis*) must have existed at the date of the sale.

A slave was sold without his *peculium*. The slave took away part of his *peculium* to his new master, who was thereupon sued for theft. The penalty for the theft exceeded the value of the slave, and the buyer surrendered the slave to his old master (*noxæ deditio*). The buyer was nevertheless bound to pay the price. If the theft had occurred before the sale, and the buyer had been obliged to surrender the slave, then the penalty for eviction would have been due. (D. 21, 2, 3.)

3°. The eviction must be by order of a court of law, and the order must not be bad in law. (D. 21, 2, 16, 1; D. 21, 2, 51, pr.; C. 8, 45, 15.)

If the eviction is by force, the remedy of the buyer is the interdicts to recover possession. (C. 4, 49, 17.)

If the buyer goes to arbitration and loses, he has no redress against the seller, because he was not forced to go to arbitration. (D. 21, 1, 56, 1.) If the judge that ordered the eviction made a mistake through ignorance or stupidity, the buyer had no redress. He was deprived of his property by the blunder of a judge, a calamity that ought to be assimilated to floods or the like, all of which losses must be sustained by the buyer. (Vat. Frag. 10; C. 8, 45, 8; C. 45, 15.)

4°. The eviction must not be due to the fault of the buyer.

If the buyer, having a good defence as possessor, but no remedy if out of possession, allows the adversary, wilfully or by negligence, to get possession, he must suffer the loss. (D. 21, 2, 29, 1; D. 21, 2, 66, pr.; C. 8, 45, 19.)

5°. The buyer must give notice to the seller of any threatened eviction, and allow the seller to come in and defend the title. (D. 21, 2, 53, 1; C. 8, 45, 20; C. 8, 45, 8; C. 8, 45, 17.) The neglect of this precaution involved a forfeiture of the penalty, unless the seller was out of the way and could not be found, or had expressly relieved the buyer from the necessity of giving him notice. (D. 21, 2, 63; D. 21, 2, 56, 6; D. 21, 2, 55, 1.)

If the buyer is evicted from only a part of the thing sold, or

from the usufruct of it, the seller must pay twice the proportion of the price that ought to be given for what is lost, not twice the whole price. (D. 21, 2, 13; D. 21, 3, 14.)

2. If no stipulation were made at the time of the sale, the seller was bound to promise a penalty of double the price by stipulation, but not to give sureties for the amount. (D. 21, 1, 31, 20; D. 21, 2, 37, pr.; D. 21, 2, 56, pr.) This obligation seems to have rested on an edict of the Curule Ædile, the terms of which have not come down to us. It was confined, probably by the terms of the edict, to sales of articles of value—as pearls, precious stones, silk garments, slaves. (D. 21, 2, 37, 1.) It seems also that the defendant was compelled to pay double if he refused to promise. (D. 21, 2, 2.)

3. If no stipulation were made, and the buyer was evicted, the seller was bound to give him compensation. (C. 8, 45, 6; D. 19, 1, 3, pr.; Paul, Sent. 2, 17, 1; D. 21, 2, 76.) This obligation was imposed in the absence of a penal stipulation, and the seller was bound simply for compensation, not for a penalty. (D. 21, 2, 60.)

The measure of damages was not the price the buyer gave for the thing, but the loss he suffered by the eviction. (*Quanti tua interest rem evictam non esse; non quantum pretii nomine dedisti.*) (C. 8, 45, 23.) Hence the amount payable was greater or less, according as the thing increased or lessened in value. (D. 21, 2, 70; C. 8, 45, 9.) In no case, however, where the seller was ignorant of the flaw in his title, could he be compelled to pay more than twice the price as compensation for eviction. (D. 19, 1, 44.)

The stipulation being for a penalty was construed strictly; the obligation considered as of the essence of a contract in good faith was interpreted more liberally, with less regard to the letter and more to the spirit of the contract.

1°. As regards the exception of grounds of eviction (*causæ evictionis*).

A slave is sold by Titius, who says, in a general way, that the slave is entitled to liberty upon the happening of an event, but without disclosing the event. If the buyer did not know the condition, he can demand compensation; but in this case the penalty of stipulation could not be exacted. (D. 21, 2, 69, 5.)

2°. In the penal stipulation the eviction must be by law; but in this obligation *bonæ fidei*, that is not necessary; it is enough if the thing sold were not the property of the seller. (D. 21, 2, 41, 1.) Thus, if the buyer himself subsequently becomes the

owner of the thing sold, he can recover damages as for eviction. (D. 19, 1, 13, 15.)

A vase is left to Titius as a legacy upon a condition. Titius, knowing nothing of the legacy, buys the vase from the heir. He can recover the price in an action for breach of contract of sale. (D. 19, 1, 29; D. 30, 1, 84, 5.)

Gaius sells a slave belonging to Sempronius to Titius, and Sempronius dies, leaving Titius his heir. Titius can compel Gaius to restore the price of the slave. (D. 21, 2, 9.)

The other conditions (3°, 4°, and 5°) apply equally to the general obligation and the penal stipulation.

IV. The seller must suffer the sale to be rescinded, or give compensation in the option of the buyer, if the thing sold has faults (unknown to the vendor) that interfere with the possession and enjoyment of it. (D. 19, 1, 13, 1.) If the seller knows of the faults and conceals them, he is guilty of bad faith (*dolus*), and is liable even for consequential damage. (D. 19, 1, 13, pr.) In speaking of this duty (IV.), therefore, it is assumed throughout that the seller was ignorant of any faults in the thing sold.

We are left in no doubt as to the source whence this obligation was added to the law of sale. At first, no obligation existed except where there had been an express warranty against faults in the thing sold by the formal contract of stipulation. This explains a curious restriction in the duty. The seller was not responsible for all faults, but only for those that hinder the free possession of the thing. This limit is found in the early forms of stipulations, which are ascribed to M. Manilius, who was consul B.C. 148.

"That those she-goats are to-day in good health and able to drink, and that one may lawfully have them—all this you undertake?"[1]

"That those swine are sound, and that one may lawfully have them, and be guaranteed against all damage done by them; and that they are not from a tainted herd (and have got over the fever and flux)—all this you undertake?"[2]

These stipulations contain no penalty; and it may be inferred that they would not have been made if the law had implied in every sale a warranty against undisclosed faults. It would thus appear that about B.C. 150 the obligation of warranty existed only when it was made expressly by stipulation.

[1] *Illas capras hodie recte esse et bibere posse habereque recte licere, haec spondesne?* (Varro, de R. R. 2, 3, 5; D. 19, 1, 11, 4.)

[2] *Illasce sues sanas esse habereque recte licere noxasque praestari neque de pecore morboso, esse spondesne?* To which some add—*perfunctus esse a febri et a furia.* (Varro, de R. R. 2, 4, 5.)

The next step was taken by the Curule Ædile, who had jurisdiction over the markets, and naturally took a special interest in the law of sale. The reason for his intervention is manifest. The seller knows, or at least has the means of knowing, what are the faults in the thing sold, but his interest is to conceal them in order to effect a sale or enhance the price; the buyer, on the other hand, has the strongest interest in knowing the exact worth of the thing sold, but his opportunities of knowing are very slender. (D. 21, 1, 1, 2.) There is, therefore, nothing unfair in throwing upon the seller the obligation of disclosing any important defects in the thing he wishes to sell. This is especially important in the sale of animals and slaves. Slaves were common and valuable articles of merchandise, and they were liable to have serious undisclosed faults. It would have been very inconvenient if it had been as dangerous to buy a slave in Rome as it is to buy a horse in England.

I. The effect of the edict of the Curule Ædile was to impose on the seller an obligation to warrant the absence of certain faults in slaves, animals, and other things, with or without a stipulation. (D. 21, 1, 31, 20; C. 4, 49, 14.) If the seller did not do so, and faults were subsequently disclosed, then the sale could be rescinded, or a deduction made from the price, in the option of the buyer. (D. 21, 1, 48, 1.)

"Those that are selling slaves shall inform the buyers what disease or defect each has; which is a runaway or wanderer, or still liable to be claimed for some wrong. And all those things they shall, as in duty bound, when the slave comes to be actually sold, openly and clearly declare. If a slave has been sold despite the foregoing, or has been in a state altogether different from what was promised, with or without stipulation, at the sale, and it is alleged that in that respect a warranty ought to have been given, we shall give an action to cancel the sale not only to the buyer, but to all to whom the property belongs. On the other hand, if the slave has been impaired in value after the sale and delivery by an act of the buyer or his agent or household; or if any offspring of it has been acquired after the sale; or if there has been any accessory to it in the sale, or the buyer has gathered any fruit,—all shall be restored.

"Likewise, if a slave has committed a capital offence, or attempted suicide, or been sent to the amphitheatre to fight with wild beasts, all these things shall be mentioned in the

sale; and if they are not, the seller shall be liable to an action.

"Still more: if anyone knowingly has offended in the premises, he shall be liable to an action. (D. 21, 1, 1, 1.)

"The sellers of beasts of burden shall openly and plainly declare what disease or defect each has; and as they are sold equipped in their best harness, so shall they be delivered to the buyer. If anyone offends in the foregoing, we shall give actions against him as follows:—For the restitution of the harness, or cancelling the sale because of its non-delivery within sixty days; for disease or defect, to cancel the sale, within six months; for disease or defect, to obtain a deduction of the price, within one year.

"If a pair of beasts of burden are sold together, and the sale is liable to be cancelled for one, the other may be returned." (D. 21, 1, 38, pr.)

"In all that herein relates to the soundness of beasts of burden, the same shall be observed in regard to all other cattle." (D. 21, 1, 38, 5.)

The terms of the edicts differ, but the times mentioned in the edict relating to beasts of burden were transferred to the sale of slaves (Paul, Sent. 2, 17, 5); and substantially the two edicts may be read together. (D. 21, 1, 38, 2.) In order that the edicts should apply, the following conditions must exist: (1) The fault must exist at the time of the contract (C. 4, 58, 3); and (2) the buyer must be ignorant of the fault, although ignorance of the seller is no excuse. (D. 21, 1, 48, 4; D. 21, 1, 1, 6; D. 21, 1, 51, pr.)

Morbus (disease).—Sabinus defines it as "an abnormal condition of the body, which impairs its usefulness" (*morbus est habitus cujusque corporis contra naturam, qui usum ejus facit deteriorem*). (D. 21, 1, 1, 7.) Disease may be in the body generally, as fever; or in some part only, as blindness and lameness. (D. 21, 1, 1, 8.)

The want of teeth is not a disease, says Labeo, for then all newborn children would be diseased. (D. 21, 1, 11.)

Labeo thought the sterility of a female slave was a disease, within the meaning of the edict; but Trebatius said it was not, if it did not arise from some special disease. (D. 21, 1, 14, 3.)

Vitium (defect) is distinguished from disease. All disease is defect, but all defect is not disease. (D. 21, 1, 11.) *Morbus* is a temporary, *vitium* is a permanent and inherent defect (D. 50, 16, 101, 2), as a one-eyed or stammering slave, a biting or kicking horse, an ox that gores. (D. 21, 1, 1, 7; D. 21, 1, 4, 3.)

In regard to both *morbus* and *vitium*, it is to be observed that they included only defects of the body, not of the mind, unless the mental defect clearly arose from some bodily ailment (D. 21, 1, 4, 2; D. 21, 1, 4, 3; D. 21, 1, 4, 1); and even of the bodily ailments, only those sufficiently serious to impair the usefulness of the slave or animal. (D. 21, 1, 1, 8; D. 21, 1, 4, 6; D. 21, 1, 6, 1; D. 21, 1, 10, 2.)

Fugitivus and *erro* (runaway and wanderer). A runaway is one that escapes beyond the reach of his master, with the intention of deserting his service. (D. 21, 1, 17, pr.) There must be an intention to desert (D. 21, 1, 17, 3), and an actual escape beyond the control of his master. (D. 21, 1, 17, 13.)

Erro or wanderer is one that is in the habit of staying away from home, wandering about with no particular object, and returning home after a time. (D. 21, 1, 17, 14.)

The edict mentions a runaway, but not a thief (*fur*). This seems a curious inconsistency, a thief being scarcely less objectionable than a runaway. The reason assigned is that a thief may be peaceably possessed; but the vice of running away is one inconsistent with the possession of the slave (*habere licere*). (D. 19, 1, 13, 1.)

Vitium noxæ.—In consequence of the rule that the responsibility for a slave's delict attaches to his master at the time of action brought, it was not safe to buy a slave without a special warranty that no such liability was attached to the slave. (D. 21, 1, 17, 18.)

Another fault seems to have been included in the edict; not to sell an old hand for a new (*ne veterator pro novicio veneat*) (D. 21, 1, 37); the temptation was of course to represent a slave as more docile, in order to enhance the price. (D. 21, 1, 65, 2.)

It seems also that the seller was bound to disclose the nationality of the slave, otherwise the sale might be cancelled; for the nationality was often a most material circumstance in the selection of a slave. (D. 21, 1, 31, 21.)

An extension was given to the edict by the interpretation of the jurists. The edict, in terms, specifies certain faults that must be disclosed, and requires a warranty to be given orally, with or without stipulation (*dictum promissumve*). The jurists held that a warranty in respect of faults not specified in the edict, given orally, with or without stipulation, should have the same effect as a warranty given under the terms of the edict. (D. 21, 1, 18.) Hence, if anyone affirmed anything of a slave that was not true, or denied anything that was true, as saying that he was not a thief when he was, or that he was a skilled workman when he was not, then an action lay against him. (D. 21, 1, 17, 20.)

But every recommendation of his goods by a seller was not construed into a warranty. Language of mere praise was scrupulously distinguished from promises intended to create a liability. (D. 21, 1, 19.) If a seller said his slave was steady, you were not to expect the gravity and sobriety of a philosopher; if he said the slave was active and vigilant, it was not to be supposed that he worked night and day. (D. 21, 1, 18, pr.) So, if the slave was said to be an artificer, you must only expect what was ordinarily looked for in an artificer. (D. 21, 1, 19, 4.)

The edict, so far as its exact terms have been preserved to us, applies only to slaves and cattle (*res se moventes*), not to moveables, and still less to immoveables. We are assured, however, by Ulpian, that it included all these classes of things. (D. 21, 1, 1, pr.; D. 21, 1, 63.) An example is given in the Digest (D. 21, 1, 49) of pestilential land, the sale of which might be cancelled, and another in the Code (C. 4, 58, 4) of land bearing poisonous herbs or grass.

Again, when a vessel was sold there was an implied warranty of its soundness. (D. 19, 1, 6, 4.) But this decision was not arrived at without a conflict of opinion; Labeo and Pomponius held that there was an implied warranty, Sabinus that there was not.

B. *Duties imposed on the Seller by Special Agreement.*

1. It was entirely in the power of the parties to define the quantity or extent of the thing sold, or to reserve rights for the seller. Thus the seller might reserve a usufruct or *habitatio.* (D. 19, 1, 53, 2; D. 19, 1, 7.) On the other hand, he might warrant the absence of any servitude (*uti optimus maximusque est*). (D. 50, 16, 169; D. 50, 16, 90.) Again *ruta caesa,* which, unless specially mentioned, are not included in the sale, might be added. (D. 19, 1, 17, 6.) On the other hand, the seller might reserve all the edible fruit (*pomum*) or the quarries (*lapicidinae*) on the land. (D. 50, 16, 205; D. 18, 1, 77.) But personal obligations, not falling within the class of praedial servitudes, could not be imposed.

Lucius Titius promised to give annually out of his lands 100,000 ***modii*** of corn to the owner of the lands of Gaius Seius. He sold the farm, with an express clause that the land was sold subject to all burdens (*quo jure quaque conditione ea praedia Lucii hodie sunt, ita vaeneunt itaque habebuntur*). Notwithstanding this agreement, the buyer was not bound to supply the 100,000 *modii* of grain annually. This obligation is not a *servitus.* (D. 18, 1, 81, 1.)

2. The seller may, by agreement, make himself responsible for the accidental loss of the thing sold, or liable only for misconduct (*dolus*), not for due care (*culpa* and *diligentia*). (D. 18, 1, 35, 4.)

3. Every seller was bound to promise a penalty of double the price on eviction, unless it was part of the bargain that he should not make that promise. (D. 21, 2, 37; D. 21, 2, 56; D. 21, 2, 4.) If the seller bargains that he shall not pay compensation in the event of the buyer being evicted, he is not obliged to pay damages, but he is bound to restore the price paid if the buyer is evicted. (D. 21, 2, 69, pr.; D. 19, 1, 11, 18.)

4. By no agreement between the parties can the seller be exempted from responsibility for cheating (*dolus*). (D. 13, 6, 17.)

Titius sells a thing that he knows is not his own or is mortgaged, and bargains to be exempt from responsibility for eviction; such a bargain is void. (D. 19, 1, 6, 9.)

5. By express agreement the seller might bind himself to

give sureties against eviction. (D. 21, 2. 4, pr.) The surety was said to be *auctor secundus*.

DUTIES OF BUYER (*Emptor*) = RIGHTS *in personam* OF SELLER (*Venditor*).

A. *Duties imposed upon the Buyer without Special Agreement.*

1. The buyer must pay the price agreed upon. He is bound not merely to deliver the money, but to give a good title to it. (D. 19, 1, 11, 2.) Thus a payment of the price with money belonging to the seller is no payment at all. (C. 4, 49, 7.)

If the buyer does not pay on delivery of the thing sold, and has not got credit, he must pay interest. (D. 19, 1, 13, 20; D. 19, 1, 13, 21; Paul, Sent. 2, 17, 9.) If credit has been given, interest is due from the expiration of the credit. If, before the money is paid, the ownership of the thing sold is called in question, the buyer is not bound to pay, unless sureties of the highest trustworthiness are offered in case of eviction. (Vat. Frag. 12; D. 18, 6, 18, 1.)

2. The buyer ought to accept delivery; and he may be compelled to remove what he has bought by the *actio ex vendito*. (D. 19, 1, 9.)

3. The buyer must pay the expenses the seller is put to in keeping the thing sold prior to delivery—as, *e.g.*, repairing a house, providing medical attendance or teaching to a slave, or the expenses of burying a slave (D. 19, 1, 13, 22), and generally expenditure honestly and properly incurred. (C. 4, 49, 16.) The seller must, however, furnish a slave sold with food, if he has the services of the slave, and the buyer does not make delay in receiving the slave. (D. 19, 1, 38, 1.)

B. *Duties imposed on the Buyer by Special Agreement.*

1. Right of pre-emption to seller (*pactum protimiseos*). On a sale, a seller could bargain that the buyer should not sell the thing to anyone except himself. (D. 18, 1, 75; D. 19, 1, 21, 5.)

2. The seller might make it a term of the contract, that the thing sold should be let to him at a given rent. (D. 19, 1, 21, 4.)

3. It might be agreed that a female slave should not be employed for immoral purposes. (C. 4, 56, 3.) The seller could not after the sale withdraw the condition; and a violation of it enabled the slave to claim her freedom. (C. 4, 56, 1.)

4. A slave might be sold with the condition that he should be removed from a certain district. (D. 18, 7, 5; C. 4, 55, 5.)

5. A slave might be sold on condition that he should be

manumitted. (C. 4, 57, 6.) To these examples many more might be added if it were necessary. Often these special duties were imposed by stipulation, especially when a penalty was added; but a mere oral agreement without stipulation was perfectly valid.

Investitive Facts.

The contract of sale is made as soon as the price is agreed on, although it is not as yet paid over, nor even an earnest given; for what is given as an earnest is a proof (not a part) of the contract of sale. This ought to hold only in the case of unwritten contracts of sale; for in such sales we have made no change. But in those that are made by writing, we have determined that the sale is not complete unless instruments of sale are written out by the contracting parties; or, if written by another, signed by the maker of the contract; and that if made through a *tabellio* (notary), the sale is not completed unless the writings are fully finished in every part. For as long as any of these conditions is wanting there is room to draw back, and either seller or purchaser can retire from the purchase with impunity. But we have allowed them so to retire only if nothing has been given as earnest. But if this has followed on the agreement, then whether the sale has been formally put in writing or not, he that refuses to fulfil the contract, if he is the buyer, loses what he has given; and if the seller, is forced to restore double, although nothing was expressly said about the earnest. (J. 3, 23, pr.; G. 3, 139.)

The earnest (*arrhae*), if not part of the price, was to be returned on the completion of the sale. (D. 19, 1, 11, 6; D. 18, 3, 8.) Often a ring was given. (D. 18, 1, 35, pr.; D. 14, 3, 5, 15.) The advantages of earnest were these: (1) it marked off the stage of mere proposals from that of a definite agreement; (2) the forfeiture of the earnest was an inducement to the faithful performance of the contract.

The meaning of J. 3, 23, pr. seems clear enough, but it conflicts with the constitution (C. 4, 21, 17) referred to by Justinian. According to the Institutes, no change was made in the case of agreements that were not to be reduced to writing. The earnest was merely proof of some agreement, and there is no reason why the buyer should get off from his contract by forfeiting the earnest. In the case of sales to be attested in writing, Justinian enacted that the agreement should not be binding at the time consent was given, but only when the written instruments were perfected. In the interval, either party might withdraw, but if earnest had been given, only with the loss of the earnest. In the Code, it is stated: Illud etiam adjicientes, ut in posterum si quae arrae super facienda emptione cujuscunque rei datae sunt, *sive in scriptis sive sine scriptis;* and then it proceeds as in the Institutes. According to this, the new rule would appear to apply to all sales whether to be drawn up in writing or not. But this can hardly be what was meant, as the Institutes say explicitly that no change was made in unwritten contracts of sale; and, it may be added, such a change was not called for.

Remedies.

A. To Enforce the duties of the Seller.

I. *Actio Empti.*—This was an action by which the seller could be compelled to perform his obligations or pay compensation. It was necessary, however, that the buyer should have paid the price, or at least made a tender of it. (D. 19, 1, 13, 8.)

By this action also were enforced all special agreements (*pacta*) made in the contract of sale. (D. 19, 1, 11, 1.)

II. *Actio Redhibitoria.*—This was the action given by the edict of the Ædile to cancel a sale in consequence of faults in the thing sold. (D. 21, 1, 23, 7 ; D. 21, 1, 60.) It could be brought by the buyer, or by any universal successor. (D. 21, 1, 23, 5 ; D. 50, 16, 171 ; D. 21, 1, 19, 5.) The object was twofold—(1) complete restitution to the seller of the thing sold, with all its produce and accessories ; and (2) to give the buyer the price, with interest, as an equivalent for the restitution of the produce. (D. 21, 1, 31, 2 ; D. 21, 1, 23, 9 ; D. 21, 1, 27 ; D. 21, 1, 29, 2.) The seller was required to restore the price before the buyer delivered up the things sold. (D. 21, 1, 25, 10 ; D. 21, 1, 26.)

The action must be brought within six months.

III. *Actio aestimatoria seu quanti minoris.*—This action is brought to reduce the price, not to cancel the sale. When this action was used, it was, however, in the power of the *judex* to cancel the sale. (D. 21, 1, 43, 6.)

This action must be brought within one year.

IV. *Actio ex stipulatu* or *condictio certi :* when a promise has been made by stipulation.

B. To Enforce the duties of the Buyer.

I. *Actio Venditi.*—This was the remedy of the seller, by which he could compel the buyer to observe his duties, whether those were inherent in the contract, or added by special agreement as part of the sale. (D. 18, 1, 75 ; D. 19, 1, 11, 1.)

II.—HIRE (*Locatio Conductio*).

Definition.

In *locatio conductio* one person (*locator*) agrees to give to another (*conductor*) the use of something, or to do some work, in return for a fixed sum (*merces certa.*) (D. 19, 2, 1 ; D. 19, 2, 22, 1 ; Paul, Sent. 2, 18, 1.)

The contract of letting on hire is very like that of sale, and rests on the same rules of law : for as the contract of sale is made by agreeing on a price, so there is understood to be a contract of letting on hire when the amount to be paid is fixed. The *actio locati* is open to the letter ; the *actio conducti* to the hirer. (J. 3, 24 pr. ; G. 3, 142.)

Moreover, just as it was a common question whether barter was a contract of sale, so a question used to be raised with regard to letting on hire. The case put was this :—A man gives you something to use or enjoy, and receives something else from you in turn to use or enjoy. Now, it is held that this is not a letting on hire, but a distinct kind of contract. If, for instance, a man has one ox and his neighbour too has one, and they mutually agree that each shall lend the other his ox free every ten days in turn, to do their work, and one ox dies while not in his owner's care, then no *actio locati* or *conducti* or *commodati* is open to the owner, for the loan was not gratuitous ; but he must bring an *actio praescriptis verbis.* (J. 3, 24, 2 ; G. 3, 144.)

Part of the sum may be paid in goods, as when the landlord agrees to accept so much corn for a portion of the rent. (D. 19, 2, 19, 3.)

The price must be substantial. If the payment were a single coin, there would be a gift not a letting for hire. (D. 19, 2, 46 ; D. 19, 2, 20, 1.) Hence a letting to a wife for a mere trifle, as a favour to her, is void, as being a prohibited dona-

tion. (D. 24, 1, 52.) But the amount was not to be too narrowly scrutinised if there was no fraud, and the intention of the parties was to have a real letting, and not a gift. (D. 19, 2, 22, 3 ; D. 19, 2, 23.)

All we have said above (in regard to sale) about leaving the price to be fixed at the discretion of a third person, must be understood to apply also to letting on hire, if the pay is left to a third person's discretion. Hence, if a man gives clothes to a fuller to clean, or to a tailor to mend, and no sum is fixed to be paid at the time, but he is to give afterwards the sum they agree on, then this is not properly a contract of letting on hire, but gives rise to an *actio praescriptis verbis*. (J. 3, 24, 1 ; G. 3, 143.)

Sale differs from letting, as ownership differs from a temporary use.

If I deliver to you gladiators on these terms, that for each man that comes out unhurt I shall be given twenty *denarii* as the price of his toil (*pro sudore*), and for each man that is killed or disabled one thousand *denarii*, it is a question whether this is a contract of sale or of letting on hire. The better opinion is, that as regards those that come out unhurt the contract is one of letting on hire ; but that as regards those that are killed or disabled, it is one of sale. Which it is to turn out in each case depends on accident, just as if the sale or letting on hire were conditional : for there is no doubt now that things can be sold or let out conditionally. (G. 3, 146.)

Another disputed case is this : If Titius agrees with a goldsmith that the goldsmith shall, out of his own gold, make rings of a certain weight and shape and receive say ten *aurei*, is this a contract of sale or of letting on hire? Cassius says that it is, as regards the materials, a contract of sale ; as regards the work, of letting on hire. But it is now held that it is a contract of sale alone. If, however, Titius gave his own gold, and a sum was fixed to be paid for the work, there is no doubt it is a case of letting on hire. (J. 3, 24, 4 ; G. 3, 147.)

This contract includes the two antithetical objects of all contracts—*things* and *services*. The duties arising out of this contract differ materially, therefore, according as the object is the use of a thing, or the performance of some service. This distinction must be kept in view with reference to a question that cannot be passed over without discussion. What is the true place of the contract of hire? In this work it is placed under the category of rights *in personam ;* but is not the interest of a hirer of land such as to require it to be placed, along with usufruct and use, under the law of property? This question does not arise with reference to the hiring of services, and therefore, even if we were bound to transfer the hiring of things to the law of property, we should still be obliged to reserve a place for the hiring of services among contracts. Are we right in placing the hire of things under contract instead of property—under rights *in personam,* instead of under rights *in rem?*

This depends upon the nature of the interest of the hirer (*conductor*). Has the *conductor* of a farm a right *in rem,* or only a right *in personam* against the letter (*locator*), the owner of the land? According to the definition of right *in rem*, it is necessary that the *conductor* should have a right as against all the world to the possession of the land for the time agreed upon. Now, nothing is more certain than that the *conductor* had no such right. In the first place, if the *locator* sold the farm, the buyer could at once evict the *conductor*. (C. 4, 65, 9.) Again, if the landlord be-

queathed the farm as a legacy, the legatee could evict the *conductor*, whose only remedy was an action for damages against the heir. (D. 19, 2, 32.) But even the landlord (*locator*) himself was not bound absolutely to allow the *conductor* possession, for, if he could show that he wanted the house let for his own accommodation, he could evict the *conductor* without giving him any compensation. (C. 4, 65, 3.) But if a farm forms part of a dowry, and is let out by the husband for a fixed time, the wife cannot reclaim the farm without giving security that she will leave the tenant-farmer in quiet enjoyment, provided only she receives the rents. (D. 33, 4, 1, 15; D. 24, 3, 25, 4.)

The right of a *conductor* may be contrasted with the interest of a usufructuary. A *conductor* could not bring an action for theft against a person that had stolen growing crop (D. 19, 2, 60, 5), or had secretly dug for and carried away minerals. (D. 47, 2, 52, 8.) The owner (*locator*) was, however, bound to sue the thief, and hand over the proceeds to the *conductor*. On the other hand, the usufructuary, although he had no right to the crop before it was gathered, had, nevertheless, such an interest in the land as to enable him to bring an action for theft. Hence, although he was not owner of the stolen produce, and therefore could not bring the *condictio furtiva*, he was regarded as having a right to the possession, which was violated by the theft. (D. 7, 1, 12, 5.) It is true that the *conductor* of a moveable had the *actio furti* when the moveable was stolen, but that was in consequence of his being responsible for the loss of the thing. (J. 4, 1, 15.)

The true position of the *conductor* appears by contrast with the holder of a *superficies* (p. 430). For his protection a special interdict was invented (D. 43, 18, 1, pr.); and also, if he were not in possession, a prætorian action *in rem*. We are told that this action was provided because it was uncertain whether an action for letting would lie—precisely the same controversy that existed in the analogous case of *Emphyteusis*, and which was settled by the Emperor Zeno. (D. 43, 18, 1, 1.) Another text from the same passage describes the contrast between *superficies* and the contract of *locatio-conductio*. *Superficies* was a right either perpetual or granted for a very long time; and Ulpian goes on to say that that was the test by which the Prætor discriminated between *superficies* and a simple contract of hire. If, says Ulpian, a person hired a *superficies* for a short time, no action *in rem* would be given; but if it were for a long time, such a remedy would be given. (D. 43, 18, 1, 3.) The letting of farms was usually limited to five years. (D. 19, 2, 9, 1; D. 19, 2, 24, 2; C. 4, 65, 7.) Considering that it was a disputed point whether the *actio ex locato* would lie in the case of *superficies*, there can be no hesitation in affirming that the actions *in rem* were given only in the case of a perpetual interest in the land, or one lasting at least for a considerable time.

Lastly, the tenant-farmer was not a possessor (p. 341), and therefore could not avail himself of the Interdicts. This fact, taken along with another, that the farmer had no *utilis actio in rem*, conclusively proves that his interest belongs to the class of rights *in personam*.

Rights and Duties.

First, *Locatio-conductio* of things.

The following terms were generally employed to designate the parties. The hirer (*conductor*) of a house (*praedium urbanum*) was called *inquilinus*, and the rent he paid was called *pensio*. The hirer (*conductor*) of a farm (*praedium rusticum*) was called *colonus*, and the rent he paid *reditus*.

DUTIES OF *locator* OF THINGS = RIGHTS *in personam* of *conductor* (*inquilinus* or *colonus*).

I. To deliver the thing to the hirer, and to permit him to keep it for the time agreed upon. (D. 19, 2, 9 ; D. 19, 2, 15, 1.) The hirer may sublet. (D. 19, 2, 48, pr. ; C. 4, 65, 6.)

The responsibility incurred by an owner (*locator*) who does not perform this duty, varies according as his non-performance arises from his fault or not. If he fails in consequence of his own fault, he must pay full compensation (*id quod interest*). (D. 19, 2, 30, pr.)

Titius lets a farm to Seius for five years. At the end of two years Titius sells the same farm to Sempronius, who turns Seius out. Titius must pay Seius compensation for the eviction. He could have protected himself, however, by making it a condition of sale that Sempronius should allow Seius to remain for the rest of his tenancy. (D. 19, 2, 25, 1.)

If, however, it is through no fault of the owner that the hirer is evicted, the latter is entitled only to a remission of the rent. (D. 19, 2, 30, pr.)

Gallus buys a house from a person in possession, whom he has every reason to believe to be owner. He then lets the house to Maevius. Soon after, the true owner brings an action against Gallus, and succeeding in it, evicts Maevius. Maevius has an action against Gallus ; but if the latter offers Maevius equally good accommodation elsewhere, he is entitled to be absolved from the action. (D. 19, 2, 9, pr.)

Titius lets a farm to Gaius, and the farm is confiscated. Gaius is entitled only to a remission of the rent, not to damages for the non-enjoyment. (D. 19, 2, 33.)

If a house is burned down, the tenant (*inquilinus*) is not bound to pay any rent after the fire. (D. 19, 2, 30, 1.)

If the thing let is carried off by robbers, the owner is bound to remit payment for the unexpired term of the contract. (D. 19, 2, 34.)

A landlord, during the currency of a lease, resolves to pull down the house and rebuild it. If there is no necessity for this step, he must give the tenant compensation (*id quod interest*) ; but if it is necessary, he must allow simply a remission of the rent. (D. 19, 2, 35, pr.)

Titius lets a farm to Gaius for five years. At the end of two years Titius dies, leaving Sempronius his heir, and bequeathing a usufruct of the farm to Gaius. Gaius is absolved from the further payment of rent (D. 7, 1, 34, 1), and the heir is bound to release Gaius from the contract. (D. 33, 2, 30, 1.)

II. The owner is bound to keep the thing in a state such that the hirer can enjoy the use agreed upon. If the thing becomes deteriorated, and is not repaired, the hirer may demand a reduction of the rent or a release from the contract. Trifling repairs must, however, be executed by the hirer. (D. 19, 2, 27.)

Titius lets a house to Gaius, and Sempronius, an adjoining proprietor, builds and shuts out his light. Gaius may throw up the contract. So if the doors and windows decay, and are not repaired. (D. 19, 2, 25. 2.)

III. The responsibility of a landlord in respect of faults in the thing hired is similar to that of a vendor in a contract of sale. In some cases, a warranty of fitness for the use intended was implied. (D. 19, 2, 19, 1.)

Titius lets a farm to Gaius along with the large jars or vats (*dolia*) used in wine making. The vats are rotten, and Gaius loses his wine. Titius must pay for the wine. (D. 19, 2, 19, 1.)

Titius lets pasture-land that produces poisonous or injurious herbs. If Titius is not aware of the fault, he is bound merely to remit the rent; but if he did know, he must pay all the damages that may result. (D. 19, 2, 19, 1.)

Gaius hired Stichus, the slave of Titius, to drive his mules. By the negligence of Stichus a mule was killed. Must Titius pay for the mule? If the contract was made with Stichus and not with Titius, Titius must pay the damage to the whole extent of the slave's *peculium*, and also so far as he has drawn profit from the letting. But if Titius himself let the slave, he is responsible if Gaius hired simply a muleteer, without reference to any particular one, and Stichus was selected by Titius. (D. 19, 2, 60, 7.) Generally, however, in such cases, the hirer had an action *ex delicto*. Thus, if a slave was let out to keep a shop and stole anything, the hirer could sue his master for the theft, and compel him either to pay him the value of the things stolen, or to surrender the slave (*noxae deditio*). (D. 19, 2, 45, 1.)

IV. The owner must permit the hirer to carry away any moveables he has brought on the land or house, and even fixtures, provided he promises (by stipulation) not to injure the house, but to leave it in as good condition as before. (D. 19, 2, 19, 4.) (See p. 278.)

Duties of Hirer of Things (*inquilinus, colonus*) = Rights *in personam* of *locator*.

A. In the Absence of Special Agreement.

1. To pay the rent agreed upon (*pensio, reditus, merces*) and interest, if the payment falls in arrear. (D. 22, 1, 17, 4; C. 4, 65, 17.)

An agreement was made between Titius and Seius, that during the period of the lease, Seius should be permitted to hold the farm, and, if he were evicted, Titius should pay a penalty of 10 *aurei*. Seius paid no rent for two years. Titius can expel him without making himself liable to the penalty. (D. 19, 2, 54, 1.)

In certain cases the hirer was entitled to a remission of rent, in whole or in part, even when there was no misconduct on the part of the *locator*. (D. 19, 2, 15, 2.)

Thus when a house needs repair, and the landlord requires the tenant to leave during the repairs, the tenant pays no rent; and if the tenant is kept out for more than six months, he can throw up his tenancy. (D. 19, 2, 60, pr.)

In other cases a remission was allowed on account of loss or damage to crops, but only when the damage was serious (D. 19, 2, 25, 6); and was not compensated by particularly good harvests in prior years of the tenancy (C. 4, 65, 8); and when the risk was not thrown upon the tenant either by the custom of the place or by special agreement. (D. 19, 2, 15, 4; C. 4, 65, 19.) Subject to these limitations, the landlord was obliged to forego even the whole of his rent when the crop was lost or very much destroyed by inundations, tempests, hostile invasions, wind or rain. Allowance

was also made for the depredations of locusts (C. 4, 65, 18), jackdaws, starlings, and for the blight. (D. 19, 2, 15, 2.)

II. The hirer must keep possession of the thing for the time agreed upon. If without a reasonable excuse he leaves the house or land, he must nevertheless continue to pay rent. (D. 19, 2, 24, 2; D. 19. 2, 55, 2.) If the tenant has reason to fear that the house will fall down, he is absolved from paying the rent. (D. 19, 2, 27, 1.)

III. The hirer must take all reasonable care of the thing hired, but he is not responsible for unavoidable accident. (C. 4, 65, 28.) He is responsible if the thing is stolen (J. 4, 1, 15), but not if it is carried away by robbers. (D. 19, 2, 9, 4.)

The hirer ought to do everything according to the terms of his hiring; and if anything is passed over in the terms, he ought to render in that case what is just and fair.

When it is for the use of garments, or silver, or beasts, that a man has made or promised payment, he is required to guard those with all the care that the most diligent head of a house employs in regard to property of his own. If he does this and yet by some mishap loses the property, he will not be bound to restore it. (J. 3, 24, 5.)

Gaius hires from Titius weights, which are broken by the Ædile for being unfair. Must Gaius make good their value? If he hired them for good weights, he is released; but if he knew they were light weights, he must pay their value. (D. 19, 2, 13, 8.)

Titius lets two mules to Gaius, and guarantees that they will carry a certain weight. Maevius overloaded the mules, and they were injured. Gaius may be sued for breach of contract, and Maevius for *damnum injuria*. (D. 19, 2, 30, 2.)

A shipmaster proceeds on a river without a rudder. A storm arises, and the boat is lost. He is responsible to the passengers for the damage they sustain, upon the contract of hire. (D. 19, 2, 13, 2.)

A shipowner has agreed to carry goods to *Minturnae*, but finding the river too shallow, transfers the goods to a boat belonging to another owner. The boat is lost at the mouth of the river. Which of the owners is responsible? Upon this point opinion did not seem to be quite agreed. Labeo says the owner of the first vessel is not responsible unless he was in fault; but he is, if he transferred the goods without the consent of the owner, or at a time when he ought not, or the second vessel is unseaworthy. (D. 19, 2, 13, 1.)

IV. The hirer must return the thing at the time agreed upon. The hirer was bound to give up possession, even if he claimed the property as his own. After surrendering possession, he could, if he liked, institute an action for the recovery of it. (C. 4, 65, 25.) Zeno made it an offence punishable with fine or exile f r a tenant to contest the title of his landlord without yielding up possession. (C. 4, 65, 32.)

B. By Special Agreement.

1. An agreement that the hirer shall not keep fire (*ignem ne*

habeto), made him answerable when the house was lost by accident, if he kept a fire. (D. 19, 2, 11, 1.)

2. An agreement that the hirer will not fell, peel, or burn the trees, nor suffer it to be done, imposes on him the obligation not only of stopping a person that does it, but of taking means to prevent anyone doing it. (D. 19, 2, 29.)

3. A penalty was often added to the obligation to keep possession for the time agreed upon, corresponding to the penalty on the *locator*, for eviction. (D. 19, 2, 54, 1.)

4. It may be agreed that if a farm is not cultivated in the manner prescribed by the contract, the landlord may turn out the tenant and let the farm to another, and that the tenant in that case should make up the rent if the landlord could not get the same rent as before. If, however, the land fetched more, the tenant could not recover the excess, because it was held that the agreement was meant for the benefit of the landlord only. (D. 19, 2, 51, pr.)

Second, *Locatio-conductio* OF SERVICES (*operarum*).

If the material upon which labour is to be employed is contributed by the workman, the contract is one of sale, not of hire. The hire of services exists only when the workman gives his services, and nothing more, and all the material is contributed by his employer. (J. 3, 24, 4.) But a distinction was made among services. Sometimes a service consists in making an article, as a gold ring out of gold. Sometimes a service has no reference to any corporeal thing, as the carrying of a verbal message. In this last case there can be no dispute as to which is hirer and which letter. The object of the contract is service; the servant gives the service, and the employer pays for it; the servant is the letter (*locator operarum*), and the employer, the hirer of the service, is *conductor operarum*. Thus a secretary was said to let his services, and his employer to hire them. (D. 19, 2, 19, 9; D. 19, 2, 38.) But a difficulty arose when the work was rendered in respect of a thing. Suppose clothes are sent to be washed, essentially the same relation exists as in personal services; the laundress cleans the clothes, and the owner pays her. But the Roman jurists in this case said the laundress was the hirer (*conductor* or *redemptor operis*), and the owner was the letter (*locator operis*). The usage of the jurists is distinct and uniform.[1] But it proceeds upon a confusion with the quite different case of letting things for use. The landlord is the letter (*locator*), and the tenant the hirer (*conductor*). But this resemblance is extremely superficial. If the jurists had followed the test of payment, it would have kept them right. The tenant pays, and is the hirer (*conductor*); in like manner, a person that

[1] The fuller (*fullo*) of clothes is *conductor*; the owner of clothes *locator*. (D. 19, 2, 9, 5; D. 19, 2, 13, 6; D. 19, 2, 60, 2.)

The carrier is *conductor*; and the owner of the goods carried is *locator*. (D. 19, 2, 11, 3; D. 19, 2, 25, 7.)

A person that teaches a slave is *conductor*; the owner is *locator*. (D. 19, 2, 13, 3.)

A jeweller or builder that executes work is a *conductor*, and the person for whom, and with whose material the work is done is *locator operis*. (D. 19, 2, 13, 5; D. 19, 2, 59; D. 19, 2, 62.)

sends his slave to be taught, pays for and hires the services of the teacher. To avoid this source of confusion, it is convenient to speak simply of the employer and the workman.

DUTIES OF WORKMAN (*locator operarum, conductor operis*)=RIGHTS *in personam* OF EMPLOYER (*conductor operarum, locator operis*).

A. In the absence of Special Agreement.

I. The workman was bound to execute the work properly, and in the manner agreed upon, within a reasonable time. (D. 19, 2, 51, 1; D. 19, 2, 60, 3; D. 19, 2, 58, 1.)

From the rules in *locatio conductio* of things, it may be inferred that if the workman was not in fault (as if disabled) he simply lost his wages; but if he were in fault, he must pay full compensation (*id quod interest*).

II. The workman must take good care (*praestare diligentiam, culpam*) of the things entrusted to him; and he is bound to pay their value, if the things are lost or destroyed through his negligence or unskilfulness. But generally he is not answerable for loss arising from *vis major*, as robbery; or from faults in the thing upon which he is working. (D. 19, 2, 62; D. 19, 2, 59; D. 19, 2, 9, 5; D. 19, 2, 13, 6.)

A workman has agreed to take a column from one place and set it up in another, or to remove casks of wine. If the column or casks are broken, the workman is not bound to pay their value unless he was in fault; and he was in fault if he did not exercise the highest degree of care. (D. 19, 2, 25, 7.)

A builder undertakes to put up a house with the owner's own material. After it is partly up, it is destroyed by an earthquake; the loss falls on the owner. (D. 19, 2, 59.)

A precious stone is sent to a lapidary to be cut or set. In doing so the lapidary breaks the stone. He is bound to pay damages if the fracture was due to his unskilfulness, but not if it was due to a flaw in the stone. (D. 19, 2, 13, 5.)

A fuller receives clothes to be cleaned; the clothes are eaten by vermin, or stolen, or returned to the wrong person. The fuller must pay their value. (D. 19, 2, 13, 6; D. 19, 2, 25, 8.)

A coachman, in racing another, overturned his own carriage, and broke the leg of a slave whom he had undertaken to carry. He is liable either in an action on the Aquilian law for negligence, or on the contract. (D. 19, 2, 13, pr.)

In some cases, however, the workman accepts a larger responsibility.

1. When work is let by the job (*per aversionem*), it remains at the risk of the workman until approved. (D. 19, 2, 36.)

2. When work is to be paid for by so many feet or according to measure, the risk is with the workman until the measure is made. (D. 19, 2, 36.)

In both cases, however, the workman is free from risk, if it is by the fault of the employer that the thing is not approved or measured. Also if the work requiring to be approved

perishes by *vis major* before approval, the loss falls on the employer, because the workman is not responsible for more than his own care and skill. (D. 19, 2, 37.)

B. By Special Agreement.

1. The workman, by agreement, might undertake to bear the loss resulting from accident. (D. 19, 2, 13. 5.)

A warehouseman put up a notice that he would not accept gold, silver, or pearls at his own risk. Such articles were, however, entrusted to his care, with his knowledge. This acceptance was held to be a renunciation of the notice. (D. 19, 2, 60, 6.)

Warehousemen (*horrearii*) were bound to take special care and unusual precautions, but if their utmost care failed to frustrate the attempts of robbers, they were exonerated. (C. 4, 65, 1; C. 4, 65, 4; D. 19, 2, 40.)

2. An agreement that the work must be to the satisfaction of the employer (*uti arbitratu domini opus approbetur*) was construed as if it said according to the satisfaction of a fair and reasonable man (*viri boni arbitrium*). It applies only to the quality of the work, and not to the time allowed for doing it. (D. 19, 2, 24, pr.)

An agreement was sometimes made that if the work was not done by a certain day, it might be taken away and given to another. The employer cannot take it away until the day passes, and the workman is not liable to be sued until the work has actually been given to another. (D. 19, 2, 13, 10.)

DUTY OF THE EMPLOYER (*conductor operarum*, or *locator operis*) = RIGHT *in personam* OF WORKMAN (*locator operarum*, or *conductor operis*).

To pay the wages agreed upon, unless through the fault of the workman the services promised have not been given. (D. 19, 2, 38, pr.) If the wages were not paid in time, interest was due. (C. 4, 65, 17.)

A secretary was engaged for a year to Antonius Aquilia. Before the end of the year Antonius died. If the secretary did not receive any salary during the same year from any other person, he was entitled to his full salary from the heir of the deceased. (D. 19, 2, 19, 9; D. 19, 2, 19, 10.)

An advocate was obliged to return his fee (*honorarium*), if, through his own fault, he failed to appear in the cause for which he was engaged. (D. 19, 2, 38, 1.)

When a ship was lost, the amount paid as freight could be recovered. (D. 19, 2, 15, 6.)

SPECIAL DIVESTITIVE FACTS.

1. The expiration of the time for which the contract was to last. (C. 4, 65, 11.)

If the hirer of a farm (*colonus*) is permitted by the owner to

remain in possession after his five years' lease is exhausted, there is an implied re-letting (*relocatio*) to him of the farm for one year. But in the case of houses, if the original contract was in writing, a re-letting is not presumed, and cannot be made except in writing. In the absence of such writing the tenant holds merely during the pleasure of the owner. (D. 19, 2, 13, 11.)

2. If the interest of the *locator* in the thing let has expired, then the letting is at an end. (D. 19, 2, 9, 1.)

3. The death of a workman puts an end to a hiring of service or work; but the death of a letter or hirer of things does not. (C. 4, 65, 10.)

If the hirer dies during the time of hiring, his heir comes into his place as hirer, and has the same rights and duties. (J. 3, 24, 6.)

4. The hirer may be evicted from a farm, of which he has been in arrear of rent (D. 19, 2, 54, 1), or if he has misconducted himself in the hiring, or the house let wants repairs, or the landlord requires the house for his own accommodation. (C. 4, 65, 3.)

Remedies.

I. To enforce the duties of a landlord (*locator rerum*), and employer (*locator operis*), and workman (*locator operarum*).

1. *Actio conducti.* (D. 19, 2, 15.)

2. *Interdict de migrando.*—This was given only to a hirer of houses (*inquilinus*), to enable him to remove his property from the house on payment of his rent. (D. 43, 32, 1, pr.) It includes also property under his care. (D. 43, 32, 2.) It is a perpetual interdict; and is given to and against heirs. (D. 43, 32, 1, 6.)

II. To enforce the duties of the hirer of things (*conductor rerum*), and the (*conductor operis* (workman), and the *conductor operarum* (employer).

1. *Actio locati.*

2. *Actio furti* (D. 19, 2, 42), the action on the Aquilian Law, the interdict *quod vi aut clam*, and the *actio arborum furtim caesarum.* (D. 19, 2, 25, 5; D. 19, 2, 43.)

JETTISON (*Lex Rhodia de Jactu*).

The Roman Law adopted, so far as not inconsistent with itself, the maritime law of Rhodes. This fact is brought out very forcibly in a rescript of the Emperor Augustus. I am, says he, indeed, master of the land, but the law rules the sea. The Maritime law of Rhodes (*lex Rhodia*) applies wherever it is not opposed to special legislation. (D. 14, 2, 9.)

If, in order to save a ship, a portion of its cargo is thrown overboard, the owners of the vessel and cargo must share with the owners of the goods thrown overboard the loss they sustain. (D. 14, 2, 1.)

A captain of a ship, fearing that his ship is overloaded, causes a portion of the cargo to be put into boats. The boats are capsized. In this case there is clearly contribution. Suppose, however, the boats are saved and the ship is lost, is there contribution? No, because the goods in the boats have not been saved in consequence of the loss of the goods in the ship. (D. 14, 2, 4, pr.)

A mast is cut and thrown overboard. The owner has a right of contribution, if it was done to save the vessel, and the vessel was saved. (D. 14, 2, 3; D. 14, 2, 5.)

A ship suffered severely in a storm, and was driven into a port, where the captain had the damage repaired. Continuing the voyage, the ship reached its destination in safety. In this case there is no contribution for the expenses of repairs, because that was a part of the ordinary expenditure, rather than a loss incurred for the sake of preserving the cargo. (D. 14, 2, 6.)

Money paid for the redemption of a ship from pirates gave rise to a claim for contribution on the cargo, but not if the goods were stolen by robbers. (D. 14, 2, 2. 3.)

There was no contribution for slaves drowned in a shipwreck, any more than if they had died on board or thrown themselves into the sea. (D. 14, 2, 2, 5.)

Contribution is required from those whose property has been saved by the jettison, upon the equitable ground that the loss was incurred to save their goods. (D. 14, 2, 5.) No contribution could be required on account of free persons saved, because their lives constituted a value that could not be expressed in money. But they must contribute on account of their garments and jewellery saved from shipwreck; not, however, for food and the like consumable articles. Also the owner of the vessel must contribute because his vessel is saved. (D. 14, 2, 2, 2.)

A more difficult point is raised by Callistratus. May contribution be demanded in respect of goods which, although saved, have been damaged by the water? The answer was that such goods should contribute according to their depreciated value only.

Suppose the goods were deteriorated to the extent of 10 *aurei*, and the amount due on contribution was less, say 2 *aurei*; is the owner of the damaged goods not only to suffer the loss of 10 *aurei*, but to pay 2 *aurei* for contribution? or may he not claim contribution for the damage done to his own goods? Callistratus, endorsing the opinion of Papirius Fronto, said that contribution should be made not merely for jettison, but, as in the case mentioned, for damage done by sea water. (D. 14, 2, 4, 2.)

Valuation.—In measuring the value of the goods lost and saved for the purpose of contribution, a distinction was drawn. The value of the goods thrown overboard or damaged by sea water, was held to be the price paid for them, not the price that they would probably fetch at the port of destination. The reason was, that although it was fair that the owners of the goods saved should pay for the goods thrown overboard, all that they could reasonably be asked to do was to save the owner from

loss, not to make for him a profit. But the goods saved, as was but fair, were valued at the price they would fetch at the port of destination, because that was the true measure of the value of what was saved from shipwreck. (D. 14, 2, 2, 4.)

REMEDIES.—Although in substance the obligation to contribute for goods thrown overboard was founded on equity, and not on contract, and was therefore a real quasi-contract, yet in form such was not the case. The owners of the goods lost had no direct action against the owners whose goods were saved ; their remedy was against the ship-master upon the contract of letting on hire. (D. 14, 2, 2, 2.) The object of the action was to require the shipmaster to retain the goods that were saved until the amount due for contribution had been paid (D. 14, 2, 2, pr.) ; or if the goods had been delivered, to allow the losers to sue the owners of the goods saved in the ship-master's name.

The shipmaster may either retain the goods saved until contribution has been made D. 14, 2, 2, pr.) ; or he may sue the passengers and owners on the contract of hire *actio ex locato*).

III.—PARTNERSHIP (*SOCIETAS*).

DEFINITION.

Partnership is a contract in which two or more persons combine their property, or one contributes property and another labour, with the object of sharing amongst themselves the gains. (C. 4, 37, 1.) The share of profit need not be proportional to the capital contributed by each partner (D. 17, 2, 5, 1) ; but a partnership cannot be constituted in which one partner contributes neither property nor labour. (D. 39, 6, 35, 5 ; D. 17, 2, 5, 2.) A partnership could exist in which one of the parties was to share in the profit, but not in the loss ; but a partnership could not exist when one of the partners was to share in the loss only, and not in the profit (*Leonina Societas*). Such a contract could not be made except from a charitable motive ; but in partnership it was necessary that there should be a valuable consideration moving from each of the partners. (D. 17, 2, 29, 2.)

A farm adjoining the lands of Lucius Titius and of his neighbour Gaius Seius was for sale. Titius, desiring to have the part adjoining his land added to it, asked Seius to buy the land. Afterwards, Titius, without informing Seius of his purpose, went and bought the farm in his own name. Can Seius compel Titius to share the farm with him ? In other words, are they partners ? Julian said the question was one of fact, not of law. What did Seius and Titius intend ? If the agreement was simply that Seius should buy the farm, and give Titius a part of it, there was no partnership. But if the intention was that the thing bought should belong to them jointly (*ut quasi commune negotium gereretur*), then Titius will be bound to give up to Seius the portion of the farm set apart for him by the agreement. (D. 17, 2, 52, pr.)

Flavius Victor and Bellicus Asianus made an agreement to this effect :—Land was

to be bought with the money of Victor, on which Asianus by his labour was to raise buildings ; upon the sale of these Victor was to get back the money with a certain sum in addition, and Asianus was to have the balance. This is a partnership. (D 17, 2, 52, 7.)

Titius gives Seius a pearl to sell on condition that Seius should give Titius 10 *aurei* if he sold the pearl for that sum ; and if he got more, should keep the excess for himself. If the intention was to form a partnership, Titius contributing the pearl and Seius labour, and 10 *aurei* was mentioned merely as a mode of determining the division of profits, it would be a partnership ; but if Titius simply intended to trust Seius with his pearl on sale, and allowed the excess above 10 *aurei* as a reward for his trouble, it would be a valid contract, of the nature of an equitable contract, but not a partnership. The practical difference would be this :—If it were a partnership, Seius could compel Titius to deliver the pearl, if he had not done so, in order to give him an opportunity of selling it ; or if Titius sold it, or gave it to another to sell, Seius would still be entitled to his profit ; but if it was not a partnership, Seius had no rights against Titius until the pearl had actually been delivered to him. (D. 17, 2, 44.)

KINDS OF PARTNERSHIP.—In some respect the rules applicable to partnership differed according to the subject-matter of the contract.

The partnerships in which we usually join, either extend to the whole of our goods—this the Greeks call by the special name of Κοινοπραξία—or apply to some one business only, as buying and selling slaves, oil, wine, or corn. (J. 3, 25, pr. ; G. 3, 148.)

I. TRADE OR PROFESSIONAL PARTNERSHIP (*Societas universorum quae ex quaestu veniunt*).

This is the kind of partnership that is understood to be made, if no other form is specially agreed upon. (D. 17, 2, 7.) Sometimes it is called *societas quaestus et lucri* or *societas quaestus et compendii* (D. 17, 2, 13 ; D. 29, 2. 45, 2) ; but these additional terms, although they serve to explain the scope of the contract, add nothing to it. *Quaestus* is whatever is gained by the exercise of skill or labour (*qui ex opera cujusque descendit*). (D. 17, 2, 8.) A partnership of two bankers or money-lenders (*argentarii*) is an example of a trade partnership. (D. 17, 2, 52, 5.)

Neither partner is bound to contribute anything that does not come under the definition of commercial profit (*quaestus*). Each keeps to himself separately what he acquires by legacy, gift, or inheritance. (D. 17, 2. 9 ; D. 17, 2, 71, 1 ; D. 29, 2, 45, 2.) In like manner, the partners cannot demand from the partnership the payment of debts, except those incurred in the pursuit of the profit (*quaestus*), which it is the object of the partnership to share. (D. 17, 2, 12 ; D. 17, 2, 82.) Other expenditure might, however, be imposed on the partnership by special agreement.

Julius and Attius are partners. Julius has a daughter, Flavia, and it has been agreed that the dowries of the partners' daughters shall be paid out of the partnership property. Julius, on the marriage of Flavia, promised a dowry, but died before it was paid, leaving Flavia his heir. Flavia, being her father's heir, was now bound to pay to the husband the amount of the dowry. A divorce, however, took place, and Flavia was released by her husband from the obligation of paying the dowry.

Can she, as heir of her father, claim to rank as a creditor against the partnership funds in respect of her dowry? Papinian observed that the original agreement was valid if both the partners were to have a right to charge the dowries of their daughters against the partnership funds, even if one only of the partners had a daughter. In this case, if the dowry had been paid, Flavia could have recovered it from her husband, and would not have been obliged to give it back and share it with Attius, because she got the money back from her husband in her own right, and not as her father's heir. But as the money was not paid, and not demanded from the partnership funds before the death of Julius, and consequent termination of the partnership, Papinian decided that Flavia had no claim. He goes on to add that if the dowry had been paid by Julius, and his daughter had died leaving her husband surviving, Julius would have been bound to sue the husband for the dowry and restore it to the partnership funds. If, on the contrary, the wife had survived the marriage, Julius could take back the dowry only subject to an obligation to return it to Flavia if she re-married. If the first husband's estate did not suffice to restore the dowry, a second dowry could not be charged against the partnership funds. (D. 17, 2, 81.)

II. PARTNERSHIP FOR A SINGLE TRANSACTION (*Societas negotiationis alicujus*).

The partnership may be limited, as stated by Justinian, to a single sale or other transaction, in which case only what is gained and expended in connection with it enters into the partnership. (D. 17, 2, 5, pr.)

Cornelius has three horses, and Licinius one; and they agree to sell them in a single team (*quadriga*), and divide the proceeds. Before the sale, the horse of Licinius died. Was Cornelius bound to pay three-fourths of the loss? This depends on the terms of the agreement. If the partnership was only for the sale of the team, then until the sale there was no interchange of ownership, and the loss falls wholly on Licinius. But if the agreement was that they would make a team of four, in which partnership Cornelius had three shares and Licinius one, and the horse of Licinius died, the loss must be divided between the partners, in proportion to their shares. (D. 17, 2, 58, pr.)

III. A special case of this partnership was in the collection of taxes (*societas vectigalium*). It differed from the other instances of partnership in no respect, except one of the divestitive facts (see p. 523.) It is generally ranked as a distinct kind of partnership.

IV. *Societas universorum bonorum.*—This is a partnership including all the property of the partners, in whatsoever manner acquired, and providing for the payment of all their expenses. (D. 17, 2, 1, 1.) It occurs where two persons agree to put all their money into a common purse, out of which all their expenses are to be paid.

As soon as the contract is made, the moveable and immoveable property of each of the partners becomes, without any mutual delivery, at once the joint property of all the partners. (D. 17, 2, 2.) Whatever is subsequently acquired by a partner does not become joint property until the partner gives it in the usual way to his copartners. (D. 17, 2, 74.)

What a partner acquires by legacy, inheritance, gift, or in any other manner, belongs to the partnership. (D. 17, 2, 3, 1 ; D. 17, 2, 73.) Thus, even the dowry that one of the partners receives with his wife must be shared with the partners, subject to the obligation of the husband to return it in certain events. (D.17, 2, 65, 16 ; D. 17, 2, 66.)

The sums due (*nomina*) to each partner can be sued for only in that partner's name, but each partner is bound to place his right of action at the disposal of his copartners. (D. 17, 2, 3.) The damages obtained by a partner for an injury (*injuria*) to his son must also be given up to the partnership. (D. 17, 2, 52, 16.)

On the other hand, all the lawful expenses of the partners must be paid out of the common fund ; but not damages that they have to pay for wilful misconduct. (D. 17, 2, 73 ; D. 17, 2, 52, 18.) Money lost in gambling cannot be charged to the common fund (D. 17, 2, 59, 1), unless the partners have shared in gains from the same source. (D. 17, 2, 55.)

V. Joint Ownership (*Societas unius rei vel certarum rerum*). (D. 17, 2, 31.)

The subject of joint ownership crops up in this place merely from a peculiarity of the forms of action. If the joint-ownership arose from some act or event other than the will of the co-owners, the proper remedy was the action *communi dividundo* or *familiae erciscundae ;* but if the joint ownership arose from the act of the co-owners, the *actio pro socio* could be brought (D. 17, 2, 34) ; and in no material respect was there any difference between them, unless perhaps that a partner cannot be compelled to pay beyond his means ; whereas there was no such restriction in the other actions. Thus each partner could alienate his own share (C. 4, 52, 3), but not more than his own share. (D. 17, 2, 68.) A partner could not exercise any right of ownership (as building on the common land) against the wishes of the others. (D. 17, 2, 39 ; D. 8, 2, 27, 1 ; D. 8, 5, 11, pr.) For when two persons have equal rights, the one

that forbids prevails (*in re enim pari potiorem causam esse prohibentis constat*).

Pamphilus, a freedman, and his patron Titius, together buy land, and delivery is made to both. They are joint-owners. Pamphilus, however, paid the whole price. He can compel Titius by the *actio pro socio* to pay the half. (C. 4, 37, 2.)

Two brothers, joint-heirs, agree to hold all that they get from the inheritance in common. This constitutes a partnership of the inheritance, but does not include what they acquire from other sources. (D. 17, 2, 52, 6.)

An agreement between Titius and Julius was made, that whichever acquired an inheritance should share it with the other. Titius afterwards became sole heir of his father. Thereupon a partnership of the inheritance arises. (D. 17, 2, 3, 2.)

Titius and Seius are co-owners of Stichus. Titius leaves a legacy to Stichus of two *aurei*. Seius being the sole owner of Stichus becomes entitled to the legacy. Can the heir of Titius, as the heir of a partner, compel him to divide the legacy? No, because Seius receives the legacy, not in his capacity as partner, but, by the operation of a rule of the civil law, in consequence of his being owner. But he is obliged to give the heir half of the value of Stichus. (D. 17, 2, 63, 9.)

Rights and Duties.

The rights and duties of partners may be considered under two heads—(1) the duties partners owe to each other; and (2) the duties they owe to outsiders in consequence of the acts or forbearances of one of themselves.

I. Duties of Partners *inter se*.

1. Each must contribute to the common fund what has been agreed upon, and also whatever each gets in respect of the partnership. Hence, if one partner recovers more from a debtor than the others, he must share his good luck with his co-partners. (D. 17, 2, 63, 5.)

2. Each partner is entitled to be reimbursed all expenses properly incurred (D. 17, 2, 52, 12), and to be indemnified in respect of all the duties to which he subjects himself on behalf of the partnership. (D. 17, 2, 27; D. 17, 2, 28; D. 17, 2, 38.) If one of the partners becomes insolvent, and is unable to pay his share, the other partners must, in proportion to their shares, make good the deficiency. (D. 17, 2, 67, pr.)

A partner, travelling for his firm to buy merchandise, is entitled to travelling expenses, and the cost of conveying himself, his baggage and merchandise. (D. 17, 2, 52, 15.)

A partner, in resisting the flight of slaves belonging to the partnership, is wounded. Can he recover the cost of medical attendance for his cure? Labeo held that he could not, and drew a subtle distinction between expense incurred on behalf of the partnership and expense incurred incidentally in consequence of being a partner. It is like the case where a legacy is left to a man in consequence of being a partner. He is not obliged to contribute that. (D. 17, 2, 60, 1.) This subtlety was rejected by Julian,

whose opinion had the further sanction of Ulpian, and is endorsed in the Digest. (D. 17, 2, 61.)

Titius and Seius agreed to deal together in mantles, and Titius set out on a journey to buy stock. On his way he was met by robbers, who stole the money he took to pay for the merchandise, wounded his slaves, and stripped him of his own private property. Julian held that not merely must the loss of the partnership money be borne equally by the two, but that Seius must pay half the loss of the private property of Titius, and of the other damage, including medical expenses. (D. 17, 2, 52, 4.)

3. Whether one partner is liable to another simply as such (by the *actio pro socio*) in case of wilful wrong, as is a man that has suffered anything to be deposited with him, or whether he is not also liable for a fault on the score of sloth, that is, and negligence is questioned. The opinion has, however, prevailed that he is liable even for a fault. But everything that falls short of the utmost possible diligence is not therefore a fault. For it is enough that a partner display such diligence in regard to the common affairs, as he usually does in regard to his own. And the man that has taken to himself a partner lacking in diligence has only himself to complain of; he must ascribe his loss, in fact, to his own want of forethought. (J. 3, 25, 9.)

A partnership is made between Sempronius and Titius, Titius undertaking to pasture the cattle of Sempronius, and share the profits with him. The cattle are taken over by Titius at a valuation. Some of the cattle are carried off by robbers, and the rest stolen. In this case Titius must pay the value of the stolen cattle, but the loss of the cattle taken by robbers falls on Sempronius. The reason is, that with due care Titius could have prevented the theft, but he could not withstand robbery. (D. 17, 2, 52, 3).

A partner employed his slave to work for the partnership; the slave by his negligence did some damage. The partner could not set off against this damage any special benefit acquired through that slave. (D. 17, 2, 23, 1 ; D. 17, 2, 25.)

And the general rule was that a partner could not set off what he gained by unusual industry against losses incurred by negligence. (D. 17, 2, 26.)

II. Rights and Duties of Partners in relation to third parties.

In modern law, questions affecting partnership generally arise with regard to the rights and obligations of third parties against the partners. Every partner, engaged in the business of the partnership, is an implied agent in his transactions with other persons within the scope of the partnership. But the contract of partnership in Roman law dealt solely with the rights of partners as between themselves ; and one of the partners had no implied power to bind the others, even in matters strictly within the business of the partnership. One of the partners might, indeed, to a qualified extent, be an agent for the others, but only in the same way as a stranger to the partnership. This peculiarity is to be attributed to the slow and imperfect development of agency in the creation of contracts. See *postea*, Agency.

Investitive Facts.

Partnership was formed by the simple consent of the parties. (D. 17, 2, 4.) It seems at one time to have been a moot point whether a partnership could be made subject to a condition, but this was decided in the affirmative by Justinian. (C. 4, 37, 6; D. 17, 2, 1, pr.)

If no express agreement has been come to as regards the shares of profit or loss, equal shares in both cases are contemplated. But if the shares have been expressed, then they must be kept to. (J. 3, 25, 1; G. 3, 150.)

It is easily seen that if the share is expressed in one case only, whether of profit or loss, but omitted in the other, then in the other case also that has been passed over the same share must be kept to. (J. 3, 25, 3; G. 3, 150.)

As in the case of sale and letting, the determination of the shares might be left to a third party (*arbiter*). (D. 17, 2, 76.) If no decision were given, the contract came to nothing. (D. 17, 2, 75.) If the decision were manifestly unfair, it would be set aside. (D. 17, 2, 79.) But the mere fact of the arbiter giving more to one than another was not evidence of unfairness, because one might contribute a larger share of capital, industry, or credit. (D. 17, 2, 80.)

It never was doubtful that, if two persons come to an agreement between themselves that two-thirds both of profit and of loss shall belong to one and one-third to the other, such an agreement holds good. (J. 3, 25, 1.)

But certainly the following agreement has been much disputed.

If Titius and Seius agree between themselves that two-thirds of the profit shall belong to Titius and one-third of the loss, two-thirds of the loss to Seius and one-third of the profit, ought such an agreement to be regarded as valid? Quintus Mucius thought that such an agreement was contrary to the very nature of a partnership, and therefore ought not to be regarded as valid. Servius Sulpicius was of the contrary opinion, and his view has prevailed. For often there are some men whose services in a partnership are so valuable, that it is just that they should be admitted into it on better terms than the others. In support of this, it may be added, that no one doubts men can join in a partnership on these terms,—that one shall bring in all the capital, the other none, and yet that the profit shall be shared in common; for often a man's services are an equivalent for capital. So fully has the opinion opposed to that of Quintus Mucius been established, that it is even accepted that partners may agree that one shall share the profit without being liable for loss, as Servius consistently thought. But such an agreement ought to be understood to mean, that if one part of the business brings in a profit, and another a loss, then a balance must be struck, and only the excess of profit over loss be regarded as profit. (J. 3, 25, 2; G. 3, 149.)

Transvestitive Facts.—No partner could give away his share, so as to put another in his place. (D. 17, 2, 19.) The rule is thus expressed: the partner of my partner is not my partner (*Socii mei socius meus socius non est*). (D. 50, 17, 47, 1.)

Divestitive Facts.

1. A partnership lasts as long as the partners continue their consent; but if one renounces the partnership, it is dissolved. Clearly, however, it a

partner craftily renounces the partnership in order to be alone in having some profit that is falling in—if, for instance, a member of a partnership that extends to all the goods of the partners is left heir to some one, and thereupon renounces the partnership in order to be alone in profiting by the inheritance—he is compelled to share the profits. But any other profit he makes, without hunting after it, belongs to himself alone; while all that is acquired in any way after the partnership is renounced, is given up to the renounced partner, and to him alone. (J. 3, 25, 4; G. 3, 151.)

The power of withdrawal exists only when the duration of the partnership has not been fixed. If a time has been agreed upon, a partner that withdraws divests himself of all rights in respect of the partnership, but remains liable for all obligations. (*Socium a se non se a socio liberat.*) (D. 17, 2, 65, 6.) Even if no time is fixed, a partner cannot withdraw when it is inconvenient for the partnership; as, for example, to force a sale of slaves at a disadvantage. (D. 17, 2, 65, 5.)

An agreement that a partner should not be at liberty to withdraw was void. (D. 17, 2, 14.)

2. By Action. If one of the partners goes into court to secure his rights, it is understood that the partnership is thereby dissolved. (D. 17, 2, 65.)

3. A partnership is dissolved, too, by the death of a partner; because, in entering into a contract of partnership, a man chose for himself a determinate person. Even if the partnership was formed by more than two persons consenting to join, the death of one dissolves it although several survive, unless it was otherwise agreed when they joined in partnership. (J. 3, 25, 5; G. 3, 152.)

The *Societas vectigalium* is an exception to this rule. In this partnership the heir of a partner may by, but not without, a special agreement succeed as a partner. (D. 17, 2, 59; D. 17, 2, 35.)

If one of the partners acts on the assumption that a partner is alive, who in point of fact is dead, the partnership is regarded as existing. This beneficial rule existed also in mandate. (D. 17, 2, 65, 10.)

4. Therefore it is agreed that *capitis deminutio*, too, dissolves a partnership; for, on the principle of the *jus civile*, this is regarded as almost equivalent to death. But if the members agree to go on still as partners, a new partnership is held to begin. (G. 3, 153.)

This is true only of the greater and middle change of status, not of the smallest (*minima capitis deminutio*). Hence the arrogation or emancipation of a partner did not dissolve the partnership. (D. 17, 2, 58, 2; D. 17, 2, 65, 11.)

5. Again, if one of the partners has his goods sold off, either by the State or by private creditors, the partnership is dissolved. But in this case a new contract of partnership may be entered into; for such a contract needs only bare consent, and comes under the *Jus Gentium;* and all men, by natural reason, can give consent. (G. 3, 154.)

Confiscation of goods, too, plainly breaks up a partnership, if, that is, the whole goods of the partner are confiscated; for since another comes into his place, he is regarded as dead. (J. 3, 25, 7.)

Again, if one of the partners, weighed down by heavy debts, yields up his

goods, and has all his substance sold for debts, public or private, the partnership is dissolved. But in this case, if the members agree to go on still as partners, a new partnership is begun. (J. 3, 25, 8.)

6. Again, if a contract of partnership is made for some special business, when that is ended the partnership is at an end. (J. 3, 25, 6.)

7. The loss of the partnership property also terminates the partnership. (D. 17, 2, 63, 10.)

8. By the lapse of the time for which the partnership was constituted. (D. 17, 2, 65, 6.)

REMEDIES.

I. *Actio pro Socio.*

1. This action is brought to enforce the rights *in personam* of the partners; if a division of the property is desired, recourse must be had to the *actio communi dividundo*. It is, therefore, confined to the accounts between partners. (D. 17, 2, 43.)

2. If any obligations are outstanding, and cannot be settled on the dissolution of the partnership, security must be given to the burdened partner. (D. 17, 2, 27; D. 17, 2, 38.)

3. Partners have a special benefit as between themselves; they cannot be made to pay more than they can afford, or have deprived themselves of the means of paying (*in id quod facere possunt quodve dolo malo fecerint quominus possent condemnari oportere*). (D. 17. 2, 63 pr.)

A partner, however, who denies the existence of a partnership, does not enjoy this benefit. (D. 42, 1, 22, 1; D. 17, 2, 67, 3.)

If a man brings an action against his parent or *patronus*, or if a partner brings an action against a partner in a suit arising out of the partnership, the plaintiff cannot gain more than his opponent can pay. And it is the same when a man is sued for what he has given as a present. (J. 4, 6, 38.)

2. The *actio communi dividundo* co-exists with the *Actio pro socio.*

3. The *actio legis Aquiliae, actio furti,* and others, may also, according to circumstances, be invoked by an injured partner. (D. 17, 2, 47, 1; D. 17, 2, 49; D. 17, 2, 50; D. 17, 2, 45; D. 17, 2, 46; D. 17, 2, 51 pr.; D. 17, 2, 51, 1.)

FOURTH.—*HISTORY AND CLASSIFICATION OF ROMAN CONTRACTS.*

Having enumerated and described the Roman Contracts as they are given in the Institutes of Gaius and Justinian, we may pause before proceeding to complete an outline of the subject from the *corpus juris*, to examine the principles upon which the Roman contracts are based, and the order of their development. These two topics—the history and juridical principles of contract—are, at least for the student of Roman law, inseparably bound up together. The history of contract affords the best justification of the arrangement that has been set forth, and a careful analysis of the principles upon which the Roman Law extended legal protection to contracts sometimes furnishes a clue to their history.

1.—Formal Contracts.

The formal contracts of the Roman law, as already described, are three in number: they are all said to descend from the *jus civile;* and they rest upon a simple principle. The obligatory force of these contracts depends on the exact observance of their respective forms.

The juridical principle of the formal contracts is obvious, and requires no commentary, but the question of their origin is very obscure. According to the opinion of some high authorities, the three formal contracts—*Nexum*, *Stipulatio*, *Expensilatio*—are not equally ancient. The *Nexum* is said to be the parent-contract from which not only the *Stipulatio* and *Expensilatio*, but all the other contracts of the Roman law are lineally descended.

The writer has been driven to the conclusion that this hypothesis, although very attractive, is not supported by the evidence; and that we must still look upon the stipulation as primordial, as it is one of the most ancient contracts of the Roman law. (See Note at the end of this section.)

1. Anciently in Rome betrothals were made by stipulation (hence the terms *sponsus*, *sponsa*, from *spondeo*). (D. 23, 1, 2.) In the classical period, the stipulation was not employed, and no action lay for breach of promise. We learn from Servius Sulpicius, a jurist who died B.C. 42, that betrothal was an institution of the Latin people, who kept up the action for breach of promise (*actio ex sponsu*) until they were incorporated with the Romans. There can be no question of the antiquity of the custom. It was, in fact, one that could not fail to arise as soon as men gave up the practice of stealing wives, and sought them by purchase. A preliminary bargain was necessary to settle the price, and the conclusion of that bargain prior to the ceremony of marriage was betrothal. One of the forms of Roman marriage, in olden times, was a mancipation of the wife to the husband (*coemptio in manum*). Now it would have been impossible that the previous contract should have been made by a mancipation, even fictitiously, because if the woman had really been mancipated, even for the sake of form, to an intending husband, she would at once have been subjected to his *manus* beyond recall. (G. 1, 115 B.) Hence, in betrothal, an extremely ancient institution, we find the opposition between contract and conveyance, between promise and property. This distinc-

tion, if Sulpicius is right, corresponded with that between *stipulatio* and *mancipatio*.

2. It is impossible to avoid being struck by the prominence given to the stipulation in the Roman law of procedure. Not only was it largely employed by the Prætor, but in its oldest form as a *sponsio* it figured in the ancient *condictio* (the *legis actio* of that name. See Book IV., Proceedings *in jure. Legis Actiones*). The ancient form of suretyship, called *vadimonium*, appears also to have been made by *sponsio*.

It is easy to understand why the stipulation should have been so extensively employed in civil procedure. The obligations enforced in connection with civil proceedings took the form of requiring a person to do or not to do something. Now we can hardly suppose such contracts ever to have been made by *nexum*. The *nexum* was germane to contracts relating to the transfer of property, but it seems quite irrelevant to contracts concerned with personal acts and forbearances. But such contracts fell naturally under the domain of the stipulation.

There is nothing in Roman law to throw light on one of the characteristics of the stipulation; namely, the form of question and answer. It is a unique form. But the other essential feature of the stipulation anciently—the word *spondeo*—has some interesting affinities.

The cognate term in Greek—σπονδή—is a sacrifice by libation of wine, oil, honey, or water. It is also the name for a simple treaty of peace as distinguished from a treaty of alliance. This ought to be taken along with a statement of Gaius (G. 3, 94), who says that in one case only could *spondeo* be used by an alien: namely, in making peace with the Roman people. It may perhaps be inferred that the word *spondeo* carried a sanctity with it beyond the confines of Rome. It would appear that *sponsiones* were current among the Greek and Latin tribes as a most binding and sacred kind of promise.

The third formal contract is *Expensilatio*. Ortolan contends at great length, and with much vigour, that this contract is derived from the *Nexum*. He summons to his aid the well-known terms in which entries were made in the domestic ledger. *expensa lata*—terms that seem to imply originally a weighing out of the money.

The *Expensilatio* was rarely, if ever, used as a means of *creating* rights *in personam;* it was used as a mode of novation, insomuch that if the text of Gaius were all the information

we had, we should be bound to omit *Expensilatio* from the list of contracts, and introduce it under the head of Transvestitive Facts. The juridical principle of the contract is obvious. According to all testimony, the accounts of a Roman household were kept with extreme exactness, and all sums due to or by the head of the house, when ascertained, were duly entered. In case of dispute, these books formed the best evidence; if the books of the creditor and debtor agreed, the dispute was at an end; if the books of the creditor only had the entry, the question was whether the entry was made with the consent of the debtor. If it was, there could be little hesitation as to the judgment that ought to be given. From the extreme care and scrupulous honesty with which the family accounts were kept, they naturally attained a high degree of value as evidence; and there seems no difficulty in believing that at length the debtor was not allowed to go behind the entry on the ledger, if it were made with his consent, to dispute his obligation. The literal contract is in short, merely an example of the doctrine of *estoppel*. A man that had consented to his name being entered as debtor for a given sum in the books of another, was not permitted to deny that the money was really due. From the writings of Cicero we learn that one that entered what was not due to him, and one that did not enter as due what he really owed, were alike guilty of nefarious misconduct.

There is no reason for limiting the effect of the literal contract to debts arising from *nexum;* it was equally applicable to debts arising from stipulation, or in any other way. Nor is any real light thrown upon the *expensilatio* by connecting it with the *nexum*. The words *expensa lata*, for aught that appears to the contrary, may have been employed in as figurative a sense when the doctrine of *estoppel* was first applied to written entries in the household ledger, as the word "expenditure" is at the present day.

II.—Equitable Contracts.

1. *Depositum, Pignus, Mutuum, Commodatum.*

Of the contracts *re* enumerated by Gaius and Justinian, two, but two only, can with absolute confidence be regarded as derived from the *nexum*. These two are *pignus* and *depositum*. It is a curious circumstance, if it be merely accidental, that both Gaius (G. 2. 60) and Boetius mention two only, and these the same examples; namely, *pignus* and *deposi-*

tum. There appears to be no testimony in favour of a similar derivation of *mutuum*, a contract that presents strong affinities with the two undoubted derivatives of the *nexum;* and yet there seems no reason why such testimony should be wanting, if, indeed, the *mutuum* had ever been made *per aes et libram.*

When we seek, in the absence of positive testimony to determine the precise character and limits of the *nexum*, especially with a view to the claim advanced for it as the parent form of all contracts, it is of the utmost importance to possess two unquestionable instances of derivative contracts. By examining the characteristics of the progeny, we may be able to determine something of the nature of the parent, and to specify what we should expect to find in other members of the family. The relation of the *pignus* to the *nexum* has been already described (p. 433). A few words may now be added in respect of the *depositum.* Boethius (Cic. Top. 4, 10, 41), explaining the term *fiducia*, says it occurs when a thing is given by *mancipatio* or *cessio in jure* to another, on condition that upon the happening of certain events it should be conveyed back to the owner. This happens when a man, afraid of civil broils, mancipates his land to a more powerful friend, who promises to restore the land when the danger has passed away. From this it would appear that the contract of *fiducia* was of the nature of a condition or engagement annexed to the conveyance of property.[1]

The transaction *per aes et libram* always admitted a considerable degree of elasticity in the language employed in what we may call the "operative part" of the proceeding. The presence of the balance-holder and the bronze was indeed constant, but the *nuncupatio*, the words that determined the legal character of the ceremony, varied. Gaius gives several examples; as in the conveyance of a slave (G. 1, 119), and in the making of a will. (G. 2, 104.) But in these cases, although the language varies, it is within narrow limits. The words define the legal effect of the ceremony, and nothing more. But the cases of deposit and mortgage carry us further. The words employed do not simply qualify the act

[1] An instance probably of the same kind is narrated by Varro (de r. r. 7, 105) as the opinion of Mamilius. "A freeman that gives his services, as in slavery, on account of the money that he owes is, until he discharges the debt, called *nexus.*" (*Liber qui suas operas in servitude* (in) *pro pecunia quam debebat* (dat) *dum solveret, nexus vocatur, ut ab aere obaeratus.*) This is supposed to refer to an actual *mancipatio* of the debtor himself, on condition that when the debt is paid his creditor shall release him.

of conveyance; they impose on the person receiving the property an obligation to return the property on a future day named, or on the happening of some event. These cases, then, furnish an example of the perversion, so to speak, of the form of conveyance to the purpose of contract. But the perversion is within the very narrowest limits. The words creating a conditional obligation to return the property are closely connected with the conveyance; and without any great stretch may be held to be covered by the ceremony, and so to be clothed with a legal sanction. The slightness of this perversion is made apparent when we consider that it would have required a distinct step in advance to have got so far as the *mutuum*. In that case the obligation was to return, not the things actually lent, but the same quantity and quality. This fact should be kept in mind, because while we know that deposit was at first made *per aes et libram*, we have no evidence that *mutuum* ever was.

The *contractus fiduciæ*, or engagement annexed to a conveyance *per aes et libram*, presents some features deserving of remark. It was not introduced by the Prætor, for the fiduciary deposit is at least as old as the XII Tables; nevertheless it was a contract in which good faith was required. Again, a person that broke an engagement of this sort was punished with the civil and political disabilities of infamy. This appears strange, since it was not until nearly the end of the Republic that a *stipulatio* could be upset by the plea of fraud. (See Sub-Div. II., Fraud in Contract.) But it seems to have been considered that the greater the confidence reposed, the more shameful was a breach of faith, and thus infamy might attach to a simple breach of contract. The reason why infamy was fixed to a delinquent depositee or mortgagee is manifest. The owner divested himself of his ownership; he gave up his right *in rem* against all the world, and accepted instead a right in *personam* against the person to whom he conveyed his property. The infliction of infamy was an attempt to strengthen what Bentham calls the social sanction in consequence of the weakness of the legal sanction. Under the head of Mortgage an account has been given of the manner in which the Prætor dexterously superseded the clumsy and inconvenient mortgage of the *jus civile*. His action in the case of deposit was similar. He gave effect to a deposit made without the ceremony *per aes et libram*, deprived the depositee of his

right *in rem*, and thus disabled him from alienating the property. Having thus given complete security to the owner, who now, in spite of the deposit, continued to have all the rights and remedies of an owner, the Prætor was at liberty to remove the penal action to which a depositee was exposed. Except, therefore, when the deposit was made under stress of shipwreck, fire, or the like, a depositee was not liable to pay double the value of the thing in the event of his being condemned for breach of contract.

There appears to be no evidence to connect the contract of *mutuum* with *nexum*, but it would seem to have been ranked in the Prætor's Edicts along with *commodatum* and *pignus*. (D. 12, 1, 1, 1; D. 12, 1, 2, 3; Ulp. Frag. Inst. 3, 1.) *Commodatum*, in the form we know it, was of Prætorian origin. (D. 13, 6, 1.) These two contracts naturally go together. *Mutuum* is the loan of things that are consumed in the use; *commodatum* is the loan of things that are not consumed in the use. In *mutuum* the borrower necessarily becomes owner of the things lent, and is bound to return simply the same quantity and quality: in *commodatum* the borrower acquires no right *in rem* to the thing, and must return the identical article he has borrowed. In regard to both contracts the evidence, although not conclusive, tends to show that the Prætorian contract was a substitute, not for the *nexum*, but for the *stipulatio*. Thus, although in the absence of a *stipulatio* the Prætor compelled a borrower to return the money, wine, corn, or whatever else he borrowed, he did not require him to pay interest. For *that* there must be a distinct and special stipulation. The utmost extent to which the Prætor relaxed this rule, was to permit—and that only in a few cases—interest to be attached to the loan by mere oral or written agreement (*pactum*) without the interrogative form (*stipulatio*). If we suppose that, prior to the intervention of the Prætor, a borrower could not be forced to return what he borrowed unless he had bound himself by *stipulatio*, we may take it that loans were seldom made without *stipulatio*, and that the promise of the *stipulatio* included both principal and interest. If, however, a lender neglected that precaution, upon what ground could he ask the assistance of the Prætor? The Prætor could not be asked to give effect to an informal promise as such, but he might go so far as to require the borrower to return the principal, for the borrower was taking advantage of the forms of the *jus civile* to cheat the lender of his money. Equity required so much, but it required

nothing more. Interest was always regarded in the Roman law as arising exclusively from contract; it did not bear the same relation to money lent that the rent of a farm did to the ownership of the farm. (D. 50, 16, 121.) Since, therefore, equity did not demand that the borrower should pay interest, and there was no *stipulatio*, the Prætor limited his interference to the return of the principal borrowed.

Commodatum was introduced by the Prætor, whether as a new form of contract invented by him or not, it would be rash to say. It occupies a peculiar position; on the one side of it is *usus* or *ususfructus*, gratuitous like *commodatum*, but belonging to the class of rights *in rem;* on the other side is *locatio-conductio*, belonging, like *commodatum*, to the class of rights *in personam*, but not gratuitous. There is again a contrast with *mutuum*. Interest is a valuable consideration for a loan, and the contract of *mutuum* might be either with or without interest. *Commodatum* exists only when there is no valuable consideration, and when there is no right *in rem*.

Of the four contracts *re* mentioned in the Institutes, two certainly, *pignus* and *depositum*, and two probably, *mutuum* and *commodatum*, were derived from formal contracts. The author of the change was the Prætor. The object of the change was to prevent the forms of the civil law being used as means to defraud a person of his property. Suppose a deposit is made without the ceremony *per aes et libram*, and the depositee refuses to return the property, what remedy had the owner? He could not sue on the *contractus fiduciae*, for there was no such contract; could he sue as owner by the *vindicatio?* The probability is that he could not, because he had of his own volition parted with his property, trusting to the honour of his friend. At all events there was an injustice in driving the owner to the *vindicatio*, because as the depositee was in possession, the owner was required to prove his title. However that may be, we may rest assured that the Prætor would not have introduced the *actio depositi* if the owner had had any other suitable remedy. The principle he adopted was that it would be unjust to allow an owner to be deprived of his property merely because of his neglect to use a legal ceremony.

The main object of the Prætor's interference, therefore, was restitution. He interfered not to give effect to an informal promise, but rather to redress a wrong; not so much to compel the depositee to fulfil his promise, as to make him give back to

the owner the property of which he was unjustly deprived. It is this circumstance that gives to the so-called real contracts their peculiarities. The remedy of the Prætor is given to the owner to recover his property ; unless, therefore, he has parted with his property, he has no occasion for the remedy. Hence there can be no contract *re* except by delivery of property by an owner. Suppose Titius promises to lend Gaius 10 *aurei*, but fails to keep his promise ; Gaius cannot compel him to lend the money, if no stipulation has been made. If, however, Titius does advance the money, then the Prætor gives him an action for the recovery of it.

The Prætor went further in the case of the other three contracts *re*, and gave an action to the depositee or borrower (*commodatarius*) or mortgagee. This action was called *contraria*, and the word is significant. Suppose Maevius agreed to lend Sempronius his slave for a week, and sent the slave according to his promise. It would be unfair to Sempronius to demand back the slave before the week had expired, or to refuse to pay any extraordinary expense that the borrower was put to by the slave. The Prætor, then, acting on the principle that he that seeks equity must do equity, refused an action to the owner until the time had expired, and he gave compensation to the borrower.

2. Innominate contracts *re*.

It was long before the principle of the contracts *re*, although obviously capable of a much wider application, was distinctly perceived and consistently applied. At first the Prætor attempted merely to supply a remedy for certain cases of flagrant injustice with the smallest possible interference with the rules of the *jus civile*. But new cases occurred involving substantially the same grievance, and calling for an application of the same remedy. A single instance may be taken as a type of many. Gaius lends his ox to Titius for a fortnight to make up a ploughing team, and Titius agrees at the end of the fortnight to return the ox, together with one of his own, to be lent to Gaius for a similar period. After Titius has had the use of Gaius' ox, he refuses to perform his promise, and Gaius is put to the expense of hiring another ox to do his ploughing. The injustice that Gaius suffers is manifest, and is of precisely the same character as that of a lender when the borrower refuses to repay the loan. But the contract does not fall within the definition of *mutuum ;* nor is it *commodatum*

(because it is not gratuitous); nor is it *locatio conductio*, because the consideration is not in money. Had Gaius then no remedy?

In seeking for a suitable remedy for cases like that stated, the jurisconsults naturally turned first to the action for fraud (*actio de dolo*). The conduct of Titius, if he had the means of performing his contract and refused, was certainly unjust, but it could hardly be called a fraud. If, indeed, he had intended from the first to cheat Gaius, and used the promise only as a means to get the use of his ox, his conduct was fraudulent. But this could rarely be proved even when it was the fact, and the *actio de dolo* could not often be relied upon. The true remedy was to apply the equitable principle of the contracts *re*, and at length, after long controversy (for even Paul (D. 19, 5, 5, 3) and Diocletian (C. 2, 21, 4) except one class of cases), this course was adopted.

A remedy called *actio in factum praescriptis verbis* was given whenever, in a bilaterial engagement, one of the parties had executed his promise, and the other refused to execute his promise. (D. 19, 5, 2-3.)

3. *Mandatum.*

Mandate is placed in the Institutes in the class of contracts arising from consent (*ex consensu*). The circumstance that mandate alone of the consensual contracts presents an *actio contraria*, excites a suspicion that it is not in its right place, and that it should rather go along with the contracts *re*. If mandate were a true consensual contract, then it ought, from the moment that consent is given, absolutely to bind both parties. But, as already pointed out, mandate has not these characters. In the first place, the rights of the *mandatarius* do not arise from the consent of the *mandator* simply; they flow from his performance of the mandate. His rights rest, therefore, upon equity rather than upon consent. In the second place, the rights of the *mandator* do not arise from the simple promise of the *mandatarius*. That is the case when the agent is paid. But where the agent is not paid, the principal has an action against him only when he has suffered injury by trusting to his promise, and thereby omitted to take the steps he would otherwise have taken to protect his interests. It is true that the claim of the *mandator* does not rest upon *acts* (as is the case in all other contracts *re*), but upon a *forbearance*. But in equity there is little difference

between saying, "I have done something at your request, in order that you may do something to me," and "I have abstained from doing something at your request, because you have undertaken to do it for me."

It is easier to assign mandate to its true place among contracts than to determine its origin. Is mandate an ancient, independent contract, or is it derived, and if so, from what other form, *nexum* or *stipulatio?* A contract in respect of the use of a thing or the services of a person might be made with or without valuable consideration; and if with valuable consideration, either in money or not. A contract for the use of a thing without consideration was *commodatum:* a contract for a personal service without consideration was *mandatum:* a contract for the use of a thing, or a personal service with a consideration in money, was *locatio conductio:* a contract for the use of a thing, or a personal service with a consideration, but not in money, was an innominate contract *re,* and was enforced by the *actio in factum praescriptis verbis. Commodatum* and *mandatum* thus naturally go together. They stand in the same relation to *locatio-conductio;* and probably they originated in the same way. The actions of *commodatum* or *mandatum* could never be employed unless when there was an absence both of a stipulation and of a pecuniary consideration. Occasionally this view is taken by the jurists. Thus in stating a case for mandate where there was no valuable consideration, Scaevola is at pains to add, "and there was no stipulation." (D. 17, 1, 62, pr.) Thus the equitable contract of *mandatum,* like the equitable contract of *commodatum,* may have been introduced where the parties had neglected to employ the *stipulatio;* but there is not sufficient evidence upon which to base any certain opinion.

III.—Contracts for Valuable Consideration.

In all the so-called consensual contracts (except *mandatum*), a pecuniary, or at least a valuable, consideration was essential.

1. Sale.—The contract of sale, as it was interpreted during the Empire, contained three main points:—(1) The duty of the seller was simply to deliver, not to make a good title; (2) he was bound to warrant against eviction; and (3) against faults in the thing sold. But the evidence is conclusive that these obligations were at first made by stipulation, and that they became part of the law of sale only through the edict of the

Curule Aedile. The effect of the Aedilitian Edicts was partly to impose on sellers a duty to disclose faults, and partly to enable warranties to be given without stipulation. A mere verbal warranty was to have the effect of a stipulation. The executory contract of sale was thus built up partly by admitting pacts for stipulations—*i.e.*, informal for formal verbal promises ; and partly by imposing as a legal duty that which previously could arise only from express stipulation.

The account given by Sir Henry Maine traces the executory contract of sale up to the *nexum*. If there were no positive evidence of the manner in which that contract was developed in the Roman law, there would be some plausibility in ascribing the origin of the contract of sale to a process by which property was actually conveyed for a price. But there can be no question that the duties of the seller, in the mature law, arose from dropping stipulations, not from lopping off the ceremonial part of the *mancipatio*. It was *stipulatio*, not the *nexum*, that was the parent-form of the executory contract of sale. There is an analogy between the executory contract of sale and betrothal—the executory contract of marriage. Betrothal was in the most ancient times made by *stipulatio*, while the marriage itself was effected *per aes et libram*.

2. Hire (*Locatio-conductio*).—There is nothing to show any connection between hire and stipulation such as subsisted between sale and stipulation.

3. Partnership (*Societas*).—There appears to be no evidence to connect partnership with either *nexum* or *stipulatio*, as indeed from the nature of the contract could scarcely be expected.

In these three cases the principle of valuable consideration is found. In a subsequent place, some other instances will be cited of contracts based on valuable consideration, but these are few in number. The Roman law never attained the point of generalising the principle of valuable consideration. That was the reason, probably, even more than the mistake with regard to *mandatum*, that induced the jurists to describe certain contracts as founded on consent, whereas when they came to describe the contracts individually, they stated that the very essence of them was a pecuniary consideration.

The three classes into which contracts have been divided may now be defined from a new standpoint, as unilateral or bilateral, executed or executory.

A contract is unilateral when it consists wholly of promises

by one person. It is bilateral when it consists of promises made by two persons, which promises are the consideration for each other. Again, there is a distinction between executed and executory contracts. If a unilateral contract is executed, there is an end of it. But a bilateral contract may be executed as respects the promise of one party, and be executory as regards the promise of the other. Such a contract may be said to be part executed. If neither party has performed his promise, the contract is executory.

1. The formal contracts are *unilateral* and *executory*. This is obviously true of the *stipulatio;* and it was true of the *expensilatio*. The *nexum* also was unilateral, for it imposed an obligation solely on the person receiving property by conveyance.

2. The equitable contracts are *bilateral* agreements, *part executed*. Before either party has executed his promise, there is an executory agreement, but one that cannot be enforced by law. As soon as one has performed his agreement, the other is subjected to a legal obligation in respect of his promises. The equitable contracts are thus not executory.

3. The *bilateral executory* contracts of the Roman law are based on valuable consideration.

DERIVATIVE THEORIES OF THE STIPULATION.

The following passage from "Ancient Law" gives a concise account of the view of those that maintain not merely that the stipulation was produced from the *nexum*, but that the *nexum* itself, as a contract, was an extension or perversion of the ancient conveyance *per aes et libram*:—

"There is some, but not very violent, conjecture in the following delineation of the process. Let us conceive a sale for ready money as the normal type of the *nexum*. The seller brought the property of which he intended to dispose—a slave, for example—the purchaser attended with the rough ingots of copper which served for money, and an indispensable assistant, the *libripens*, presented himself with a pair of scales. The slave, with certain fixed formalities, was handed over to the vendee—the copper was weighed by the *libripens* and passed to the vendor. So long as the business lasted it was a *nexum*, and the parties were *nexi;* but the moment it was completed the *nexum* ended, and the vendor and purchaser ceased to bear the name derived from their momentary relation. But now, let us move a step onward in commercial history. Suppose the slave transferred, but the money not paid. In *that* case the *nexum* is finished so far as the seller is concerned, and when he has once handed over his property, he is no longer *nexus;* but, in regard to the purchaser, the *nexum* continues. The transaction, as to his part of it, is incomplete, and he is still considered to be *nexus*. It follows, therefore, that the same term described the conveyance by which the right of property was transmitted, and the personal obligation of the debtor for the unpaid purchase-money. We may still go forward, and picture to ourselves a proceeding wholly formal, in which *nothing* is handed over and *nothing* paid; we are brought at once to a transaction indicative of much higher commercial activity, an *executory Contract of Sale*."—*Ancient Law*, p. 320.

According to this statement, the *nexum* would be the earliest contract known to the Roman law; the stipulation would probably be its first offshoot, while the *expensilatio* would be later. Does this represent the true genesis of the Roman contracts? The question is important, because the answer must affect all the other contracts of

the Roman law. The conclusion to which the present writer has been driven is that there is no sufficient evidence to connect the stipulation by way of descent with the *nexum*, but that such evidence as exists points rather to the stipulation as representing an element in law equally primordial with the notion of property itself. Considering the high authority in favour of the derivation of the stipulation, it is necessary to consider the arguments at some length.

The derivative theory has appeared in two principal forms, the first published by Savigny, the second by M. Ortolan, and in this country by Sir Henry Maine. Savigny considers the *stipulatio* to be derived from the *nexum;* but the *nexum* itself he regards as by no means the primary form of contract. The oldest contract in his view is the *mutuum;* the *nexum* was merely a fiction employed to bring other contracts within the scope of the remedy provided by law for the *mutuum*. The reasoning that led Savigny to this conclusion may be briefly stated. He observes that the object that first demands the attention of the legislator is the protection of property. To secure to every man the enjoyment of his own, is the first imperious duty of the lawgiver. To enforce promises is not so urgent; and accordingly Savigny thinks that legal remedies were provided for property at a time when the fulfilment of promises had no other guarantee than the good faith (*bona fides*) of the promiser. He thinks that the first application of actions to promises was in the case of loan—a case that illustrated in a striking manner the necessity for legal protection. He thus contrasts hiring with loan. I let a house to another person for a term, at the expiration of which he refuses both to deliver up the house and to pay the rent. Now I can recover my house without going upon the contract, simply as my property; I cannot however, recover the rent, unless the contract is enforced by law. But suppose I give him a loan of money, thereby making him owner of the money lent. Here, in consequence of my trusting him more, I have no legal remedy at all, because the ownership of the money is changed. Surely, then, this is a case that loudly calls for the assistance of law; and accordingly it is at this point, Savigny believes, the law of Rome first gave protection to contracts. If the borrower were permitted to retain what he had borrowed, he would have enriched himself unjustly by defrauding the lender; and it was a principle of the old *jus civile* to give a *condictio* against every one that unjustly enriched himself at the expense of another. This he holds to have been the principle on which the *condictio* was founded, and the only principle at first recognised by the Roman law. He considers that the fictitious sale (*nexum*) was resorted to in order to bring other contracts within the scope and remedy of loans. The *nexum* was in fact a fictitious loan, and in that capacity it obtained legal recognition. His difficulty becomes greater with the *stipulatio* and *expensilatio*, which in their mature form had no special reference to loan. Nevertheless, Savigny believes that both the *stipulatio* and *expensilatio* had no other basis in law than as fictitious loans of money.

There is, however, another class of contracts not enforced by *condictio* (the remedy for *mutuum, stipulatio*, and *expensilatio*), but by *actiones bonae fidei*. Savigny holds that contracts resting solely upon good faith do not call so earnestly for protection from the law. The parties, he contends, did not even go before a judge (*judex*) properly so called; they went before arbitrators (*arbitri*). If there was any dispute, as each professed to act in good faith, there could be no pretence for refusing to submit to the decision of an impartial person. The arbitrator, chosen in such a spirit, was not confined to the strict rules of law, but was at liberty to decide according to the dictates of natural honesty and fairness. Such, according to Savigny, is the import of the distinction between actions *stricti juris* and actions *bonae fidei*.

In support of his views, Savigny refers to what he considers the *probable* origin of the stipulation. In the first place, he remarks that the word itself bears testimony in his favour. The most ancient and approved derivation traces it to the same root as *stipendium*—namely, *stips*, signifying money; and he thinks the stipulation rested on

the fiction of a loan of money. But apart from the danger of building a theory on a supposed derivation of a word, it is not certain that *stipulatio* was the original name of the contract. There is reason to suspect that the original name of the contract was *sponsio.* (D. 50, 16, 7.)

It is a necessary part of Savigny's theory that the stipulation did not come into existence for Roman citizens until the abolition of the *nexum* by the *Lex Poetelia* (B.C. 326, 324, or 313). Inasmuch as the *nexum* and *stipulatio,* according to his views, were both fictitious modes of accomplishing one end, there could have been no necessity for the stipulation so long as the *nexum* was in existence. Savigny says, indeed, that even before that time aliens living in Rome, who could not use the *nexum,* may have introduced the practice of dropping the fictitious sale and trusting to a solemn form of words. At all events, he thinks that after the *lex Poetelia,* all, both citizens and aliens, adopted the stipulation as the solemn form of authenticating contracts in place of the superseded *nexum.* Now, as will appear presently, there can be no question that the *stipulatio* existed long before the *lex Poetelia;* that it was in vigour at least as early as the XII Tables, and in all probability is of much greater antiquity. This completely disposes of Savigny's theory, even if it were relieved from other and insuperable objections.

Ortolan and Sir H. Maine accept so much of Savigny's views as relate to the derivative origin of the stipulation; but they look upon the *nexum* as being at first the only contract from which subsequently all the rest descended. The *nexum* admitted of analysis into two parts – the ceremony of the balance and bronze, and the oral or nuncupative part, specifying the object of the ceremony, and determining the nature of the obligation. By dropping the ceremonial part, Ortolan says, the oral or verbal contract of stipulation was obtained.

Sir H. Maine carries the derivative hypothesis to its extreme issue, and if his view could be supported, it would reduce very much the primitive elements of law. His general point of view may be thus stated. Nearly the whole civil law may be grouped round three ideas,—Property, Contract, and Testament. Property comes first; testament is derived from it. This is so far true that the Roman Will was derived from the solemn form of conveying property—namely, the *mancipatio;* but this must be taken subject to the qualification that a Will could be made in Rome independently of the *testamentum per aes et libram.* If now contract also could be shown to be derived from Property, then the three great departments would be reduced to one, and Property would rank as the only primitive element. The bond uniting the two ideas is the *nexum,* which was simply the name for a *mancipatio,* when that antique form was resorted to, not for the conveyance of property, but for sanctioning a contract. It is an undoubted fact that the same form used in the conveyance of property and in making wills was also employed to give legal effect to some contracts. It is also a fact that certain contracts—such as *depositum* and *pignus*—were derived from the ancient *nexum.* But, on the other hand, the evidence, it is contended, falls completely short in regard to the most important contract of all—the stipulation.

Sir Henry Maine lays chief stress upon the analogy of the Roman Will. The argument may be thus stated. The Roman Will in its mature form was, although unquestionably derived from the *nexum,* unlike its parent in every important particular. In its final shape it was a secret document, revocable up to the death of the testator, until which event it had no force whatever. Now the instrument from which it was derived was, in all these particulars, exactly the reverse. It was irrevocable, it was made in the presence of five witnesses, and it took effect at once. Surely, then, this transformation is as great as was required to evolve contracts out of the *nexum.* The force of the analogy is, however, weakened by the following considerations.

1. The things compared are not similar. There is no antecedent improbability in the derivation of testaments from conveyance. For what is a testament? In form, doubtless, in the Roman Law, it was the nomination of an heir, but in substance it

was a means of providing for the posthumous distribution of property. Now, there is nothing unlikely in the derivation of the mode of conveying property after death from the mode of conveying it during life, and a testament was substantially a conveyance of property to survivors. But contract differs *toto coelo* from conveyance; it is at the opposite pole of juridical ideas. It is the standing contrast between *jus in rem* and *jus in personam*.

2. There is positive evidence in favour of the derivative character of the Roman Will; there is no evidence, so far as known to the writer, of the derivation of the stipulation from the *nexum*. We are told in the Digest not merely that the *mancipatio* gave birth to the form of the testament, but also by whom and by what authority the change was effected. No such evidence, either from Cicero or from Gaius, is forthcoming in the case of stipulation. The absence of testimony is not conclusive, but it falls short of conclusiveness only on the supposition that the change from *nexum* to stipulation was effected by an agency earlier than the Prætorian. Indeed, there can be no question that the change, if effected at all, was not made by the Prætor.

The force of this argument is increased when we remember the characteristics of those contracts that have undoubtedly arisen from the *nexum*. The difference between them and the stipulation is so marked as in itself almost to compel us to assign another origin to the stipulation. The *pignus* and *depositum* are equitable contracts; the stipulation is a formal contract: the equitable contracts were established by the Prætor; the stipulation is older than the Prætors: these contracts are but slight deviations from the conveyance of property; the stipulation may have acts and forbearances for its object: the equitable contracts are all bilateral engagements, where one of the parties has performed his promise; the stipulation is a purely unilateral contract. The development of contracts *re* from *nexum* offers a much closer analogy to the case of stipulation than the genesis of the Roman Will from *mancipatio*, and it can hardly be said that the characteristics of the equitable contracts add probability to the theory of the derivation of the stipulation from the *nexum*.

3. What M. Ortolan asks us to believe is that at some time or other, through some agency or other, the *nexum* was divested of all the dramatic and solemn part—the fictitious sale *per aes et libram*—and that an equal legal sanction was given to the bare words, being the informal part of the transaction. You have but to leave out the ceremony, the five witnesses, the balance-holder, the symbolic transfer of the bronze, and there remains the oral or nuncupative part; that is, the stipulation. This is asking us to make a very clean sweep of the *nexum;* a demand certainly not encouraged by the example of testaments. When the Prætor extended the testament made by mancipation, he retained seven witnesses, five of whom represented the old five witnesses, one represented the balance-holder, and the other the *familiae emptor*. To a stipulation, however, no witnesses were necessary. This was a real defect, for which not even an imperfect remedy was provided, until the habit of committing stipulations to writing became general.

But there is a stronger answer to M. Ortolan. Drop the ceremonial part of the *nexum*, he says, and there remains the nuncupation; that is, the stipulation. There could not be a greater fallacy. The nuncupation is not the stipulation. It is a mere verbal statement. But a verbal statement (unless in the form of question and answer) is a *pact*, not a stipulation. There is no greater opposition within the law of contract than that between a pact and a stipulation. A pact was not supported by action; a stipulation was a contract *juris civilis*. We might be tempted to listen to the hypothesis, unsupported as it is by positive evidence, if it explained the facts, but that is exactly what the hypothesis in question does not do.

Two things in the beginning, one thing always, characterised the stipulation. In the beginning, the word *spondeo* alone could be used—alone had any legal effect; from the first and always, the verbal statement must be in the *interrogative form*. Does the *nexum* throw any light on the exclusive value of the words *pondeo?* None what-

ever, for there is no evidence connecting that word with the mancipation. Does it explain the interrogative form, which, looking at the subject historically, may be called the essence of the contract? Not any more, for every formula handed down to us as belonging to the transaction *per aes et libram* is direct and categorical, not interrogative. So far, therefore, as the evidence is worth anything, it tells the other way. Perhaps it may be suggested that the interrogative form was adopted in place of the fictitious sale *per aes et libram*. But that again is mere conjecture; itself a hypothesis to support a hypothesis. The conclusion, therefore, seems unavoidable, that the hypothesis of the derivation of contract from conveyance, through the *nexum*, is not supported by evidence.

It is clear that if the stipulation was derived from the *nexum* it must have been prior to the XII Tables, and that means really in the prehistoric age of Roman Law The burden of proof rests with those that affirm a connection between the stipulation and the *nexum*. The absence of positive testimony would not be conclusive; for although the stipulation may have been carved out of the *nexum* in prehistoric times, traces of the operation might continue until within the historic period. But no such traces have been indicated. The *nexum* had five witnesses; the stipulation required none. In the examples of *nexum* that we know the action was *bonae fidei*; in stipulation, the remedy was *stricti juris*. So far, then, as the records of Roman law help us to a conclusion, the suggestion that "contract" is the offspring of "property" seems really to have no other support than its own inherent fascination.

The circumstance that we know very little, indeed almost nothing, of the *nexum*, but that the materials for a history of the stipulation are tolerably abundant, may be explained by saying that the *nexum* belongs to a hoary antiquity, and was superseded by its more versatile and useful child, the stipulation. But it may also be explained by the suggestion that the *mancipatio* was never perverted for the purpose of contract except in a very few cases, and that these lost nearly all their importance as soon as the Prætor introduced equitable actions.

FIFTH.—*EXTENSION OF EQUITABLE CONTRACTS.*

I.—INNOMINATE REAL CONTRACTS.

Paul, in a well-known formula, sums up all the cases of innominate contract. Either, says he, I give something to you in order that you may give something to me, or I give something to you in order that you may do something for me; or I do something for you in order that you may give something to me, or I do something for you that you may do something for me. (*Do tibi ut des; do ut facias; facio ut des; facio ut facias.*) (D. 19, 5, 5, pr.) This classification proceeds upon the distinction between a promise to do and a promise to give, so familiar to Roman lawyers, owing to the difference between a definite and an indefinite demand (*certa* and *incerta intentio*). In itself, however, it is a distinction without much logical value—the general word "to do" including "to give." It omits, moreover, the negative form "not to do," for that may equally, with the positive form, be the object of a promise. Paul's formula ought to be co-extensive with every kind of contract, and had better be expressed thus:—

I do something in order that you may do something. *Facio ut facias.*

I do something in order that you may not do something. *Facio ut non facias.*

I abstain from doing something in order that you may do something. *Non facio ut facias.*

I abstain from doing something in order that you may not do something. *Non facio ne facias.*

It will be convenient, however, to arrange the illustrations according to the *formula* of Paul, in order to bring out more clearly the analogies between the innominate and the other contracts.

I. *Do ut des.* I give that you may give.

1. Analogy to sale. Exchange (*Permutatio*).

The comparison of sale—the giving of a thing for money, with exchange—the giving of one thing for another, is instructive. Sale is a consensual contract, but exchange is not. Hence a mere agreement to exchange was without obligatory force until one of the parties had given what he promised. (D. 19, 4, 1, pr.; D. 19, 4, 1, 2; C. 4, 64, 5.) Moreover, the duty of exchange was different from sale. The seller was not bound to make out a good title; even if he sold what was not his own, the contract of sale was good, and he was bound simply to compensate the buyer when evicted. But in exchange both parties were bound to make a good title; and hence if one delivered what was not his own, the contract was wholly void. (D. 19, 4, 1, 3.)

A. gives B. a vase, B. promising to give A. in exchange a horse. B. refuses to do so. What is A.'s right? To the horse, or only to the return of the vase? In one passage, Paul is made to say that A.'s right is merely to the restitution of his vase (D 19, 4, 1, 4); but in another passage he says that A. has an option, and may, in his own discretion, demand either the restitution of the vase, or damages for the non-delivery of the horse. (D. 19, 5, 5, 1.)

In exchange, as in sale, pending delivery the thing remained at the risk of the person to whom it was to belong, and he that was bound to deliver was responsible only for reasonable care. (D. 19, 5, 5, 1.)

2. Analogy to sale. Variations, by agreement, in the essence of the contract.

Changes could be made in the contract of sale within very extensive limits. But no variations were permitted in the essential characteristics. If a contract were made resembling

sale, but differing in an essential feature, it would not be a consensual contract, but could be enforced only as an equitable contract.

Julius gave Attius 5 *aurei*, Attius undertaking to give Julius the ownership of the slave Stichus. Before being delivered, Stichus died. Could Julius demand back his money? If it were a sale he could not, because the risk attached to the buyer from the moment of the sale. But the obligation in sale was not to make out a good title; it was simply to deliver. This case, therefore, is not a sale, and Attius being unable to give Stichus, who has died, must refund the money. (D. 12, 4, 16.)

Lucius Titius agrees to give Gaius Seius a pearl, to be returned within two months, or its value, estimated at 10 *aurei*, paid. This was not sale, because Gaius Seius had the option of returning the pearl: nor letting on hire, because there was no consideration, no sum agreed on for the use of the pearl: nor mandate, because if Gaius Seius could sell the pearl within two months for more than 10 *aurei*, he was to keep the balance: nor partnership, because if there was any profit, it all went to Gaius Seius. (D. 19, 3, 1, pr.; D. 19, 5, 13, pr.) As such an agreement did not fall within any of the consensual contracts, Gaius Seius could not compel Lucius Titius to give him the pearl; but if Titius had done so, he could by an action *in factum* compel Gaius Seius to restore the pearl within two months, or pay its value. (D. 19, 3, 1, pr.) From its special character this was sometimes called the *actio de aestimato*.

Suppose now, before Gaius Seius has sold the pearls, or the two months have expired, the pearls have, without his fault, been lost, who is to bear the loss? Ulpian, repeating the opinion of Labeo and Pomponius, says that if Titius asked Seius, Titius must bear the loss; if, on the contrary, Seius asked Titius, Seius must bear the loss; if neither specially was responsible for the negotiation, then Seius was to answer only for reasonable care. (D. 19, 5, 17, 1.) This is an example of the general rule determining the amount of care exigible in contracts. If Titius made the request, then presumably Seius acted out of favour; if Seius made the request, presumably it was for his own profit; if neither specially, then presumably it was for the benefit of both; in which case both parties answer for due diligence, but not for accidental loss.

3. Analogy to Letting on Hire.

Titius gives the loan of his slave Stichus, who is a carpenter, for a month to Gaius, Gaius agreeing to give him in return an equal time of Pamphilus, also a carpenter. Gaius refuses to do so after Stichus has been with him for a month. Titius cannot sue for hire, because an exchange of the use of slaves is not a price (*merces certa*). Inasmuch, however, as he has actually lent Stichus, he can by the *actio in factum* compel Gaius to give him the use of Pamphilus. (D. 19, 5, 25.)

4. Analogy to *Mutuum* or *Mandatum*.

Licinius asked Victor for a loan of money. Victor having no money, gave him a vase to sell, and to take the price of it as a loan. Licinius sold the vase, but did not use the money. By what action can Victor recover it? He cannot sue for it as a loan, because until Licinius has used the money there is no *mutuum*. Neither is this a mandate, because it was not the intention of either party that Licinius should be the agent of Victor. But as Victor had delivered the vase, he could recover the price of it by the *actio in factum*. (D. 19, 5, 19, pr.)

Titius gave Sempronius 30 *aurei*, to be let out at interest by the latter. Sempronius undertook to pay the tribute due by Titius, Sempronius being charged with interest at the rate of six per cent. per annum. If that allowance of interest exceeded the tribute, the excess was to belong to Titius; if it was less, the deficit was to

diminish the principal: if the tribute swallowed up more than the principal and interest, Titius must refund the excess to Sempronius. No stipulation was made. The interest, taking it at six per cent., exceeded the amount of the tribute. By what action could Titius recover the surplus? Not by the *actio ex mutuo*, because as Sempronius was not bound to return the principal in the event of its being lost without his fault, the transaction was not a loan. Nor was the contract a mandate, for if Sempronius got more for the money than six per cent., he kept the excess to himself. The remedy, then, was by *actio in factum*. (D. 19, 5, 24.)

5. Analogy to Deposit.

Titius and Seius make a wager (*sponsio*), and each deposits a ring with Sempronius, who engages to give both to the winner. Titius wins. Sempronius refuses to give up either ring. Titius can sue him by the *actio in factum praescriptis verbis;* not for deposit, because he did not deposit Seius' ring. (D. 19, 5, 17, 5.)

Cornelius gives money to Seius to give to Titius, if he succeeds in bringing back the fugitive slave of Cornelius. Titius fails, and Seius refuses to restore the money. This is not a case of deposit, because Seius undertakes not merely the custody of the money, which is all that is involved in deposit, but also a special trust to give the money to Titius in a certain event. Cornelius will, therefore, recover his money by the *actio in factum praescriptis verbis*. (D. 19, 5, 18.)

6. Analogy to *Commodatum*.

Titius and Gaius are walking by the Tiber, when Titius asks to see Gaius' ring. While looking at it, he lets it fall, and it rolls into the Tiber, and is lost. Merely looking at a ring hardly constitutes a use within the meaning of *commodatum*, but Titius could be sued by the *actio in factum* for failing to return the ring after he had looked at it. (D. 19, 5, 23.) If the ring had been struck out of his hand without any fault on his part, Titius would not have been responsible. (D. 19, 5, 17, 2.)

Seia shows a ring to Julius, who undertakes to ascertain its value. This is neither a deposit nor a loan (*commodatum*) of the ring. Suppose, then, Julius refuses to give it back, or by his negligence loses it, what remedy has Seia? Or suppose Julius sends it by a careless servant, who loses it on the way. If Seia wished to sell the ring, and Julius gratuitously undertook to make inquiries for her, he is not answerable merely for his own or the messenger's negligence; but if Julius for his own purposes procured the custody of the ring, he was bound to answer for his own negligence, and also for the messenger's, if the latter was not a trustworthy person. (D. 13, 6, 10, 1; D. 13, 6, 11; D. 13, 6, 12; D. 19, 5, 1, 2.)

Calpurnius wished to buy plate, and Titius, a goldsmith, sent some for inspection. This is evidently neither deposit nor loan. Calpurnius did not approve the specimens, and sent them back by his slave Stichus. On the way Stichus was beaten and robbed of the plate. The loss falls on Titius. If, however, it had been stolen from Stichus, his master would have had to pay for his negligence. (D. 19, 5, 20, 2; D. 19, 5, 17, 4.)

Titius gives Seius some cups, Seius undertaking to return either the cups or their weight of equally good silver. This is not *commodatum*, because the obligation is not to return the identical cups, and the remedy is by the *actio in factum*. (D. 19, 5, 26.)

Titius owes money to Maevius, and Maevius to Sempronius. Titius, in order to procure delay from Maevius, gave him some golden vessels that he might give them as a pledge to Sempronius. This is not a *commodatum* with Maevius, because there is a consideration for the use; nor is it *locatio conductio*, because the consideration —the granting a respite to Titius—is not a pecuniary one. (D. 13, 7, 27.)

II.—*Do ut facias.*

1. Analogy to Letting on Hire.

Titius repairs the house of Gaius on condition that Gaius shall repair a house of Titius. This is not *locatio conductio*, because it is an exchange of services for services, not of services for money. Gaius must, however, repair the house of Titius, or be amerced in damages by the *actio in factum*. (D. 19, 5, 5, 2.)

Julius allows Attius to dig for chalk in his land, Attius agreeing to fill up the excavations. Attius does not do so. He may be sued by Julius by the *actio in factum*. (D. 19, 5, 16, pr.) The *actio locati* would not lie, because no rent was paid for the use of the land.

Sempronius gives his slave Stichus to Maevius, who undertakes to manumit him. After the time agreed upon, or a reasonable time has elapsed, Maevius fails to manumit Stichus. Sempronius can either reclaim the slave (by a *condictio*), or ask damages for non-performance of the agreement if the slave has been injured or made away with. (D. 19, 5, 5, 2.)

Sempronius gives Maevius 10 *aurei* as an inducement to him to manumit his slave Pamphilus. Maevius delays the manumission. Sempronius can then sue Maevius for damages if he would have derived any benefit from the manumission of Pamphilus. If, however, Sempronius derives no benefit from the manumission, he can reclaim his money. (D. 19, 5, 7.)

Sempronius gives his slave Stichus to Maevius on condition that Maevius shall manumit his slave Arethusa. Maevius manumits Arethusa, and afterwards is evicted from Stichus, who is taken from him in a lawsuit at the instance of the true owner. If Sempronius knew that he was not owner his conduct is fraudulent, and he would be amenable to the *actio de dolo;* if he were a *bona fide* possessor, he is still liable in damages by an *actio in factum*. (D. 2, 14, 7, 2.)

III.—*Facio ut des.*

At this point the analogy, with the nominate contracts, becomes weak, and considerable doubt prevailed, even in the time of Paul, whether in the absence of fraud such contracts could be enforced. But the texts are quite clear that in this case also the principle of the equitable contracts should apply.

Titius having lost a slave, offers a reward to the finder. Gaius pursues and restores the slave. Has Gaius any right to recover the promised reward? Ulpian observes that such a promise could not be called a nude pact, incapable of supporting an action; what it was, however, he felt some difficulty in stating (*habet in se negotium aliquod*). Ulpian at this point nearly struck upon the principle of valuable consideration; but he goes off without making the discovery, and says the remedy is the *actio in factum*, unless perhaps the action for fraud would lie (*actio de dolo*). (D. 19, 5, 15.)

Seia wrote a letter to Lucius Titius, saying that if he still had the affection for her that he once had, he was, on receipt of the letter, to sell his property and go to her; and she promised him a salary of 10 *aurei* a year during her life. Titius sold off his property and went. If there was nothing improper (*contra bonos mores*) in the arrangement, he could recover the salary. (D. 44, 7, 61, 1.)

IV.—*Facio ut facias.*

Titius has a slave Stichus, the son of Gaius, and Gaius has a slave Pamphilus, the son of Titius. Titius agrees to manumit Stichus, and Gaius to manumit Pamphilus. Titius does so; but Gaius refuses. Titius has an action (*in factum praescriptis verbis*)

against Gaius to recover the value of Stichus, whom he has manumitted. (D. 19, 5, 5, 5.)

Titius has a debtor in Carthage, and Gaius a debtor in Rome. Titius and Gaius agree that Titius shall collect and keep the debt in Rome, and Gaius collect and keep the debt in Carthage. This resembles mandate, but differs from it in a material point. If each collected the debt as agent at the cost and risk of the principal, it would be mandate ; but in this contract they exchange debts, and each takes upon himself the whole cost and risk of collection. On the other hand, it might be said that the expense incurred by one is a set-off to the expense incurred by the other ; and it might be argued that in collecting the debt each acts as an agent, but that the responsibility of each as principal has been compounded by special agreement. Paul, however, considers it the safer course to treat the case not as mandate, but by the *actio in factum praescriptis verbis.* (D. 19, 5, 5, 4.)

Sempronius and Maevius mutually agree that Sempronius shall put up a building on the land of Maevius, and Maevius build on the land of Sempronius. In this case, also, the safest remedy, if Sempronius has built and Maevius refuses, is the *actio in factum praescriptis verbis.* (D. 19, 5, 5, 4.)

Sixth.—*EXTENSION OF CONTRACTS FOR VALUABLE CONSIDERATION.*

Agreements (*Pacta*).

The class of consensual contracts, like that of equitable contracts, was at first limited to a small number of specified agreements. But just as the principle of the equitable contracts suggested and necessitated the class of innominate real contracts, so the principle of the consensual contracts would seem to justify a wide extension of the class of contracts in which consent alone should give rise to actions.

But this step was not taken. The jurists failed to extract the principle of valuable consideration from the contracts where it was implicitly admitted. The Roman law refused to enforce any promise the value of which could not be measured in money ; if it had gone so far as to proclaim that there must be a consideration also of money or money's worth, it would have attained the goal to which it was constantly and unconsciously tending, but which it never actually reached. We have now to consider how far the Romans succeeded in filling up the blank in their system due to their failure to apprehend and apply the principle of valuable consideration.

With regard to an agreement between any two persons containing any unfulfilled promise, the law may take one of several courses. (1) It may regard the promise as wholly void, so that even if it is fulfilled, it will order restitution. (2) It may not go so far as to order restitution, but it may refuse in any way to give effect to the promise, if the promiser declines to fulfil it. (3) If there are reciprocal promises, it may recognise the agreement

so far as to refuse its assistance to a promisee, with reference to that agreement, unless he also performs his promise. (4) It may compel the promiser to fulfil his promise, or answer in damages for non-performance. In respect of the two first-mentioned courses, we may briefly say that the agreement in law is void. The last two courses indicate a difference of treatment adopted by the Roman law. Those agreements (with the limitation presently to be noted) that the law does not directly enforce, but which it recognises only as a valid ground of defence, are called Pacts (*Pacta*). Those agreements that are enforced—in other words, are supported by actions—are called Contracts (*Contractus*). These terms are ancient. *Pactum* is found, as a verb, in the XII Tables. The thing, if not the name of contract, is still more ancient. *Contractus* was the name for all those conventions or agreements that were recognised and enforced by actions. The exceptions are few, belong to a late period, and will be duly signalised.

History of Pacts.

1. *Pacts in relation to Delicts.*

In the XII Tables a provision is made that if one breaks the limb of another, unless he is forgiven, he must submit to his own being broken. (*Si membrum rupsit ni cum eo pacit talio esto.*) The punishment of retaliation could not be avoided except by coming to terms with the injured person. This is an example of the rule that an agreement to waive an action for a delict is binding, and a good answer to the action. (D. 2, 14, 7, 14.) The effect of such a pact was entirely to take away the sufferer's right of action. A special defence was not necessary, but if it appeared in evidence that the sufferer had agreed not to sue the wrong-doer, he was defeated. (D. 2, 14, 17, 1.)

2. *Pacts in relation to the Divestitive Facts of Contract.*

At some period, which it would be difficult to determine, but which was certainly before the time of Cicero (*De Orat.* 2, 24; *Pro Publio Quintio*, 5), the Prætor inserted a provision in his edict, making a pact a good defence to an action on contract, as well as to an action on a delict. He said (D. 2, 14, 7, 7), "I will support all pacts that do not sin against good faith or any Statute, *Plebiscitum*, *Senatus Consultum*, or Imperial Constitution, and which are not an evasion of these." [1]

[1] *Pacta conventa, quae neque dolo malo, neque adversus leges, Plebiscita, Senatus Consulta, edicta principum, neque quo fraus cui eorum fiat, facta erunt, servabo.*

The pact specially in view of the Prætor was doubtless the pact of release (*de non petendo*). Each contract had its special divestitive as it had its special investitive facts. A contract *per aes et libram* could be dissolved only *per aes et libram*. A literal contract was terminated by writing; a stipulation by a stipulation. A mere verbal release from a formal contract had no effect. But it would have been against good conscience to allow a person to reimpose upon another, by taking advantage of the forms of law, an obligation that he had deliberately, though informally, cancelled. The Prætor, therefore, by inserting an *exceptio* in the pleadings, practically enabled any contract to be dissolved by mere consent, without any formality. A technical distinction was still preserved. When a contract was dissolved by its appropriate divestitive fact, it was said to be extinguished *ipso jure*, so that it could no longer support an action. But when the release was made by a pact, the contracts of *stipulatio* and *expensilatio* were not held to be dissolved; on the contrary, they were still in contemplation of law subsisting, but if attempted to be enforced would be defeated by the insertion of a special defence in the pleading (*exceptio pacti*).

Moreover, if a debtor has agreed with his creditor that he shall not be sued for payment, still none the less he remains under the obligation. For by a mere agreement obligations are not in every case dissolved. The action is therefore available against him in which the plaintiff uses as his *intentio* SI PARET EUM DARE OPORTERE (if it appears that he ought to give). But it is unfair that, despite his agreement, he should be condemned; and therefore he can defend himself by the *exceptio pacti conventi*. (J. 4, 13, 3.)

Thus, in effect, although not in form, the Prætor, by sanctioning informal releases, took away all necessity for resorting to the formal releases. In other words, the pact of release superseded the formal divestitive facts.

3. *Pacts in relation to the Investitive Facts of Contract.*

In describing the consensual contracts, attention was drawn to the distinction between those rights and duties that were annexed to each contract by law, and those that were added by special agreement of the parties. Such a special agreement was called "added pact" (*pactum adjectum*). (D. 2, 14, 7, 5.) The effect of such a pact differed according as the contract was *stricti juris* or *bonae fidei*. The *stipulatio*, *expensilatio*, and *mutuum* are contracts *stricti juris*; all others are *bonae fidei*.

(1.) In contracts *bonae fidei* a pact had a different effect,

according as it was made at the time of the contract and as part of it, or subsequently. Those made at the time of the contract, and as part of it (*in continenti*), were of equal validity with the contract itself (*pacta conventa inesse bonae fidei judiciis*). (D. 2, 14, 7, 5.) This would seem to be a plain dictate of common sense. In a consensual contract, for example, where no form was required, what could be more reasonable than to give effect to the pacts or agreements made by the parties? And yet, as we have seen in tracing the history of the contract of sale, that view was by no means at first accepted by the Roman law. Variations or additions to the primitive or naked contract of sale could at first be made only by the solemn form of stipulation, and were enforced by the action given to stipulation. At length, however, the liberal opinion of Sabinus triumphed, and it was held that all terms agreed upon by the parties to a contract *bonae fidei* as part of the contract were to be enforced by the same action as the contract itself. (D. 18, 5, 6; D. 18, 1, 6, 1; D. 19, 1, 11, 6; D. 19, 1, 11, 3; D. 18, 3, 4, pr.)

Pacts made not at the time of the contract, but subsequently (*ex intervallo*), either varying the terms of the contract, or wholly or partially dissolving it, could be used as a defence (*exceptio*) to an action on the contract. But it did not follow that such a pact would support an action. For the rule here applied, that a nude pact was available as a plea in defence, but could not be enforced by action.[1] The distinction is not without reason. A pact made at the time of the contract is within the consideration of the contract; but a pact made subsequently is either gratuitous or supported by a new consideration. It would, therefore, be quite logical and consistent to refuse to subsequent pacts any effect except by way of defence.

The rules adopted by the Roman jurists were as follows:— If the subsequent pact affects the essence of the contract (*natura* or *substantia contractus*), such as the price in a contract of sale, it is, in fact, a new contract relating to the same subject-matter as the old, and superseding it. It therefore gave rise to an action. If, however, the pact does not vary the essence of the contract, but only such collateral rights and duties as could have been inserted at the making of the contract, it cannot be enforced by action, but is, as in other cases, available only as a plea in defence. (D. 18, 1, 72, pr.; D. 2, 14, 7, 5.)

[1] *Nuda pactio obligationem non parit, sed parit exceptionem.* (D. 2, 14, 7, 4.)

Titius buys a slave from Maevius ; and after the sale it was agreed that Maevius should give the usual security against eviction with sureties. If, now, Maevius refuses to give sureties, he cannot be sued upon the pact ; but if he has not got his price, he will be repelled in suing for it if he does not give the sureties according to his promise. If he has actually received his price, the buyer has no remedy. (D. 18, 1, 72, pr.)

(2.) In contracts *stricti juris* the rule was somewhat different. A subsequent pact (*pactum ex intervallo*) relating to a *stipulatio*, *expensilatio*, or *mutuum*, has no other effect, in any case, than as a defence (*exceptio*). It is even a question whether a pact made at the same time as the contract, with the view of modifying it, could be treated as part of the contract. In the case of *stipulatio* and *mutuum*, however, to some extent this was admitted. Thus, if all the terms of the contract were not embraced in the stipulation, but some were omitted, these were regarded as contained in the stipulation. (D. 12, 1, 40.)

An agreement was made for a loan, and that so long as interest was paid the principal should not be demanded. The return of the money was promised by stipulation, without any reference to the agreement about the return of the principal. It was held that the condition must be regarded as if it had been part of the stipulation. (D. 2, 14, 4, 3.)

I give you 10 *aurei*, and you agree to repay 20. The debtor is not bound to restore more than 10. (D. 2, 14, 17, pr.)

I give you 10 *aurei*, and you agree to repay 9. The debtor is bound to repay 9, and not more. (D. 12, 1, 11, 1.)

Pacts enforced by Action.

A simple agreement (*pactum*) could not originate a contract. It was used to dissolve a contract, or to vary and amplify the usual terms of a contract, but not to create one. Pacts were auxiliary to contracts. But in a very few cases, pacts were, to employ a common metaphor, clothed with actions, and thus practically elevated to the position of the consensual contracts. The cases are, indeed, fewer than is sometimes stated. Thus, an agreement of compromise (*transactio*), unless there was a stipulation, or something given or retained (that is, unless there were a contract *re* or *verbis*), did not support an action. (D. 2, 15, 2 ; C. 2, 4, 38.) But in two cases the Prætors, and in two others the Emperors, did undoubtedly raise certain pacts to the level of contracts. To the Prætor is due the pact of *hypotheca*, which has been already described. Even more ancient than *hypotheca* is the *pactum de constituto*, which, as mainly a form of suretyship, will be discussed under the head of Accessory Contracts.

The Emperors Theodosius and Valentinian enacted in A.D. 428, that a mere agreement to give a dowry should be binding without any *stipulatio*. (C. 5, 11, 6.) Thus was added to the investitive facts of the *dos* the *pactum de constituenda dote*.

Finally, Justinian sanctioned the greatest change of all—the *pactum donationis*. Before this, a promise without consideration was not valid, unless made by stipulation. (Vat. Frag. 264a: 263: 310.) Justinian put a promise to give a thing gratuitously on the same footing as if a price had been agreed upon. Up to this time an agreement, not involving a valuable consideration, required either to be invested with a solemn form (*nexum*, *stipulatio*, *expensilatio*), or to have been performed by one of the parties, to give it legal validity. By giving an action to support a mere informal promise of a gift, Justinian departed from the unbroken tradition of Roman law. He may have been led to adopt this course by one of two reasons. In the first place, the formal contract—the *stipulatio*—had lost much of its solemnity; it was divided by a very thin line indeed from a pact. The stipulation was in the form of question and answer; the pact was not. Even this thin partition was removed if the agreement were put in writing, for an allegation in writing that the form of stipulation had been observed, could not be overthrown by calling evidence to prove that it had not. But, in the second place, Justinian had mainly in his eye gifts for pious purposes. He declares with warmth, that when gifts are promised to religious persons or for pious uses, to refuse fulfilment merely on account of the absence of a legal formality showed not only a want of moral principle, but endangered the salvation of the promise-breaker—provoked not merely an action at law, but the wrath of Heaven. Justinian, therefore, enacted that all promises of gifts should bind, not only the promiser but his heirs, as well as be executed even to the heirs of the promisee. (C. 8, 54, 35, 5.)

Second Part.

CORREALITY—JOINT OBLIGATIONS.

(*IN SOLIDUM OBLIGARI—CORREI.*)

HITHERTO it has been assumed that there were only two parties to a contract—a debtor and a creditor. We must now consider the effect of adding one or more persons; for there may be several creditors and one debtor, or several debtors and one creditor, or several debtors and several creditors.

The multiplication of parties in a legal relation is not peculiar to contract. In almost every legal transaction there may be more than two parties; and when that happens, modifications in the legal relation necessarily follow. The character of those modifications must necessarily be determined by the nature of the subject-matter; and accordingly, in the different departments of law, we find a corresponding difference of treatment.

When a Delict was committed by several persons, their liability differed according as the delict descended from the old *jus civile*, or owed its introduction to the Prætor. In the first category are *injuria*, *furtum*, *vi bonorum raptorum*, and *damnum injuria*. (D. 47, 10, 34; J. 4, 1, 11; D. 47, 8, 2, 15; D. 9, 2, 11, 2.) The rule was that each of several persons committing one of those delicts was separately liable to pay the full penalties or compensation incurred, as if he alone had committed the offence; and thus the person injured could recover as many penalties or compensations as there were delinquents. The explanation of the rule given by Ulpian is stated too broadly.[1] It is true that by the XII Tables, *injuria* (D. 9, 2, 2, 1) was a penal action, and so was the action on the *lex Aquilia*, when the defendant disputed his liability; but penal actions introduced by the Prætor, as we shall see presently, were

[1] *Nunquam actiones poenales de eadem pecunia concurrentes alia aliam consumit.* (D. 44, 7, 60.)

governed by a different rule. The reason of the rule is that the actions for delict were quasi-criminal, and the rule of criminal law was applied, that when several join in a crime, each is punished separately, and does not escape by the punishment of the others. It would have been absurd in the case of such joint offences to lighten the penalties by dividing them among the delinquents. Accordingly, when the action did not partake of a quasi-criminal character, but was simply for the recovery of stolen property or its value (*condictio furtiva*), a different rule was followed. Each of the persons engaged in the theft was liable to be sued, even although the property might be in the possession of some of the others; but if one paid the amount, all the rest were released. (C. 4, 8, 1.) On the other hand, if an injury was done by one person to property belonging to several persons, each of those, but not more than one, could sue the delinquent for penalties. (D. 44, 7, 53, pr.) In this case, the amount recovered must be divided among the joint owners.

The rule adopted in the *condictio furtiva* was applied by the Prætor to all offences established by his edict, whether a penalty was imposed or compensation only was allowed. The delicts introduced by the Prætor partook of the character of civil wrongs rather than of crimes; and if the sufferer obtained full satisfaction, it would have been unreasonable to allow him to recover as many sets of damages as there were wrongdoers. Therefore, while any one of the co-delinquents might be sued, or all in succession, if need be, if the penalty or adequate compensation was paid by one, the others were released. This rule applied to persons responsible for things thrown or poured out of a room into the street (*de effusis et dejectis*) (D. 9, 3, 1, 10; D. 9, 3, 3); to forcible interference with *in jus vocatio* (D. 2, 7, 5, 3); to interference with appearance *in judicio* (D. 2, 10, 1, 4); to the *actio de dolo* (D. 4, 3, 17, pr.); to the action for *metus* (D. 4, 2, 14, 15; D. 4, 2, 15). The delinquent compelled to pay had no right of contribution against his co-delinquents, if it was a case of wilful wrong-doing.[1] But if not, as in things *effusa* or *ejecta*, the one compelled to pay could recover a proportion of the penalty from those jointly liable with him, by the *actio pro socio*, if they were partners; and if not, then by an *actio utilis*. (D. 9, 3, 4.)

[1] *Nec enim ulla societas maleficiorum vel communicatio justa damni ex maleficio.* (D. 27, 3, 1, 14.)

In the case of Property a different class of considerations comes into play. The relation of joint owners is determined by the maxim, *ubi emolumentum, ibi sentit et onus.* If a slave or animal, belonging to several persons, does harm, it would not be fair to require the sufferer to divide his claim and proceed separately against each owner. Co-owners are jointly liable to third parties, and any one of them may be sued for the whole damage. (D. 9, 4, 5, pr.; D. 10, 3, 8, 4.) But, as between themselves, all expenses incurred on account of the joint property must be divided in proportion to their shares.

The law of Inheritance presents us with an instructive example of the application of opposite rules in the same case. In so far as an inheritance consisted of property, all the co-heirs were joint owners. But debts due to or by the deceased were divided in proportion to the several shares of the co-heirs. Thus, if 100 *aurei* were due to a testator and he had four heirs entitled in equal shares, each of the heirs can sue for 25 *aurei*, and cannot sue for more. In like manner, if a testator owed 100 *aurei*, and left three heirs, one-half to one heir, and the other half equally between the other two heirs, the first heir can be sued for 50 *aurei* only, and the other two for 25 *aurei* each. This rule was a hardship to the debtors or creditors of the deceased, for it might involve them in as many lawsuits as there were heirs. But this hardship was ignored, in consideration of a still greater hardship that the rule of joint obligation would have inflicted upon the co-heirs. Each heir was bound to pay the whole debts of the deceased, even if no property or insufficient property were left to pay them; and if, in addition to this liability, each heir had been made a surety for his co-heirs, there would have been a considerable increase in the reluctance of nominated heirs to accept inheritances, and an aggravation of the evil that legislation persistently attempted to remove.

But these considerations do not apply where a joint obligation is imposed upon two or more heirs by a testator. Here the duties of the co-heirs are determined solely by the intention of their testator. His will is the sole law. Thus, if A. or B. or A. and B. (co-heirs) are required to give 10 *aurei* to C., C. may sue either A. or B., or both; but if one pays, the other is released.[1] (D. 45, 2, 9, pr.; D. 30, 8, 1; D. 32, 25.) Whether if A. paid

[1] Si cum uno actum sit *et solutum*, alter liberetur. (D. 30, 8, 1.) Mr Poste says the words in italics are an interpolation, and were not true in the time of Pomponius, who wrote the passage. There does not appear to be any necessity for this suggestion.

the whole, he could compel B. to pay half, depends upon the view that would be taken of the intention of the testator.

The obligations of Co-Tutors were the result of conflicting considerations. On the one hand, children were so much at the mercy of their tutors, that it was necessary to hold tutors with a very tight hand, and especially to prevent fraud by permitting them to dispute the blame among themselves, when the property of the pupil was lost. On the other hand, the office of tutor was the most thankless task a Roman could undertake. He received no payment, he could not refuse the office, and he had no choice whatever in regard to the persons that were chosen as his colleagues. These considerations were made to yield to the imperious necessity of protecting helpless infants. In respect of the pupil, co-tutors were reciprocally sureties for each other, and each was liable for the delinquency of the rest (C. 5, 52, 2); but the pupil could not recover compensation twice over by suing the tutors separately. (D. 27, 3, 15; D. 16, 3, 1, 43.) The hardship of the tutor's lot was mitigated, in some cases, by the *beneficium excussionis* (D. 26, 7, 3, 2); the *beneficium cedendarum actionum* (D. 46, 3, 95, 10; C. 5, 52, 2), and the *beneficium divisionis* (D. 27, 3, 1, 11-13.) (For an explanation of these terms, see pp. 568, 578.)

The question of joint-obligation in Contract presents a contrast to the instances cited. In those instances, the law is varied according to the requirements of justice or policy, in accordance with varying circumstances. But in contract, joint-obligation, like every other question arising out of contract, is determined by the intention of the parties. The rights and liabilities of the parties are determined by themselves. (C. 8, 40, 1; C. 8, 40, 3.) There was, however, a presumption in favour of separate as against joint-obligation. Thus, if A. and B. promise 100 *aurei* to C., and the intention is that each shall owe 50 *aurei* to C., there is no kind of joint-obligation, and C. can sue each only for 50 *aurei*. In the same way, A. may promise 100 *aurei* to B. and C., meaning 50 to each. A. owes two debts of 50 *aurei*, and not one debt of 100; or, in the language of the Digest, A. does not owe 100 *aurei in solidum*, but a *pars virilis* to each. Unless by express terms, or from the very mode of contracting, a joint-obligation was shown to be contracted, it was held, as in the above cases, that the debts were divided. (D. 45, 2, 11, 1; D. 45, 2, 11, 2.)

But if the intention were that either (but not both) of two creditors should be entitled to sue for the whole 100 *aurei*, or that either (but not both) of two debtors should be liable to pay the whole 100 *aurei*, then the obligation was joint. A joint-obligation exists when the whole debt or other object of a contract may be sued for by any one of several creditors, or may be recovered from any one of several debtors. Such debtors are said to be bound *in solidum* (that is for the whole), and they are called either *correi promittendi* or *debendi* (D. 45, 2, 1), or more commonly *duo rei promittendi* (*duo* being used merely by way of example). Similarly, joint-creditors are called *correi stipulandi* or *credendi*, or more commonly *duo rei stipulandi*. (D. 45, 2.)

Definition.

Obligations of this sort make the whole due to each stipulator, and bind each promiser for the whole. And yet though there are two obligations one thing only turns on them. If, therefore, on either side any one receives what is due or pays it, he puts an end to the obligation of all, and sets all free. (J. 3, 16, 1.)

Some writers consider that this passage does not correctly or fully describe correality; it is a description, in their view, of solidarity and not of correality. As to the alleged difference between solidarity and correality, see note at end of this section. The passage is intended to explain the form of joint-obligation known to the Roman law, and is one among many that may be cited in disproof of the alleged distinction.

Rights and Duties.

A. Duties of *correi promittendi* to the creditor, and rights of *correi stipulandi* against the debtor.

1. Each of several joint-debtors may be compelled to pay the whole or any part of the debt. The creditor may sue any one of the joint-debtors for the whole or any part of the debt (C. 8, 40, 3; C. 8, 40, 2; D. 45, 2, 3, 1; D. 30, 8, 1); but he cannot be compelled so to divide his claim, even if all the joint-debtors are solvent. (D. 45, 2, 11, pr.; D. 19, 2, 47; D. 46, 1, 15, 1.)

2. Payment in whole or in part, by one of several joint-debtors, is a discharge in whole or in part of the other joint-debtors. (D. 46, 2, 31, 1; D. 46, 3, 34, 1.)

B. Rights of *correi* as between themselves.

(A) Joint-creditors.

If one of several joint-creditors obtains payment of the whole debt, must he share it with the other creditors? The answer is, that it depends entirely upon the intention of the parties. The

mere fact of correality is not conclusive. The mere fact that two persons have each separately a right to recover a sum, does not throw light on the question, whether the sum, when recovered, is to be retained by one, or divided between the two; or, if divided, in what proportions. If, therefore, a creditor sought to obtain a share from his co-creditor, to whom the entire debt had been paid, he must prove *aliunde* that the joint-obligation was entered into with the intention that the proceeds should be divided between them in definite shares. The action would be either *pro socio* or *mandati.*

(B.) Joint-debtors.

Has a debtor, who has paid the whole debt, any right of contribution against his co-debtors? The answer must again be, that it depends entirely upon the agreement of the parties. The mere fact, however, that several debtors were bound *in solidum*, did not, in itself, create a presumption that the burden was to be divided in definite shares between them. In other words, the right of contribution rests not upon equity (as among co-sureties it does in English law), but, where it exists, upon contract. All that the joint-obligation implies, is the liability of each to the creditor for the whole debt; and it establishes no presumption as to the manner in which those who are not compelled to pay, should assist the co-debtor that pays for all, although co-debtors were in substance reciprocal sureties (*reos promittendi vice mutua fidejussores*). (D. 45, 2, 11, pr.)

It must be remembered that debtors were aided by the presumption of law, that an obligation of A., B. and C. to pay a given sum was divisible, and it was only when a clear intention to the contrary was proved, that A., or B. or C. could separately be sued for the whole. Persons before accepting such a responsibility could arrange, that although the debt was to be *in solidum*, so far as the creditor was concerned, it should, as between themselves, be treated as divisible, in any proportions they might fix. Such an arrangement would be enforced by an *actio mandati.* But, if no such agreement existed, and the co-debtors were not partners, one who was called upon to pay the whole had no action against his co-debtors to compel them to contribute, especially when the joint-obligation was contracted by *stipulatio.* If, however, the co-debtors were co-sureties, the commonest case of all, the transaction itself afforded a presumption that the intention of the co-debtors was to share the burden among themselves, although, for the better

security of the creditor, they were each liable to him for the whole. But, undoubtedly, that presumption was not considered sufficient to support an *actio mandati*, at the instance of the surety that paid the whole.

The jurists, however, met the surety half way. He could resist an action brought against himself alone, unless the creditor first transferred to him his right to sue the other debtors (*beneficium cedendarum actionum*) (p. 578). Finally, if the surety required it, a creditor was compelled by a rescript of Hadrian to sue all the solvent co-sureties (p. 578). But if a surety paid voluntarily, or did not claim the benefit of the rescript, he had no claim against his co-sureties. (D. 46, 1, 39.) *A fortiori*, this was the rule when the co-debtors were not co-sureties, and when consequently no inference whatever could be drawn from the mere fact of a joint-obligation.

But where the joint-obligation did not arise from *stipulatio*, the jurists showed a strong disposition to assist one of several co-promisers who was made to pay the whole. Thus, in the case of joint-sale or joint-hiring (D. 19, 2, 47), if one of the co-debtors were sued, he could resist payment unless the creditor first transferred to him his right of action against the other debtors. In the case of joint-mandate, even after one of the co-mandators had been sued and judgment given against him for the whole debt, he could require that the actions of the creditor against his co-mandators should be assigned to him. (D. 46, 1, 41, 1.) Sometimes, however, the nature of the contract created a strong presumption of the divisibility of the obligation as between the co-debtors. Thus, if one sum of money were lent to two persons, so that each should be liable to the creditor for the whole, and one of them was obliged to pay the whole, he had an action against the other to compel him to contribute his share. In such a transaction the co-debtors were in substance sureties for each other as well as borrowers. (C. 8, 40, 2.)

Investitive Facts.

The presumption of law was against correal or joint-obligation, but the question is one simply of the intention of the parties. (D. 45, 2, 9, pr.)

Both in stipulating and in promising two or more may become parties. In stipulating, as when to the question put by all the promiser answers, "I undertake to" (*spondeo*). For instance, if two persons stipulate severally, and the promiser answers, "To both of you I undertake to give it." But if he

had first undertaken to give it to Titius, and afterwards, when another asked him, had undertaken again, there would be two distinct obligations, and it would not be held that two parties joined in the stipulation. In promising again, two or more may become parties, as when after Titius puts the question, "Maevius, do you undertake to give five *aurei?*" "Seius, do you undertake to give the same five *aurei?*" each severally answers, "I undertake to." (J. 3, 16, pr.)

In a written instrument it was stated that "Gaius and Titius stipulated for 100 *aurei*," but it was not said that they were joint-creditors (*duo rei stipulandi*). Each, then, is creditor for 50 *aurei*. (D. 45, 2, 11, 1.)

In another case it was written, "Julius Carpus has stipulated that so many *aurei* shall be given to him. We, Antoninus Achilleus and Cornelius Dius, have promised it." Dius and Achilleus each owe one-half of the *aurei*, because it is not added that they made a joint promise (*singulos in solidum spopondisse*), so as to bind each for the whole. (D. 45, 2, 11, 2.)

Titius and Seius stipulate for 10 *aurei*, or Stichus, a slave of Titius. As Titius cannot stipulate for his own slave, the stipulation is good to him for 10 *aurei* only; but it is good to Seius for the alternative promise. As, therefore, the promises to Titius and Seius are not identical, they cannot be joint-creditors (*correi*). (D. 45, 2, 15.)

Correality may exist in the contract of service (*faciendi*) as well as in contracts relating to property (*dandi*). Thus, a workman may promise to work for two employers, each of whom would be entitled to exact his service; but performance to one discharged the obligation: or two workmen of equal parts or skill may promise their services, one or other of them, to a single *stipulator*. (D. 45, 2, 5.)

Sempronius deposits a slave in the custody of Gaius and Maevius. Maevius agrees to guard the slave with the care of a good *paterfamilias*. Gaius promises nothing. As the promises are not for the same thing, Gaius and Maevius are not joint-debtors (*correi*). (D. 45, 2, 9, 1.)

Titius and Seius request Maevius to lend 100 *aurei* to Sempronius. Sempronius fails to pay. Maevius can sue either Titius or Seius for the 100 *aurei*, as they are co-sureties. (D. 17, 1, 21.)

A. requests B. and C. to act as his agents in the management of his business. B. or C. may be sued separately for the whole loss caused by the acts of either; but if one pays, the other is released. (D. 17, 1, 60, 2; D. 46, 1, 52, 3.)

A. and B. deposit a bag of money with C. If the intention of the parties was that either A. or B. might sue for the whole (*in solidum agere*) they are *correi credendi;* but if the intention was that each should be entitled to recover half, there is no correality, and one cannot sue for the whole. (D. 16, 3, 1, 44.)

A. deposits a thing with B. and C. The presumption here is that both are liable *in solidum*. If B. is sued for the whole and pays, C. is released. If B., however, pays nothing, or only a part, A. can sue C. for the balance. If one has been guilty of *dolus* and not the other, the delinquent alone must be sued. If both are guilty of *dolus*, either may be sued, but payment of damages by one releases the other. (D. 16, 3, 1, 43.)

A. deposits money in a sealed bag with B. A. dies leaving three heirs, C., D. and E. As has been pointed out, claims arising from contract are divided between the heirs. Therefore C., D. and E. together can sue for the bag; but what happens if C. alone sues, seeing that the bag is sealed? If the bag were not sealed, B. could easily pay C. his share. It was decided that the bag could be opened either in court or in presence of irreproachable witnesses, and C.'s share taken out; and the bag must be re-sealed with the seals of the witnesses. But for this precaution, breaking the seals would have been a wilful (*dolo malo*) breach of contract. (D. 16, 3, 1, 36.)

A carriage is lent free (*commodatum*) or for payment (*locatio conductio*) to two persons. They are in one sense joint-debtors (*quodammodo rei*). If one is sued and pays for any damage, the other is released. (D. 13, 6, 5, 15.) Either can bring the *actio furti* if the carriage is stolen; but if one sues, the claim of the other is extinguished. (D. 13, 6, 6.) If the owner sues the one that did not bring the *actio furti*, he may be required to sue the one that did so, although only at the risk of the one that did not. (D. 13, 6, 7, pr.)

Two sureties bind themselves *in solidum et partes viriles*. Each is liable for the whole. But if they bind themselves *in solidum aut partem virilem*, each is liable only for his share, according to the general rule that when a man promises a greater or a lesser sum, he is liable only for the lesser. (D. 46, 1, 51, pr.)

It was not necessary, however, that the two *correi* should be made at the same moment. Thus a surety might be made between the first and the second debtor without preventing the debt from being joint. The interval must not, however, be great (D. 45, 2, 6, 3), as if a whole day intervened. (D. 45, 2, 12, pr.)

Of two parties to a promise, one can bind himself simply, the other for a particular day or conditionally. The introduction of that day or that condition will be no hindrance to claiming performance from him that bound himself simply. (J. 3, 16, 2.)

So a creditor may accept a surety from one of two joint-debtors, without also taking one from the other. (D. 45, 2, 6, 1.)

Divestitive Facts.

Performance or payment is the usual way of putting an end to a contract. If, therefore, one of several joint-debtors performed or paid, the others were released. There were, however, other ways in which a contract might be terminated, besides performance or its equivalents, and some of the most difficult points in the law of correality arise with regard to these modes of extinguishing an obligation. They may be enumerated as follows:—*confusio*, prescription, *capitis deminutio* of creditor or debtor, *acceptilatio*, *novatio*, and *litis contestatio*. (See Subdivision II., Divestitive Facts.)

Confusio in the case of one of the parties to a joint-obligation, did not affect the obligation. (D. 46, 1, 71; D. 34, 3, 3, 3.) In the same way, *capitis deminutio* of one of the parties did not extinguish the obligation. (D. 45, 2, 19.) But when any one of the several co-debtors paid part or made an acknowledgment of a debt, or did anything to break prescription, the obligation is kept alive as against all the parties to it. (C. 8, 40, 5.)

Acceptilatio was a solemn acknowledgment of payment by

a creditor, which he was not permitted to deny, even if no payment had actually taken place. It applied only to joint-stipulations. An *acceptilatio* by one of several creditors with a debtor, or by one of several debtors with a creditor, destroyed the rights of the co-creditors and extinguished the liability of the co-debtors. This was an incident, not of correality, but of stipulation. Only verbal contracts could be put an end to by *acceptilatio*.

Novatio resembles *acceptilatio*, and Venuleius argues that if one of two creditors can extinguish the joint debt by *acceptilatio*, why should he not be allowed to achieve the same result by *novatio?* (D. 46, 2, 31, 1.) *Novatio* would appear to be incidental to joint-stipulations, rather than to joint-obligations. Thus, if several *argentarii* lent a sum of money to a debtor, one of them cannot by agreement with the debtor, or by novation, prejudice or affect the rights of the other *argentarii*. (D. 2, 14, 27, pr.)

Their remains *litis contestatio*, the novation of a contract by obtaining a *formula* from the Prætor to recover the object of the contract before a judex. There appears to be no instance, among contracts, of the extinction of the joint-obligation by a *litis contestatio* with one of the parties, except stipulation. It is clear that in joint-obligations arising from mandate (D. 46, 1, 52, 3) deposit (D. 16, 3, 1, 43), *commodatum* or *locatio conductio* (D. 13, 6, 5, 15), only performance or its equivalents, and not *litis contestatio*, put an end to the joint-obligation. The liability of a correal or joint-obligation to be extinguished by *litis contestatio* is, like *acceptilatio*, an incident of *stipulatio*, and not of correality. Even in the case of *stipulatio*, the contract might be so framed as to avoid that inconvenient result.[1] Finally, Justinian enacted that even in the case of *stipulatio*, a *litis contestatio* should have no effect upon the obligation (C. 8, 41, 20.) Justinian's constitution applies to co-debtors; and there was no very strong reason for altering the law in the case of co-creditors. It was enough that the debtor should be liable to one suit. Thus we read, that if an action was begun by one co-creditor, the debtor could not release himself by tendering the amount to the other creditor. (D. 45, 2, 16.) Each co-creditor was, in fact, considered to be a sole creditor,

[1] Decem stipulatus a Titio, postea *quanto minus ab eo consequi posses*, si a Maevio stipularis. (D. 45, 1, 116.)

except for the circumstance that his rights might be affected by the acts of his co-creditors. (D. 46, 2, 31, 1.)

Correality and Solidarity.

According to some writers, a distinction is to be drawn between solidarity (*in solidum obligari*) and correality (*duo rei stipulandi* or *promittendi*). This opinion is clearly stated by Mr Poste (Gaius, 2d edit., p. 396). "Correality and solidarity agree in this, that in both of them every creditor is severally entitled to receive the whole object of the active obligation, and every debtor is bound to discharge the whole object of the passive obligation; but differ in this, that whereas correality implies the unity or identity of the obligation by which the co-creditors are entitled or the co-debtors are bound; solidarity implies that they are entitled or bound by a plurality or diversity of obligations." The consequence of this distinction is that in solidarity the right of action was not extinguished by anything except performance or its equivalents; whereas correality was destroyed by *litis contestatio*, by the mere bringing of an action, whatever its result; and also that in solidary obligations, a debtor that paid had a right of contribution against his co-debtors, whereas in correal obligations, notwithstanding the arguments of Savigny, there was no such right. Another writer, Mr Moyle (Inst. Just. I. 475,) puts the case shortly thus: "Every correal includes in itself a solidary obligation. . . . but it differs in that there is not only one obligation—object, but only *one obligation*."

The conclusion to which a consideration of the texts has led the present writer is (1) that the alleged distinction is not tenable, and there is only one kind of joint-obligation in the law of contract; (2) that the right of contribution (*regressus*) in the law of contract has nothing whatever to do with correality; but where it exists arises from a separate and distinct contract, either express or implied; (3) that extinction of a correal obligation by *litis contestatio* is an incident merely of *stipulatio*, and does not depend upon correality.

1. The jurists in several places affirm that there is not *one* obligation, but as many obligations as there are parties in correality. (D. 45, 2, 13; D. 46. 1, 5; D. 46, 3, 93, pr.) As we have seen, one of two *correi* might be bound conditionally, and the other unconditionally (D. 45, 2, 7), and it is very difficult to understand, if there be only one obligation, how that obligation can be at the same time both conditional and unconditional. Again, let us suppose that of two co-creditors (*duo rei stipulandi*) Lucius Titius and Gaius, Gaius dies, and Lucius Titus becomes his sole heir. Is the right of Titius merged in his right as heir? The very question implies that there are two obligations, and we are told that there is no merger; but the heir can sue in his own right (*qua* Lucius Titius); or he can sue in his right as heir (*qua heres Gaii*). Scaevola points out that the difference is material. Suppose Titius had agreed not to sue the debtor for a given time. He can now as heir sue him at once before the time elapses, if Gaius had not joined in the agreement. (D. 46, 3, 93, pr.) In the same way if one of two co-debtors succeeds the other as heir, he is bound by two obligations (*duas obligationes eum sustinere dicendum est*). (D. 45, 2, 13.) The reasoning by which this result was arrived at is sufficiently curious to deserve notice, for it involves, on the part at least of one of the jurists (Ulpian), an odd anticipation of the Leibnitian principle of the Sufficient Reason. Ulpian begins by observing that if a *fidejussor* becomes heir to the principal debtor, his obligation *qua fidejussor* is extinguished, and he can be sued only as principal debtor. (But see D. 46, 3, 95, 3.) He contrasts this with the case above mentioned of one *reus* succeeding to another *reus*. Why this difference? Because the obligation of the principal is *plenior*, and the lesser obligation of the surety may well be swallowed up in the greater; but in the case of *correi* the two obligations are of equal potency (*duae ejusdem sint potestatis*), and there is no reason why the one rather than the other should be merged. There-

fore, if a co-creditor succeeds his co-creditor, he has the benefit of two obligations (*duae obligationes* in unius persona concurrant). This conclusion lands Ulpian in a difficulty. If there are two obligations, why cannot the surviving creditor sue upon both? The answer is characteristic. Because the *nature* of the two obligations is such that if one is sued upon, the other is extinguished. This is a somewhat metaphysical way of saying that however numerous the obligations, they have one common object, *quia unum debitum est* (D. 2, 14, 9, pr.; D. 45, 2, 2), and, if that object is gained through one of the obligations, there is no necessity or room for the others.

The absolute distinctness of the obligations of several *correi* in contrast with the identity of the object of the obligation is brought out in a passage from Ulpian. (D. 45, 2, 3, pr.) It appears that so distinct were the obligations held to be that if the promises were not simultaneous, some thought there could not be a true correal obligation, for the first would be merged (by *novatio*) in the last. Ulpian says nothing depends upon the simultaneity of the promises, but everything upon the intention of the parties. Accordingly, if their intention was that each *correus* should be bound, the first obligation is not merged, but both remain intact. (D. 45, 2, 3, pr.)

2. Extinction of the obligation by *litis contestatio* is not an incident of correality, but only of joint stipulations. It is clearly laid down by Papinian that correality may exist in deposit, *commodatum*, and other contracts. (D. 45, 2, 9, pr.) But in these cases the joint obligation was extinguished by performance only or its equivalents, and not by *litis contestatio*. (D. 16, 3, 1, 43; D. 13, 6, 5, 15.) Mandate was in the same position, and it was clear law that a *litis contestatio* with one of two joint mandators did not release the other mandators. (C. 8, 41, 20.)

3. "Solidarity," as the name of a distinct species of joint-obligation, is not felicitous. *In solidum* means "for the whole" of a given object, as distinguished from a part (*pro parte, virilis pars*). In this sense it is used very frequently in relation to obligations when there is only one creditor and one debtor. Solidarity, if an abstract word is to be coined from *solidum*, cannot conveniently be confined to joint-obligations. Moreover, instead of using *in solidum* in contrast to *correi*, the jurists commonly employ *in solidum* to designate a correal obligation. "Cum duo *eandem pecuniam*, aut promiserint, aut stipulati sunt, ipso jure et singuli *in solidum* debentur et singuli debent." (D. 45, 2, 2.) The context shows that Javolenus is speaking of what Mr Poste calls correality in contradistinction to solidarity. Again, Papinian says: "*Eandem rem* apud duos pariter deposui, utriusque fidem *in solidum* secutus, ... fiunt *duo rei promittendi*." (D. 45, 2, 9, pr.) So in a constitution of Diocletian and Maximian we find the following test question:—"Exprimere debueras tuis precibus, utrumne *in partem* an *in solidum* singuli vos obligaveritis, ac *duo rei promittendi* extiteritis." (C. 8, 40, 3.) It is singular, if *in solidum* be a proper contrast to correality, that the distinction should not have been known to the jurists; but that, on the contrary, they should have used the phrases as equivalent to each other.

Third Part.

ACCESSORY CONTRACTS.

SURETYSHIP is the counterpart of mortgage. The object of mortgage was to strengthen the weak point of rights *in personam* by the addition of rights *in rem;* the object of suretyship is the same, by giving the creditor an action against two persons instead of one. Suretyship, then, is the creation of dependent rights *in personam;* that is, as security for other rights *in personam.*

But the early Roman law furnishes us with a different and unique species of accessory contract; namely, the *adstipulatio*, by which a subsidiary creditor is added.

First—*ADSTIPULATIO.*

DEFINITION.

Although, as we have said, another person not subject to our power stipulates for us in vain, yet we can employ another person for that purpose, who must make the same stipulation as we do; and him we commonly call an *adstipulator.* (G. 3, 110, as restored.)

Under the system of ancient procedure, called *Legis Actiones*, no one could sue except the creditor himself in person. Agents could not be employed until the formulary procedure was introduced. But the ingenuity of the lawyers opened a way of escape from this inconvenience. A person was added in the stipulation, to whom, as well as to the *stipulator*, the promise was made; and who, therefore, had a right to sue without the concurrence of the *stipulator.* The *adstipulator* was thus practically a procurator, agent, or attorney, with this great drawback, however, that he was appointed not at the time the action was brought, but at the making of the contract. In the time of Gaius, procurators were allowed, and the chief reason for *adstipulatio* had ceased. But another still existed.

An *adstipulator* is usually employed only when we are stipulating that something is to be given after our death. A stipulation by us is in that case idle, and therefore an *adstipulator* is employed to act after our death. All he obtains he is bound to restore to our heir, and he may be forced to by the *actio mandati.* (G. 3, 117.)

A man could not make a promise to take effect after his death, because that would virtually have been to make himself agent for his heirs; and it was a stringent rule of the *jus civile* that one freeman could not represent another in any legal transaction. This rule was evaded by adding an *adstipulator*, who, if he survived the *stipulator*, could sue on the promise. In the time of Justinian, as will appear further on, a man might make a contract to take effect after his death; and thus the sole remaining reason for the *adstipulatio* was taken away. Justinian does not refer to *adstipulatio.*

Rights and Duties.

A. Duty of the Promiser (*reus promittendi*) to the *Adstipulator.*

On demand by the *adstipulator*, without the concurrence of the *stipulator*, the promiser must perform his promise; but such performance at the same time releases him from his obligation towards the *stipulator.*

B. Duties of the *Adstipulator* to the *Stipulator.*

I. By him too, just as by us, an action may be brought and payment may be rightly made to him as well as to us. But all he obtains he will be forced to restore to us by the *actio mandati.* (G. 3, 111.)

II. The *adstipulator* ought not to release the promiser (*reus promittendi*) gratuitously. The *adstipulator* had precisely the same power as the *stipulator* to discharge the promiser; and if he did so gratuitously, the *stipulator* would be deprived of the benefit of the contract.

By the second chapter (of the *lex Aquilia*) an action may be brought against an *adstipulator* that has defrauded the *stipulator* by entering the money as paid, for the value of the property. (G. 3, 215.)

In that part of the statute the action is brought in evidently as an action on account of damage. But that provision was unnecessary, since the *actio mandati* was enough for the purpose,—unless, indeed, that by that statute an action for double the amount is given against a man that denies liability. (G. 3, 216.)

Investitive Facts.

The *adstipulator* must stipulate for the same thing as the *stipulator*, and from the same person.

But the *adstipulator* can use other words as well, and not those we use. If, for instance, I have stipulated in these words, "Do you undertake that it shall be given?" then he can make the further stipulation thus, "Do you pledge your credit?" or, "Do you become surety for the same?" or *vice versa.* (G. 3, 112.)

Again, he can stipulate for less, but not for more. Therefore if I stipulate for ten *sestertii*, he can stipulate for five; but not for more than ten. And if I stipulate simply, he may stipulate conditionally; but not *vice versa.* Less and more must be understood not only of amount but of time; for to give anything at once is to give more, but after a time less. (G. 3, 113.)

Remedies.

A. To enforce Duties of Promiser.

I. *Condictio certi* and *actio ex stipulatu.*

In this branch of law there are some peculiar rules; for the heir to an *adstipulator* has no right of action. (G. 3, 114.)

The object of the *stipulator*—namely, to secure a particular individual as agent—would have been completely frustrated if the rights of the *adstipulator* had been transferred to his heir or other persons

B. To enforce Duties of *Adstipulator*.

I. *Actio mandati*. (G. 3, 216.)

II. *Actio legis Aquiliae*, with penalty of double if the gratuitous release were denied. (G. 3, 216.)

Second—SURETIES.

First Case—WHEN THERE IS ONLY ONE SURETY.

The most general term in the Roman law for the substitution or addition of a new debtor is *intercessio*. (Nov. 4, 1; C. 8, 41, 19.) When the original debtor is released, and the new debtor takes his place, the name is *expromissio*. This will be considered under the head of Transvestitive Facts. If the original debtor continues bound as well as the new debtor, the contract of suretyship exists (*adpromissio*). (D. 13, 5, 28.)

The Roman law possessed no fewer than five different forms of contracts of suretyship; some of these are named by Gaius, one by Justinian.

For the promiser also others usually bind themselves. They are called sureties [*sponsores*, *fidepromissores*], *fidejussores*; and creditors usually receive them in their anxiety to secure themselves more carefully. (J. 3, 20, pr.; G. 3, 115, 117.)

To these must be added *mandatum*, and the *pactum de constituto*. The three forms mentioned by Gaius are made by stipulation. Probably these forms represent successive stages; *sponsio*, the earliest of all, is confined to Roman citizens; the *fidepromissio* is like the *sponsio*, but available for aliens (*peregrini*); and the *fidejussio* seems to be latest, as it was not dealt with by the early statutes affecting sureties.

DEFINITION.

I. *Sponsio* is a contract of suretyship by stipulation. It can be attached only to a verbal contract, and can be made by Roman citizens only. (G. 3, 93.)

II. *Fidepromissio* is a contract of suretyship by stipulation. It can be attached only to a verbal contract. It may be made by an alien. (G. 3, 93.)

The *sponsor* and *fidepromissor* are in much the same position; but the position of the *fidejussor* is very unlike theirs. (G. 3, 118.)

For they can join in no obligations that are not verbal, though sometimes the principal that promised is not bound himself, as when a woman or a *pupillus* acts without authority from the *tutor*, or when anyone promises that something shall be given after his death. It is a question, however, whether when a slave or an alien has undertaken (*spoponderit*) to do something, a *sponsor* or *fidepromissor* can bind himself on his behalf. (G. 3, 119.)

III. *Fidejussio* is a contract of suretyship by stipulation. It

may be attached to any contract or *obligatio*, whether civil or only natural.

But *fidejussores* may be taken in as parties to every obligation, whether contracted *re*, by words, by writing, or by consent. Nor does it matter whether the obligation is part of the *jus civile* or of the *jus naturale*. So entirely is this the case that a man can bind himself on behalf of a slave, whether it is an outsider that accepts him from the slave as *fidejussor*, or the slave's master for what is naturally due to him. (J. 3, 20, 1; G. 3, 119.)

This extensive application of *fidejussio* distinguishes it broadly from *sponsio* and *fidepromissio* and puts it on the same footing as *pignus* or *hypotheca*. A civil contract or obligation, within the meaning of the Institutes, is any contract or delict upon which an action may be brought. A natural obligation (*naturalis obligatio*) has been already defined.

IV. *Mandatum.*—When A. at the request of B. lends money to C., the Roman law imposed on B. an obligation to save A. harmless from all loss sustained by the default of C. to repay the money. B. is surety (*mandator*), A. is creditor (*mandatarius*), and C. the principal debtor. Two peculiarities distinguish this case from *fidejussio*.

1. After the *fidejussor* has given his word, he is absolutely bound, and cannot be released without the consent of the creditor. After B. has requested A. to lend money to C., B. can at any time withdraw before A. has actually advanced the money. A. has no claim for indemnity against B. until he has executed the mandate.

2. A *fidejussio* could be made at any time *after* the obligation to which it was attached (D. 46, 1, 6, pr.); a mandate must necessarily precede the contract to which it is really subsidiary. Thus, if A., without the request of B., had lent money to C., and B. afterwards said he would answer for any loss, A. would have no action against B. A man cannot give an authority to do that which is already done. If, however, in the same circumstances, B. by stipulation promised to answer for C., B. would be a *fidejussor*, and would be compelled to make good the loan.

V. *Pactum de constituto, Constituta Pecunia.*

Actions *in personam*, too, have been put forth by the Prætor in the exercise of his jurisdiction; as, for instance, that *de pecunia constituta*, which the *receptitia* closely resembled. But by a constitution of ours, all the advantages of the latter have been transferred to the former; and the latter having thus become superfluous, has by our orders disappeared with all its influence from our statutes. (J. 4, 6, 8.)

The *actio de pecunia constituta* may be brought against anyone that has engaged to pay money, either for himself or for another, without any stipulation coming in. For if not—that is, if he has promised to a stipulator—he is liable under the *jus civile*. (J. 4, 6, 9.)

Theophilus, in his Commentary on the above passages, gives the following account of the introduction of this Prætorian Pact. Suppose A. owes B. 100 *aurei*, and is sued by B. for the amount. The proceedings go on until the parties leave the Prætor's Court (*litis contestatio*); but before going to trial by the *judex*, A. admits B.'s claim, and promises, if he will not further press the suit, to pay him the amount by a day named. The effect of withdrawing at this stage was that the original demand was extinguished. When the day arrives, A. refuses to pay. What is B.'s remedy? If there had been a stipulation, B. would have had an action; but as it is, he is left without remedy. This is in consequence of his own liberality and A.'s want of faith (*quonium grave est fidem fallere*). (D. 13, 5, 1, pr.) A stronger case for dispensing with the form of stipulation could scarcely be conceived. Accordingly, before the time of Cicero, the Prætor introduced the remedy by the *actio de pecunia constituta*.

Prior to Justinian, the *pactum de constituto*, as a mode of constituting suretyship, laboured under several disadvantages that may be traced to its origin. It was confined to promises respecting fungible things—that is, things dealt with by number, weight, or measure. At first also it appears that the obligation concerning which the pact was made must be actually vested; that is to say, it must not be conditional or suspended for a time (*sub conditione* or *in diem*). (C. 4, 18, 2, pr.) A day also must have been originally named for payment, but Paul held that if no time were fixed, ten days' grace should be allowed before an action could be brought. (D. 13, 5, 21, 1.) Lastly, in many cases the action must be brought within a year.

Justinian fused, as he states in the text, the *actio de pecunia constituta* and the *actio receptitia*. The latter was the remedy for an ancient contract, couched in certain formal terms (*solemnibus verbis composita*), and confined exclusively to contracts with bankers (*argentarii*). It could be brought against a banker when he had promised to pay a sum on behalf of a customer on a day named. (Theoph. Inst. 4, 6, 8.) This contract was not confined to fungible things, but was as extensive as stipulation. Justinian abolished this special action, and gave against the banker the ordinary *actio de constituta pecunia* as amended by him. His alterations had the effect of putting the *pactum de constituto* on as wide a basis as *fidejussio* or *mandatum* as a mode of appointing sureties. There must be a prior debt, but it may be a natural obligation only (D. 13, 5, 1, 6; D. 13, 5, 1, 7), and the promise may refer to anything that could be the object of a stipulation. (C. 4, 18, 2, pr.) The short term of prescription was entirely taken away.

The *pactum de constituto* may now be defined as a promise made by anyone to discharge an existing obligation of another on a day named, or to give security for its fulfilment. (D. 13, 5, 28; D. 13, 5, 21, 2.) In what respect, then, does this informal agreement (pact) differ from the stipulation (*fidejussio*)? Both *fidejussio* and *constitutum* are accessory to an existing obligation, and in this respect are both contrasted with *mandatum*. In form the difference between them is simply that one is made by interrogation of the surety, the other without. Apparently, then, the only distinction is that *fidejussio* contemplated as possible an immediate liability of the surety; whereas the *pactum de constituto* postponed the liability of the surety to a future day. This difference, apparently trivial, rests upon a sound basis. In *fidejussio* there need be no valuable consideration: but in the pact there was a con-

sideration—namely, the forbearance of the creditor to sue; for the essence of the contract was to give time to the debtor.

If this be the true account of the difference between *fidejussio* and the *pactum de constituto*, it throws light on a somewhat remarkable rule. It was held that if, through some formal defect, a *fidejussio* failed, it was not to be construed as a *pactum de constituto;* for, says the Jurist, the intention of the parties was to make the stipulation, not the pact (*quoniam non animo constituentis sed promittentis factum est*). (D. 13, 5, 1, 4.) In itself this declaration would not be strange, but the peculiarity of it appears when it is compared with the analogous case of formal and informal release. The formal release by stipulation (*Acceptilatio*) stood in the same relation to a simple pact of release (*pactum de non petendo*), that *fidejussio* did to the simple pact of suretyship. Now it was held that if an *acceptilatio* should fail through some formal defect, it should be construed as an agreement not to sue. (D. 2, 14, 27, 9.) A release did not require to be supported by any consideration. If, however, we suppose that a consideration was necessary to support a contract of suretyship, the different decision in the case of *fidejussio* would be explained. If a person intended to bind himself by a form that dispensed with the necessity for a consideration, and the stipulation was ineffective, he could not be bound because there happened accidentally to be a consideration. Thus an ineffective *fidejussio* was not held to be an effective *pactum de constituto*.

Rights and Duties.

A. Duty of Surety to Creditor.

1. To pay in default of the principal debtor. *Beneficium ordinis seu excussionis.*

The true idea of an accessory contract is that it is enforced only in default of the principal contract. If the surety is liable to pay before the principal has made default, he is scarcely a surety; he is rather a co-promiser. According to the ancient law, Justinian tells us (Nov. 4, 1), if a creditor accepted a surety he was required to proceed first against the principal debtor. If, however, the creditor failed to recover in whole or in part from the principal debtor, he could then sue the surety. A somewhat harsh straining of this rule deprived the creditor of his remedy against the surety, when the principal debtor was

beyond the jurisdiction, and incapable of being sued. Papinian seems to have helped to change the rule, and we find from the constitutions of Antoninus Pius and Diocletian and Maximian that it was not necessary to proceed against the principal debtor in the first instance, but the creditor could sue whichever he pleased, the principal or surety. (C. 8, 41, 5 ; C. 8, 41, 19.) Justinian, in the Novel quoted above, restored the ancient rule, freeing it, however, from its narrowness. He enacted that when both principal and surety were within the same jurisdiction, the surety should in no case be called upon to pay unless the principal debtor had been first sued, or had made default. If the principal debtor was beyond the jurisdiction, the surety could be sued, but he might petition the judge for time to produce the principal debtor. If he succeeded in producing the principal, he was meanwhile released from the suit ; but if, after the time granted by the judge, he did not, he must discharge the obligation himself. (Nov. 4, 1.) Justinian afterwards introduced an exception for the convenient transaction of business, and allowed bankers (*argentarii*), at their option, to sue the surety without first suing the principal. (Nov. 136, 1.)

It was also the rule, as stated by Papinian, that when the creditor had rights *in rem* in security (*pignora, hypothecae*), he was not obliged to realise their value before suing the surety. (D. 46, 1, 51, 3 ; D. 46, 1, 62.) Even if the creditor sold the pledges, and was afterwards obliged to give up the price because of the eviction of the purchaser, he had his remedy against the surety. (D. 17, 1, 59, 4.) But if the agreement were that the surety should answer only for the deficiency after the sale of the pledges, he could not be sued first. (C. 8, 41, 17.)

B. Duty of Creditor to Surety. If a surety is compelled to pay the debt of the principal, the creditor must surrender to him all the rights *in rem* (*pignora, hypothecae*) that he has over property belonging to the debtor or others in respect of the debt. (C. 8, 41, 21 ; D. 49, 14, 45, 9.) If, however, the creditor holds those rights *in rem* in security for other debts as well, he cannot be compelled to surrender them until all the debts are discharged. (C. 8, 41, 2.)

C. Duty of Debtor to Surety.

In this respect also, all are on the same footing,—that if anyone pays for his principal, he can recover his money from him by the *actio mandati*.

Sponsores have this further advantage under the *lex Publilia* (B.C. 383), that they have an action for double the amount peculiar to themselves, and called *depensi*. (G. 3, 127.)

If the debtor pays the creditor, it is his duty to inform the surety. If he does not, and the surety also pays, he must indemnify the surety. (D. 17, 1, 29, 2.)

If the surety pays first, and does not inform the debtor, and the debtor pays, the *actio mandati* will not lie, but the debtor must cede to the surety his right to recover the money from the creditor. (D. 17, 1, 29, 3.)

Investitive Facts.

I. A surety binds himself to answer for the debt of another. The consent or knowledge of the debtor is unnecessary. (D. 46, 1, 30; D. 13, 5, 27.)

If A. asserts not that he will pay B.'s debt on a particular day, but that B. will do so, A. is not bound as surety. (D. 13, 5, 5, 4; D. 46, 1, 65.)

Lucius Titius, a debtor of the Seii, died. The Seii persuaded Publius Maevius, the nephew of Titius, that he was his uncle's heir, and therefore bound to pay his uncle's debts. They procured from him a letter acknowledging that he was heir, and that he owed the money in question. Maevius was not heir. It was held that his letter did not amount to a *pactum de constituto*, because Maevius intended not to answer for another, but to answer for himself, and he himself owed nothing. (D. 13, 5, 31.)

II. Modes of constituting sureties.
Sponsio, Fidepromissio, Fidejussio.

To a *sponsor* the question is put thus—Do you undertake that the same shall be given? to a *fidepromissor*—Do you pledge your credit to the same? to a *fidejussor*—Do you become surety for the same? But we shall see what is the proper name for those to whom the question is put thus—Will you give the same? Do you promise the same? Will you do the same? (G. 3, 116.)

When Greek is used, a *fidejussor* is generally accepted by his saying, On my honour I bid you, I say it, I will do it, or I desire it. But whichever Greek word he uses for "I say," it makes no difference. (J. 3, 20, 7.)

A *fidejussor* may come in either before or after the obligation is entered into. (J. 3, 20, 3.)

In stipulations by *fidejussores* we must know that it is a received principle that whatever the writing bears on its face as done, must be held to have been done. It is agreed, therefore, that if a man writes himself down as *fidejussor*, all the formalities will be held to have been duly observed. (J. 3, 20, 8.)

Mandatum.—A person made himself surety by requesting another to advance money to a third party, if that other lent the money. "Lend the money at my risk" is a mandate. (D. 17, 1, 12, 13.)

Pactum de Constituto. — As the name (*pactum*) indicates, nothing more was necessary than an expression of intention.

Titius wrote to Maevius as follows:—"I have written that in terms of the mandate of Seius, I will give security, and pay without dispute whatever sum is proved to be due to you." Titius is a surety. (D. 13, 5, 5, 3.)

One wrote to a lender in these terms:—"The 10 *aurei* that Lucius Titius borrowed from you, I shall pay you with the proper interest." This is a binding contract. (D. 13, 5, 26.)

Satis tibi facio, I will give you security. This binds me.

Fiet tibi satis a me et ab illo et illo, "So-and-so and myself will give you security." Does not bind So-and-so, and binds me only in one-third.

Fiet tibi satis a me aut ab illo et illo, "So-and-so or I will give you security." Binds me to pay all.

Fiet tibi satis, Let security be given you. This binds no one. (Nov. 115, 6.)

III. Restrictions.

1. The accessory contract must be of the same nature, in some cases, as the principal.

A. lent 10 *aurei* to B., and C. became *fidejussor* for 1000 pecks of wheat. C. is not bound, because he promises wheat, while his principal (B.) owes money. (D. 46, 1, 42.)

A. lends 100 *aurei* to B., and C. "constitutes" for grain of equal value. This is good, as *pecunia constituta* differs from *fidejussio.* (D. 13, 5, 1, 5.)

A. lends money to B., and C. promises to give a pledge in security. This binds C. to give the pledge. (D. 13, 5, 14, 1.)

2. The accessory contract, as a rule, must not be for more than the principal contract, but it may be for less.

[In one respect the legal position of all is the same,—that all alike, *sponsores, fidepromissores* and] *fidejussores,* cannot bind themselves for a debt greater than that of the principal for whom they are bound. For their obligation is [like that of the *adstipulator*] only accessory to the principal obligation; and there cannot be more in the accessory than there is in the principal. But, on the contrary, they can bind themselves for a less debt. Therefore if the principal promises ten *aurei,* the *fidejussor* may rightly bind himself for five; but not *vice versa.* Again, if the principal makes a simple promise, the *fidejussor* may promise conditionally; but not *vice versa.* And more or less must be understood to apply not only to amount but to time. For to give anything at once is to give more, but after a time less. (J. 3, 20, 5; G. 3, 126.)

This rule was construed more strictly in *fidejussio* than in *pactum de constituto.*

A. is bound to give B. a farm. C. may be surety for the delivery only of a usufruct, that being, in one sense, part of the ownership. (D. 46, 1, 70, 2.)

A. owes 100 *aurei* to B. C. "constitutes" for 200. C. is bound only for 100. (D. 13, 5, 11, 1.)

A. owes 10 *aurei* to B. C. "constitutes" for the same amount and interest. The contract will not hold for the interest. (D. 13, 5, 11, 1; D. 13, 5, 24.)

A. owes 10 *aurei* to B. C. pledges his word (*fidejussor*) for the 10 *aurei* to be paid at Ephesus. This is bad, because C.'s position is harder than A.'s. (D. 46, 1, 16, 1.)

A. owes 10 *aurei* to B. C. "constitutes" to pay it at Ephesus, or on the Ides of March. This is good. (D. 13, 5, 16, 1.)

A debtor has promised to pay me; his surety (*fidejussor*) to pay me or Titius. The contract is binding, because it is easier for the surety; he has the alternative of paying Titius, and therefore a chance of being released by him. But if the debtor promises to pay me or Titius, and the surety to pay me only, the contract of the surety is more onerous. (D. 46, 1, 34.)

A. promises the slave Stichus to B. C. becomes surety (*fidejussor*) for Stichus or 10 *aurei*. This is bad, either because C.'s promise is harder than A.'s, or is of a different nature. (D. 46, 1, 8, 8.)

A. promises Stichus or 10 *aurei* to B. C. promises (by stipulation) Stichus or 10 *aurei*, whichever B. shall choose. This is bad, because the principal obligation leaves the option with the promiser, the accessory with the promisee. (D. 46, 1, 8, 9.)

A. promises Stichus or 10 *aurei* to B., in the option of B. C. promises Stichus or 10 *aurei* (by stipulation) in his own option. He is bound, because his contract is less onerous than A.'s. (D. 46, 1, 8, 10.)

A. promises Stichus or Pamphilus to B., in A.'s option. C. promises the same by stipulation, in his own (C.'s) option. This is equally easy for C. and A.; but as C. may choose to give Stichus, and A. to give Pamphilus, there is no certainty that they will give the same object, and so the suretyship falls through, in consequence of the rule that the accessory contract must be for the same thing in *fidejussio* as in the principal contract.

3. A special restriction applicable to sureties by stipulation was introduced by the *lex Cornelia* (B.C. 81, but see p. 64). It seems not to have applied to mandate or *pecunia constituta*.

But the benefit of the *lex Cornelia* is shared by all alike. That statute forbids the same person to bind himself for the same debtor to the same creditor in the same year for any amount of money lent exceeding twenty thousand *sestertii*. And although a *sponsor* or *fidepromissor* (or *fidejussor*) should bind himself for a greater sum, say one hundred thousand, he is condemned to pay only twenty. By money lent (*pecunia credita*) we mean not only that directly given on loan, but all that at the time the obligation is contracted is certain to become due; that is, for which the debtor has come to be bound unconditionally. And so money that we stipulate shall be paid on a fixed day, is reckoned therewith; for it is certain that it will fall due, although it is only after a time that it can be demanded. Further, the name money in that statute embraces property of every kind; if, therefore, we stipulate for wine or corn, or land, or a slave, this statute must be observed. But there are certain cases in which the law allows unlimited suretyship—on account of dowry, for instance, or of money due to you under a will, or when sureties are taken by order of a *judex*. Besides, the statute levying a duty of five per cent. on inheritances provides that to the suretyships put forth under that statute the *lex Cornelia* shall not apply. (G. 3, 124-125.)

4. A restriction specially bearing on suretyship, although of wider extent, is derived from the *Senatus Consultum Velleianum*. In the time of Augustus and Claudius, enactments had been made preventing wives incurring obligations for their husbands. (D. 16, 1, 2, pr.) Afterwards, but not later than the time of

Vespasian, the *Senatus Consultum* in question was passed in the consulship of Marcus Silanus and Velleius Tutor. (D. 16, 1, 2, 1.)

The policy of the enactment is thus stated by Paul. Custom refuses to women not only offices of state (*publica munera*), but business duties (*civilia officia*), that is, which imply their going into the company of men, away from their own homes. It was, therefore, fit that they should be prohibited from undertaking business responsibilities and exposing their property to danger. (D. 16, 1, 1, 1.) The *Senatus Consultum*, with this object in view, was made sweeping. It forbad every woman to make any contract (D. 16, 1, 2, 4), or give any of her property as security (D. 6, 1, 40; D. 16, 1, 32, 1) on behalf of any person (husband, son, or father) (D. 16, 1, 2, 5), to any creditor. (D. 16, 1, 27, 1.)

Exceptions.—To this at first no exception was allowed, except where the creditor was deceived. Thus a husband pledged his wife's goods, with her knowledge. The creditor did not know that the goods belonged to the wife. She cannot plead the defence of the Act. (C. 4, 29, 5.) Justinian allowed a few other exceptions; as when a woman promised a dowry (*dos*) (C. 4, 29, 25); or when a woman became a surety for the manumission of a slave, and the slave was manumitted (C. 4, 29, 24); or when the woman received a consideration (*aliquid accipiens*) (C. 4, 29, 23); or when after two years she renewed her obligation. (C. 4, 29, 22.) But in no case was she to bind herself for her husband (Nov. 134, 8), in conformity with the general rule that gifts were prohibited between husband and wife.

An *intercessio* by a woman was treated as wholly and absolutely void.

If a woman gave part of her property in pledge, and the creditor sold it to a person ignorant of the violation of the law, the woman could reclaim it after the sale. (D. 16, 1, 32, 1; D. 6, 1, 39, 1.)

Her heirs and sureties were no more bound than herself (C. 4, 29, 20); and if as surety she paid without compulsion, she could afterwards recover it as money not due. (D. 16, 1, 8, 9.)

Intercessio includes any contract or pledge that a woman undertakes on behalf of another, whether that other person remains bound or not; in other words, whether she becomes surety (*adpromissor*), or a substitute (*expromissor*) for the debtor. (D. 16, 1, 8, 8.)

A woman pays a debt due by B. to C. This is not void, because it is a gift, and she does not herself become subjected to any obligation. (D. 16, 1, 4, 1.)

A., a woman, in order to release B. from a debt that he owes to C., offers C., in substitution for B., her own debtor D. This also is good, because the woman does not thereby bind herself for B. (D. 16, 1, 8, 5).

A., a mother, persuaded B., the tutor of her child C., to allow her to manage C.'s property, and to indemnify B. gave him sureties and pledges. Here A. bound herself

to B., but it was not for the debt of *another*, it was, in a sense, for her own projects. The sureties and pledges are, therefore, good. (C. 4, 29, 6 ; Paul, Sent. 2, 11, 2.)

The tutor of a pupil died, leaving Titius his heir. Titius hesitated to enter on the inheritance, and so make himself responsible for the suspected maladministration of the tutor. The mother of the pupil, to induce him to enter, promised by stipulation to save him harmless. Titius entered, and was compelled to pay a sum to the pupil, which he endeavoured to recover in an action against the mother of the pupil. In this case Titius was creditor, the mother was his debtor. If she was a debtor on behalf of anyone else, who was that person ? Not the tutor, because he was dead. Then it could only be Titius. But how could a distinction be made between the man Titius and the heir Titius ? Could the man Titius be creditor, and the heir Titius be the principal debtor, for whom the mother intervened ? That seemed absurd, and accordingly Titius was entitled to the indemnity. (D. 16, 1, 19, pr.)

If in this case Titius had refused to enter, not because he suspected that the tutor had incurred liabilities, but because he doubted the solvency of the tutor's debtors, then the woman would not be bound, because she would be in effect making herself surety for the debtors of the inheritance. (D. 16, 1, 19, 4 ; D. 16, 1, 19. 2.)

A Prætorian died leaving two sons, one aged seven, the other his statutory tutor (*legitimus tutor*). At the request of the wife of the deceased, the mother of the pupil, the tutor entered on his father's inheritance, but did not give his authority to enable his brother also to enter. In consequence of this the pupil sustained a loss of 1000 *aurei*, which he recovered in an action against his brother. Could the brother sue the mother on her mandate ? Yes, said Julian. Here, again, the liability of the mother was undertaken for her own projects, and not on behalf of any third person. (D. 16, 1, 19, 1.)

If a woman herself entered on an inheritance with the distinct object of paying the creditors of the inheritance in full, she could not defend herself under the *Senatus Consultum*. She had resolved rather to alienate her property than bind herself. (D. 16, 1, 32, pr.)

A., a woman, instead of becoming surety for C., gave B. a mandate to become surety. A. is thus a surety of a surety. If the creditor did not know that B. had a mandate from A., he can sue B., and B. cannot sue A., but if he knew, he cannot sue B. (D. 16, 1, 32, 3.)

A., a woman, who really intends to become surety for B. to C. in respect of a loan, herself borrows from C. and hands over the money to B., who appears merely as her surety. If the creditor C. does not know the object of the loan, he is not deprived of his remedy. (D. 16, 1, 11-12 ; D. 16, 1, 19, 5).

5. Another restraint was in the case of dowries. In A.D. 381, Gratian, Valentinian, and Theodosius introduced a rule, subsequently extended by Justinian, to the effect that neither the husband, nor his father, nor any one receiving a dowry, should be required or permitted to give any sureties for the restitution of the dowry. For, says Justinian, if the woman can intrust herself and her dowry to her husband, why should a surety be required, thus introducing an element of distrust and discord into the family ? (C. 5, 20, 1 ; C. 5, 20, 2.)

Divestitive Facts.

How far did the extinction of the principal obligation release the surety, or the release of the surety extinguish the obliga-

tion of the principal debtor? The answer varies to some extent with the form of contract.

1. Formal contract of suretyship (*sponsio, fidepromissio, fidejussio*).

It has been already stated that there was a distinction in the Roman law between a formal release and an agreement not to sue (*pactum de non petendo*). (See further, Subdiv. II., Divest. Facts.) If the principal obligation were extinguished by its appropriate divestitive fact, the surety was at once released. (D. 46, 1, 60; D. 46, 1, 68, 2; Paul, Sent. 2, 17, 15.) But if the proper divestitive fact were not employed, and the creditor had informally agreed not to sue, it depended altogether on the intention of the creditor whether the surety would be released. Unless a contrary intention was indicated, an agreement not to sue the principal debtor was construed as an agreement not to sue the surety; because if the surety were obliged to pay, he could compel the debtor to indemnify him, and thus the debtor would gain nothing by the release. (D. 2, 14, 21, 5.) But if it were specially agreed that the debtor alone should not be sued, the creditor still had his remedy against the surety. (D. 2, 14, 22.)

An inconvenience of a similar character occurred to the prejudice of the creditor. When a creditor sued the principal debtor, or the surety, and went so far in the proceedings as to obtain a *formula* from the Prætor, it was held that the obligation upon which the action was brought was extinguished, and that a new one was created by the *formula*. (Paul, Sent. 2, 17, 15 (16)). The surety was thus released, even if the creditor, after obtaining judgment, failed to recover his money from the debtor. Justinian altered this rule, and allowed the creditor, in the case stated, to sue the surety, and recover from him the balance of the debt. (C. 8, 41, 28.)

2. Mandate. When suretyship was contracted by mandate, the technical difficulty arising from the forms of extinguishing obligations did not exist.

Titius requests Gaius to give a loan to Maevius of 100 *aurei*. Gaius advances the money. Gaius afterwards sues Maevius and recovers 50 *aurei*. Can he sue Titius for the balance? That he should be able to do so is the very essence and object of the contract. Nothing relieves Titius except the repayment of the whole 100 *aurei* by Maevius. (D. 17, 1, 27, 5; D. 46, 1, 13.)

3. *Constitutum.*—When one person agreed to answer for another, that other remained bound. (D. 13, 5, 28.) If the

surety (*qui constituit*) were sued, it was held that the principal was not released except to the extent to which the debt was actually paid. We are at the same time told that anciently it was a moot point whether the action against the surety took away the obligation of the principal debtor. (D. 13, 5, 18, 3.)

REMEDIES.

A. By Creditor against Surety. If the suretyship were formal, the surety was sued upon his stipulation; if by mandate, then by the *actio mandati;* and if by *constitutum,* by the *actio de pecunia constituta.*

1. Generally, what would be a defence if the principal debtor were sued, was a defence for the surety.

The *exceptiones*, moreover, by which the debtor defends himself, are for the most part usually allowed to his *fidejussores* too. And rightly; for what is demanded from them is demanded from the debtor himself, seeing he may be forced by an *actio mandati* to give them back what they have paid for him. If, therefore, a creditor agrees with his debtor not to demand the money, it is held that to the aid of the *exceptio pacti conventi* those too may have recourse that are bound for the debtor, just as if the agreement had been made with them that the money should not be demanded from them. Some *exceptiones*, however, assuredly, are not usually allowed them. For example, if a debtor yields up all his goods, and his creditor thereafter takes proceedings against him, he defends himself by the *exceptio* NISI BONIS CESSERIT. But this *exceptio* is not granted to *fidejussores;* simply because the creditor in binding others for the debtor has this chiefly in view, that after the debtor fails and loses all his means, he may be able to obtain from those that he has bound for the debtor what is his. (J. 4, 14, 4.)

2. [Moreover, the heir of a *sponsor* or *fidepromissor* is not bound, unless we are asking about an alien *fidepromissor* in whose State another law is in use.] But not only is the *fidejussor* himself under obligation: he leaves his heir bound too. (J. 3, 20, 2; G. 3, 120.)

In *mandatum* and *constitutum* the heir of the surety also is bound. (D. 13, 5, 18, 2; C. 4, 18, 1.)

3. Prescription.

Again, a *sponsor* and a *fidepromissor* are, by the *lex Furia*, freed after two years. (G. 3, 121.)

Until the change effected by Justinian, the *actio de constituta pecunia* could not be brought after a year. (C. 4, 18, 2, pr.)

B. By Surety against the Principal Debtor.

1. For *sponsores* the *lex Publilia* allowed the *actio depensi* for double the sum paid. (G. 3, 127.)

2. If a *fidejussor* has paid anything for a debtor, he has, to recover it, an *actio mandati* against him. (J. 3, 20, 6.)

This applies also to *fidepromissores* and *sponsores*, and to *constitutum.*

3. In Mandate. The *mandator* must procure a transfer from the creditor (*mandatarius*) of his action against the principal debtor; and thus the *mandator* can sue as the agent of the creditor (*procurator in rem suam*). (D. 46, 1, 41, 1.)

Second Case—CO-SURETIES.

RIGHTS AND DUTIES.

A. In the case of *Sponsores and Fidepromissores.*

I. Duty of each surety to the creditor.

When several persons became sureties for the same debt, each was liable to pay the whole (*in solidum obligatur*). But for Italy, in B.C. 95 (p. 63), the *lex Furia* (*de sponsu*) provided an awkward remedy.

When the money can be demanded, the obligation is divided into as many parts as there are *sponsores* or *fidepromissores* at the time, and each is ordered to pay his share. (G. 3, 121.)

This was an effectual protection to the surety, but at the cost of diminishing the security of the creditor; and as the security of the creditor was the sole purpose of the suretyship, the *lex Furia* was not a success.

II. Duty of surety to his co-sureties.

When one surety paid, were the others bound to contribute? In Italy, after the *lex Furia* this point could not arise, because no surety was bound to pay more than his own fraction of the debt; but in Italy, before that statute, and in the provinces afterwards, the necessity for contribution existed.

Besides, the *lex Apuleia* brought in a kind of partnership between *sponsores* and *fidepromissores.* For if any one of them pays more than his share, for the excess he has an action against the rest under that statute. It was passed before the *lex Furia*, at a time when they were bound each for the whole amount. Hence it is questioned whether after the *lex Furia* the benefit of the *lex Apuleia* still remains. Beyond the bounds of Italy it does; for the *lex Furia* holds good in Italy only, but the *lex Apuleia* in the other regions beyond. (G. 3, 122.)

III. Duty of the debtor to the surety.

Besides, the *lex Pompeia* provided that a creditor on receiving *sponsores* or *fidepromissores* should first state and declare openly both the amount to be assured and the number of *sponsores* or *fidepromissores* he is to receive as undertaking that obligation. Unless he first states this, the *sponsores* or *fidepromissores* are allowed to demand within thirty days a preliminary trial of the question whether such a statement was first made in accordance with that statute. And if it is decided that it was not made, they are freed. (G. 3, 123.)

B. *Fidejussores, Mandatores, Qui constituunt.*

I. Duty of surety to creditor. Until the time of Hadrian, the creditor could require any one co-surety to pay the whole debt. The only remedy of the surety was to require the creditor, *before* paying him, to transfer his rights of action

against the other sureties. (D. 46, 3, 76; D. 46, 1, 41, 1.) If this were done, the surety could, in the name of the creditor, sue the co-sureties, and compel them to share the loss.

1. *Beneficium cedendarum actionum.*

We have already seen that the creditor must surrender to a surety, on paying the principal debt, all his rights against the principal, as also all mortgages. (D. 46, 1, 13; C. 8, 41, 21.) The creditor must equally surrender his action against the co-sureties. But here a difficulty arises. The debt for which the sureties are liable is *one* debt, and according to the general rule, an obligation *in solidum* was extinguished if only one of the co-creditors paid it. When, therefore, a surety was compelled to pay, was not the right of the creditor against the other parties destroyed? If so, how could he assign to the surety against his co-sureties a right that, *ex hypothesi*, was annihilated? This technical difficulty was got over by a technical subtlety. It was held that another interpretation might be put upon the transaction. It might be said that the creditor did not ask the surety to discharge the obligation, but rather to buy his (the creditor's) right against the co-sureties. For this view it was urged that the creditor could not require the surety to pay without surrender. (D. 46, 1, 36.) This view was not without its influence on practice. The transfer, or an agreement for the transfer, of the action must take place before the payment, otherwise the obligation was extinguished. (D. 46, 3, 76.) But if the creditor by his own fault was not in a position to transfer his right of action against the co-sureties, could he then compel one surety to pay the whole? Papinian answered the question in the negative. (D. 46, 3, 95, 11.)

2. *Beneficium Divisionis*, in favour of *fidejussores*, *mandatores*, and *qui constituunt*. (C. 4, 18, 3.)

Fidejussores [are bound for ever, and] if more than one, no matter what their number, are liable each for the whole, and the creditor is free to demand the whole from whom he will. But by a letter of the late Emperor Hadrian the creditor is forced to demand only a fair share from each *fidejussor* that is solvent at the time issue is joined (*litis contestatio*), and therefore, if any of them is at that time insolvent, this increases the burden of the rest. [In this respect, then, this letter differs from the *lex Furia*, that if any of the *sponsores* or *fidepromissores* is insolvent, more cannot, for this reason, be demanded from the rest. But since the *lex Furia* applies to Italy only, it follows that in the provinces *sponsores* also, and *fidepromissores*, just like *fidejussores*, would be bound for ever, and each for the whole amount, were it not for the letter of the late Emperor Hadrian, which seems to give relief to

them also. But the position of *fidejussores* is different, for to them the *lex Apuleia* does not apply.] If, therefore, the creditor obtains the whole amount from one, that one alone will bear the loss, if (that is) his principal is insolvent. But he has himself to blame; for as appears from what is said above, if the creditor demands the whole from anyone, he may, under the letter of the late Emperor Hadrian, desire that an action be given against him for his fair share only. (J. 3, 20, 4; G. 3, 121-122.)

The form of defence was, "*Si non et illi solvendo sint.*" (D. 46, 1, 28.)

When two debtors (*correi*) separately gave *fidejussores*, the creditor could not be forced to divide his claim among all, but only among those that were bound for the same debtor. (D. 46, 1, 51, 2.)

A surety of a surety cannot require division between them, because his surety is in the situation of a principal debtor. (D. 46, 1, 27, 4.)

II. Duty of debtor to surety.

In that statute [*lex Pompeia*] no mention of *fidejussores* is made. But it is usual, in accepting them also, to first make such a statement. (G. 3, 123.)

SUBDIVISION II.

RULES APPLICABLE TO CONTRACTS GENERALLY.

Rights and Duties.

Under this head little has to be added. The several duties arising from the several contracts will be found in the exposition of those contracts; and there remain only a very few general remarks.

1. Interpretation of Rights and Duties.

To the man that is understood to claim too much in respect of place, he comes very near that claims more than he has any ground (*causa*) for claiming. A man may, for instance, have stipulated with you thus: "Do you undertake to give me the slave Stichus or 10 *aurei*;" and then claim either the one or the other—the slave alone, or the 10 *aurei* alone, for instance. He therefore is understood to claim too much; because in that sort of stipulation the promiser is allowed to elect whether he prefers to pay the money or give the slave. If, then, the claimant sets forth in his *intentio* that the money only, or the slave only, ought to be given him, he snatches from his adversary this right of election, and in that way makes his own condition better, but his adversary's worse. In that case, therefore, a special form of action is set forth, in which the claimant states in his *intentio* that the slave Stichus or 10 *aurei* ought to be given him, so that he claims in the same way in which he stipulated. (J. 4, 6, 33 D.)

For the meaning of "*intentio*," see Book IV., Proceedings *in Jure*.

Gaius has promised to Titius, by stipulation, Stichus or 10 *aurei*. Gaius may change his mind as often as he pleases until he actually gives one of the two. (D. 45, 1, 138, 1.)

Titius has several farms called "Cornelian." Gaius stipulates for his "Cornelian" farm without saying which. Titius has the option of giving any of his "Cornelian" farms, whichever he pleases. (D. 45, 1, 106.)

Titius sold a house to Gaius, reserving to himself the right of habitation (*habitatio*) during his life, or 10 *aurei* a year. Gaius, exercising his option for the first year, paid 10 *aurei*, but the second year desired to give Titius the possession (*habitatio*). Gaius was safe against an action at the instance of Titius so long as in any year he either paid the rent or offered him the alternative of dwelling in the house. (D. 19, 1, 21, 6.)

Titius has stipulated for 10 or 5 *aurei;* 5 only are due. (D. 45, 1, 12.)

Titius has stipulated for a thing to be given him in one or two years. The thing is due only in two years. (D. 45, 1, 109 ; D. 45, 1, 12.)

Titius has stipulated for Stichus or 10 *aurei*, "whichever," he said, "I please." Titius can sue for either in his option. (D. 45, 1, 75, 8.)

2. Genus and species.

Again, if one stipulates for a slave in general, and demands Stichus specially, or stipulates for wine in general, and demands Campanian wine specially, or for purple in general, and demands Tyrian purple specially, then he is understood to claim too much. For he takes away from his adversary his free choice, secured him by the stipulation of paying something else than what was demanded. (J. 4, 6, 33 D.)

3. Quality.

If no special quality of an article is promised, any quality may be given in performance. (D. 17, 1, 52.) In the contract of *mutuum*, the same quality must be returned that is lent. (D. 12, 1, 3.)

Investitive Facts.

Hitherto we have dealt with the investitive facts peculiar to each separate contract ; we have now to consider in what points all contracts agree. This discussion will fall under the following divisions :—

I. Consent—Error.
II. Modality, the modification of an agreement by time, place, or condition.
III. Restrictions on the Investitive Facts.
  1. In respect of their origin : Force, Fraud, and Bad Consideration. *Vis, Dolus, injusta causa.*
  II. In respect of the object of the promise. Illegal contracts.
  III. In respect of the persons incapable of entering into contracts.
IV. Extension of Investitive Facts. Agency.

First—Consent—Error.

Two or more persons are said to consent when they agree

upon the same thing in the same sense.[1] All contracts imply consent. (D. 44, 7, 3, 1.) In order to establish a promise, a proposal must be accepted in the same sense in which it is made. This is the meaning and essence of contract; for, as has been pointed out, the obligation from contract is enforced by law, in accordance with the intention of the parties.

Intention, however, is a mental act, and can be discovered only through the medium of language. This medium is a source of error. Such error may be of two kinds, essential and non-essential.

1. Essential Error (*error in corpore*).—An error is essential when it is such as prevents the two contracting parties agreeing upon the same thing in the same sense. Such an error is inconsistent with the nature of the consent, that is of the essence of contract. It is in this sense that error is said to vitiate consent.[2] Essential error may occur in any one of three forms. A. may promise a thing to B., B. meaning to accept a different thing; or they may agree on the thing, but A. may undertake one kind of duty, and B. understand another; or, finally, A. may intend to bind himself to B., and discover that he has really promised to C. In technical language, the error may be in the *corpus*, or thing promised, or in the nature of the obligation, or in the person of the promisee.

If the stipulator is thinking of one thing, the promiser of another, no obligation is contracted, any more than if no answer had been given to the question. An example would be, if anyone were to stipulate with you for the slave Stichus, and you were thinking of Pamphilus, whose name you believed to be Stichus. (J. 3, 19, 23.)

Titius sells to Gaius for 100 *aurei* the *fundus Sempronianus*. That is the correct name; but Gaius, being in error as to the name, intended to buy quite a different farm. There is no contract of sale, because what the one intends to sell the other does not intend to buy (*quia in corpore dissensimus*). (D. 18, 1, 9, pr.) But if both mean the same farm, although they know it by different names, the contract is good. A mistake in the name is nothing if there is an agreement as to the thing.[3]

Titius lets a farm to Gaius at a rent of 10 *aurei*. Gaius understood the rent to be 5 *aurei*. There is no contract. But if the mistake were the other way, and Titius was disposed to let it for 5, then the contract is good, and the rent is 5 *aurei*. (D. 19, 2, 52.)

Maevius agreed to let a farm to Sempronius for forty years. Sempronius, misunderstanding the terms offered, agreed to buy it. There is no contract, because one has in view the duties belonging to sale, the other those belonging to letting on hire. (D. 44, 7, 57.)

---

[1] *Et est pactio duorum pluriumve in idem placitum consensus.* (D. 2, 14, 1, 2.)

[2] *Nulla enim voluntas errantis est.* (D. 39, 3, 20.)
Non videntur qui errant consentire. (D. 50, 17, 116, 2.)

[3] *Nihil enim facit error nominis, cum de corpore constat.* (D. 18, 1, 9, 1.)

Maevius deposited with Sempronius a bag of money for safe custody. Sempronius thought it was a loan, and used the money. This is not a contract either of *depositum* or *mutuum*. Sempronius, may, however, be compelled to restore the money. (D. 12, 1, 18, 1.)

Maevius, intending to make a present to Sempronius, gave him money, which the latter accepted as a loan. Was this a gift or a loan? Julian answered it was neither, because the parties intended different things. Is Sempronius bound to restore the money? Certainly; but if he has spent the money he can resist the claim of Maevius to restitution, on the ground that such a demand, after he intended to make a gift, is against good conscience (*exceptio doli mali*). (D. 12, 1, 18, pr.) Another point is suggested by this case, which although not belonging to the law of contract, may be mentioned here. What is the effect of such an error upon the ownership? Julian says (D. 41, 1, 36) that an error as to the *causa* does not vitiate the delivery (*traditio*) as a transvestitive fact of ownership. Hence, in this case, Sempronius would be owner, and the remedy of Maevius is therefore not by *vindicatio*, but by *condictio*.

Julius agrees to advance money on loan to Cornelius, a respectable man. Gaius brings to Julius another Cornelius, a needy fellow, and induces Julius to pay him the amount. There is no loan; and both Gaius and the false Cornelius are guilty of theft, because their conduct is fraudulent. (D. 47, 2, 52, 21; D. 47, 2, 66, 4.)

Julius asked a loan from A. and B. B. gave an order to his debtor Seius to pay the amount to Julius. Seius promised the amount by stipulatiou to Julius, and Julius accepted the money under the mistaken belief that Seius was the debtor of A. This did not establish a contract of loan between Julius and B., because Julius had no intention of binding himself to B.; but as Julius has got B.'s money, he was bound, in good conscience, apart from any contractual obligation, to return it to him. (D. 12, 1, 32.)

2. Non-Essential Error (*error in substantia* or *materia*) exists when the parties agree upon the same thing, in the same sense, but one has, unknown to the other, a wrong belief as to the nature of that thing. For example, a shopkeeper agrees to sell a vase to a purchaser, who imagines it to be made of gold; the shopkeeper knows it is not, but is ignorant of the delusion of his customer. In this instance the shopkeeper is free from blame, and has made a fair bargain; all the essentials of a contract are present. But it would be hard if the customer should be compelled to take what he would never have bought but for an erroneous belief as to its composition. How far in such cases should the law give relief? On the one side, the disposition of the jurists was to support transactions; on the other, it was a great hardship to force upon a buyer a different kind of article from what he intended to buy. Savigny, who has gone through the cases, sums up those in which relief was granted under this general statement:—When the difference in quality between the thing bought and that which the purchaser intended to buy is such as to put the one in a different category of merchandise from the other, then the error is fatal to the

contract. The cases, however, do not fall in with this distinction, and the distinction itself is not very precise. It would probably be more correct to say, that *materiality* of error is not capable of exact definition, but depends upon the whole circumstances of each case.

(1.) A person agrees to take an article, believing it to be gold, when in reality it is bronze. The sale is void. This result was not reached without controversy. Marcellus adhered to the hard line, that if the parties agreed as to the particular thing sold (*i.e.*, as to the *corpus*), and there was only an error as to its quality (*in materia*), the contract was good. Ulpian, however, differed from him, when the difference was between gold and bronze. (D. 18, 1, 9, 2.) If, however, the article were of gold, but of inferior quality, the contract was good. (D. 18, 1, 10.) In another case co-heirs sold a bracelet said to be of gold to one of themselves. It was found to consist chiefly of bronze. The contract was supported because the thing was partly of gold. (D. 18, 1, 14.)

(2.) A person takes an article that he thinks is silver; it is really tin or lead. The sale is void. (D. 18, 1, 9, 2.)

You have sold me, without intending to deceive me, a table covered only with silver, which I thought to be solid. The sale is void. (D. 18, 1, 41, 1.) But Ulpian seems to decide the other way, in the analogous case of a thing being gilt with gold. (D. 18, 1, 14.)

(3.) A person buys wine, as he thinks, but it is vinegar. The sale is void. Here, however, Ulpian draws a distinction. If the thing sold was wine, and became vinegar only when sour, the sale is good; but if it was vinegar from the first, then there is such a difference between the things that the error vitiates the contract. (D. 18, 1, 9, 2.)

(4.) A person buys a slave of one sex, thinking the slave to be of the other sex. The sale is void. If, however, the error were in buying a female slave as a virgin, who was not, the mistake did not vitiate the contract. (D. 18, 1, 11, 1.) Why? Savigny urges that in this, as in the three preceding cases, male and female slaves belonged to a different sort of merchandise. Female slaves were employed in housework, male slaves in work out of doors; a difference as great as separates the silversmiths from coppersmiths or iron-workers.

There are passages that seem to carry relief in cases of error further, but Savigny is not disposed so to construe them.

1°. The mistake of old clothes for new. According to the rule laid down by Savigny, this error does not relate to two different kinds of merchandise, and therefore should not be fatal. An extract from Marcian (D. 18, 1, 45) is not easily to be reconciled with this view. Marcian quotes the opinions of Labeo, Trebatius, Pomponius, and Julian, to the effect that when old clothes furbished up for new are sold (*si vestimenta interpola quis pro novis emerit*), the vendor must make good the difference in value. Savigny says in this case the vendor must be understood to have warranted the clothes as new. But there is nothing about warranty in the text; nor can it be easily supposed that Marcian had in his view a case of warranty. If he had, his proposition was to a Roman lawyer self-evident, and the array of opinion he quotes would seem superfluous. The distinction between this case and the others seems to be that the contract for the sale of the clothes was valid, but that the vendor must indemnify the buyer.

2°. Paul (D. 19, 1, 21, 2) qualifies his opinion that an error as to the *corpus* alone is fatal, not a mistake as to the quality, by the important exception that the vendor, if he is ignorant, ought to make good to the buyer the difference of price between what the buyer actually gave, and what he would have given if he had known the

real nature of the article ; as, *e.g.*, when he buys tables as made of citron, when they are not. Here again Savigny says the vendor must have sold them for citron tables ; but it may be doubted whether with sufficient reason.

3°. Error in formal contract. Titius stipulated with Gaius for a thing that he thought was of gold, but was only brass. Gaius is bound to deliver the thing agreed upon without any indemnity, unless he cheated Titius, after having given an express promise not to cheat (*doli mali clausula*). (D. 45, 1, 22.) The reason assigned is that the parties agreed on the object of the stipulation (*quoniam in corpore consensimus.*)

Second—Modality.

The term "Modality" is used to signify that a promise is limited as to the time or place of performance, or is suspended by a condition.

A. Place.

In the absence of any express agreement as to the place where the contract is to be performed, the place is often indicated by the nature of the promise. A promise to deliver an immoveable must be performed where the immoveable is ; so a promise to repair a house must be performed where the house is. But if there is no such indication, generally the creditor can demand performance where he can sue, *i.e.*, within the jurisdiction to which the defendant is subject. This rule is subject to an important qualification in the case of *bonae fidei* contracts. The defendant is not obliged to carry a moveable from the place where it happens to be at the time he is bound to deliver it, except at the risk and cost of the plaintiff. If, however, the defendant has caused the moveable to be kept purposely in an inconvenient place, he is not entitled to this indulgence. (D. 16, 3, 12, 1.) It is otherwise, however, in a stipulation (a contract *stricti juris*). When no place is mentioned in a stipulation, the promiser must deliver the thing to the stipulator within the jurisdiction to which the promiser is subject. (D. 45, 1, 137, 4.)

So much as to the place in which the plaintiff could exact performance. Where could the debtor require the creditor to accept performance? There is no text quite applicable to this ; but Savigny thinks that a complete reciprocity must be admitted between the two parties, and that the debtor would have a freedom of choice corresponding to that enjoyed by the creditor.

Too much may be claimed in respect of place,—as when a man has stipulated that something shall be given him in a certain place, and then claims it in another place, without making mention of the place in which he stipulated it should be given him. A man may, for instance, have stipulated thus, "Do you undertake to give it me at Ephesus?" and then at Rome

bring a simple *intentio* that it ought to be given him. The reason why he is understood to claim too much is this, that by bringing a simple *intentio* he deprives the promiser of the advantage he had if he paid at Ephesus. When, therefore, a claim is made elsewhere, an *actio arbitraria* is given to the claimant, in which account is taken of the advantage that would have been open to the promiser if he paid at that place. It is in trade that the greatest advantage is commonly found—in wine, oil, corn, for instance, which bear a different price in every single district; but money, too, is not let out at the same interest in every district. If, however, the claim is made at Ephesus, that is in the place where he stipulated the thing should be given him, then he rightly proceeds by a simple action. And that is pointed out too by the Prætor, because the promiser secures his advantage in making payment. (J. 4, 6, 33 c.)

The action here referred to is called *actio de eo quod certo loco.* (D. 13, 4, 3.) The sphere of its operation was narrow. In all contracts, except stipulation (D. 13, 4, 7, 1; D. 13, 4, 2, 1), and *expensilatio,* an action could be brought elsewhere than in the place of performance, the judge taking account of the circumstance. (D. 13, 4, 7, pr.) Even in the case of stipulation it was only where the promise was to give (*dare*), not to do (*facere*), that recourse was necessary to the *arbitraria actio.* (D. 5, 1, 43.)

Titius has stipulated for 100 *aurei* from Gaius, to be paid at Capua, and Maevius is surety. Owing to the fault of Gaius the money is not paid at Capua. Can Maevius be sued at Rome? Maevius is not excused, and must pay as if he had made default himself. (D. 13, 4, 8.)

The judge had power even to increase the amount agreed to be paid, if it was the interest of the plaintiff that the money should be paid elsewhere than at the place where the action was brought. (D. 13, 4, 2, 8.) On the other hand, he could acquit the defendant if the latter preferred to pay at the place agreed upon, and give proper securities. (D. 13, 4, 4, 1.)

B. TIME.

I. If no time is mentioned in the contract, performance could be immediately demanded. (D. 45, 1, 60; D. 45, 1, 41, 1; D. 50, 17, 14.) But a reasonable time, varying with the nature of the contract, must be allowed for performance.

If you stipulate that a farm shall be given you, or a slave, you will not be able to bring an action forthwith, unless a sufficient space of time for delivery has elapsed. (J. 3, 19, 27.)

Places too are usually inserted in a stipulation, as "Do you undertake to give it at Carthage?" This stipulation, though it seems to be made simply, yet in truth has a time thrown in for the promiser to use in giving the money at Carthage. Therefore, if a man stipulates thus at Rome, "Do you undertake to give it at Carthage to-day?" the stipulation would be void, because the promise in return is impossible. (J. 3, 15, 5.)

Again, time must be allowed when slaves not born are sold, or growing crop, or a contract is made for building a house. (D. 45, 1, 73, pr.)

What is a reasonable time? Suppose Titius, being at Rome, agrees to pay to Gaius also dwelling there, 100 *aurei* at Ephesus, how long time is allowed to Gaius for the payment? It is a question for the judge, who will consider how long a prudent and

fairly active man would take for the distance. On the one hand, Gaius is not to be required to go through storm and tempest, and to travel by night and day; nor, on the other hand, is he to dawdle on the way, but to make such progress as, having regard to his age, and state of health, and the season of the year, might fairly be expected. If, however, he actually goes to Ephesus, the money is due from the moment of his arrival, although he has made a quicker than average journey. (D. 45, 1, 137, 2.)

So in the case of a building, the builder must be allowed the time required by an ordinary builder. (D. 45, 1, 137, 3); and if any accident occurs to cause delay, as fire, allowance must be made, and a longer time granted. (D. 45, 1, 15.)

A difference of opinion emerges in the Digest on the question at what time a breach of such a contract occurs. Suppose a building could be put up in two years, and one year has elapsed without a beginning having been made, cannot the builder be sued, since it is now impossible that the contract should be performed within the time, or must the plaintiff wait until the last day of the two years has expired?

Ulpian states that, in the case of a contract to repair, the owner of the house is not obliged to wait until it falls down; nor, in a contract to build, until a sufficient time has elapsed to complete the building; but he may sue if there is unreasonable delay. (D. 45, 1, 72, 2.) Marcellus says, no action will lie unless a sufficient length of time has elapsed in which the repairs could have been completed. (D. 45, 1, 98, 1.) Pomponius applies the same rule to a contract for the erection of a house. (D. 45, 1, 14.) Papinian says that if there was a stipulation to execute the work in a specific time, say two years, no action could be brought until the two years had elapsed. (D. 45, 1, 124.)

II. When a time for performance is mentioned in the contract.

Every stipulation is made either simply, or for a certain day, or conditionally. It may be made simply, as when the question is, "Do you undertake to give 5 *aurei?*" and that can be claimed instantly. It may be made for a certain day, when a day is thrown in on which the money is to be paid, as, "Do you undertake to give 10 *aurei* on the first kalends of March?" But what we stipulate for against a certain day, though due at once, cannot be claimed before the day comes; and not even on that very day for which the stipulation is made can it be claimed, because the whole of that day ought to be allowed the debtor for payment at his discretion. Indeed it is not certain that the money has not been given on that day for which it was promised, before the day is gone. (J. 3, 15, 2.)

A man that has stipulated that a thing shall be given him this year or this month, cannot rightly claim until every part of the month or year is gone by. (J. 3, 19, 26.)

c. CONDITIONS.

I. *Definition.*—A CONDITION exists when the performance of a promise is made to depend upon an event future and uncertain. (D. 12, 1, 39; D. 45, 1, 100.)

Conditions referring to past or present time, either make the obligation invalid at once or do not put it off at all.

If, for instance, one runs, "Do you undertake to give it if Titius was consul, or if Maevius is alive?" and neither of those is so, the stipulation is

not valid; but if they are so, it is valid at once. For what in the very nature of things is certain is no hindrance to an obligation, though to us it is uncertain. (J. 3, 15, 6.)

Dies is when a time is agreed upon for the performance of a promise. It is either *ex die*, when performance cannot be demanded before a certain day; or *in diem*, when performance cannot be demanded after a certain day. (D. 44, 7, 44, 1.)

Do you promise to give on the kalends of March?—is *ex die*.

Do you promise to pay up to the kalends of March?—is *in diem*.

Dies is definite when a specific day is named; it is indefinite (*incertus dies*) when it is certain that the day will come, but not when it will come. (See Book III., Conditions in Wills.)

Incertus dies differs from *conditio*. When an *incertus dies* is mentioned, it is certain that the promise will be due, but not when it will be due. When a promise depends on a *conditio*, it is not certain that it ever will be due.

The Romans used certain terms with respect to deferred promises. A notable distinction was between *dies cedit* and *dies venit*.

When an obligation begins to exist, as when money becomes due, it was said, *dies cedit;* when performance may be demanded, it was said, *dies venit*.

In a simple unconditional contract, both *dies cedit* and *dies venit* the moment the contract is made.

When there is no condition, but a time is fixed for performance, the obligation at once exists (*dies cedit*), but performance cannot be exacted until the time arrives (*dies venit*).

If the contract is conditional, and no time specified, no obligation exists until the condition is fulfilled; and then performance may be at once demanded. (Both *dies cedit* and *dies venit*.)

If the contract is conditional, and also a time is fixed for performance, the obligation exists (*dies cedit*) when the condition is fulfilled; but performance cannot be demanded (*dies non venit*) until the times arrives.

The distinction between *dies cedit* and *dies venit* is of little practical importance in the law of Contract; but it is a vital one in the law of Wills.

When a man makes a stipulation conditionally, although he dies before the condition is fulfilled, yet afterwards, when the condition exists, his heir can bring the action. And so too on the side of the promiser. (J. 3, 19, 25.)

A conditional stipulation gives rise to a hope only that there will be a debt: and that hope we transmit if before the condition exists death befalls us. (J. 3, 15, 4.)

But in a conditional legacy, if the legatee died before the condition was fulfilled, he transmitted nothing to his heirs. The reasons for this distinction will be afterwards examined.

The chief practical effect of a condition in a contract was that if the promiser paid by mistake before the condition was fulfilled, he could recover his money as "not due" by the *condictio indebiti*. (D. 12, 6, 16.) But for many purposes a conditional obligation was regarded as subsisting before the condition was fulfilled. Thus a pledge might be given to secure a conditional obligation. (D. 20, 1, 13, 5.) Again, the capacity of the promiser was reckoned from the time of making the contract, not from the fulfilment of the condition: a slave could not make a contract to take effect after he was free. (D. 45, 3, 26.) Moreover, when a condition was fulfilled, it had a retroactive effect, and the obligation was held to subsist from the moment the contract was made. This was important, as we have seen (p. 269) in questions of priority in mortgage. (D. 20, 4, 11, 1.)

A stipulation is made conditionally when the obligation is put off and made to depend on some event, so that if anything is done or not done the stipulation begins to be binding. For instance, "Do you undertake to give 5 *aurei* if Titius has been made consul?" (J. 3, 15, 4.)

Titius stipulates with Gaius for 10 aurei on demand. This is not a condition, but an admonition to the debtor to be prompt in payment. Hence if the creditor dies without making a demand, his heir is nevertheless entitled to the money. (D. 45, 1, 48; D. 45, 1, 135, 1.)

A farm was mortgaged. Titius bought it from the owner on condition that the latter should release it from the mortgage before the kalends of June. Can Titius sue the owner to compel him to release the farm and deliver it? It depends on the intention of the parties. If Titius is right in his demand, the sale was not conditional; if the sale was really conditional, the owner may fulfil it or not as he pleases. (D. 18, 1, 41, pr.)

If a man stipulates thus, "Do you undertake to give 5 *aurei* if I do not go up into the Capitol?" it will be just the same as if he had stipulated that they should be given him at death. (J. 3, 15, 4.)

When no time was fixed, as in the case stated by Justinian, Papinian tells us there was a controversy. Thus, "If you do not deliver Pamphilus, do you promise 100 *aurei*?" Pegasus said no action could be brought until it had become impossible to deliver Pamphilus. Sabinus took the opposite view, and construed the condition as if it were stated thus:—"Do you promise to deliver Pamphilus, and, if you do not, to pay 100 *aurei*?" (D. 45, 1, 115, 2.)

A negative condition was usually rendered definite by adding a time—as, if you do not go to the Capitol within two years. (D. 45, 1, 27, 1.)

If Lucius Titius does not arrive in Italy before the kalends of May, will you promise me 10 *aurei*? In this case no action can be brought until (1) the kalends of May, and (2) the non-arrival of Titius in Italy. (D. 45, 1, 10.)

"If you do not go up to the Capitol or go to Alexandria, do you promise 100 *aurei*?" Papinian says in this case no action can be brought until it is certain that you cannot do one of the two things. (D. 45, 1, 115, 1.)

II. Conditions may be attached to all contracts except the *expensilatio.*

A mandate can be given either for a future day or conditionally. (J. 3, 26, 12.)

The contract of sale can be made either conditionally or simply. A case of the former is this,—"If Stichus up to a certain day gives you satisfaction, you shall buy him for so many *aurei.*" (J. 3, 23, 4.)

A condition was usually inserted in the contract at the time of making it. But conditions, subsequently agreed upon, could be used by way of defence. Thus if the creditor after making a contract agreed not to sue unless a certain event occurred, and he sued before that event occurred, he would be defeated by the *exceptio pacti conventi* or *doli mali.* So if, after the contract, the creditor agreed that the debtor should be released if a certain event happened, and that event did happen, the creditor would be defeated if he endeavoured to recover the money. (D. 44, 7, 44, 2.)

III. Fulfilment of Conditions.—A condition is said to be fulfilled (*stipulatio committitur*) either when the event occurs, or when the promiser prevents its occurrence. (D. 45, 1, 85, 7; D. 50, 17, 174.)

Gaius has promised to Maevius 10 *aurei* if Titius becomes consul. Gaius dies, and afterwards Titius becomes consul. The heirs of Gaius must pay the 10 *aurei* to Maevius. (D. 45, 1, 57.)

Seia, in writing to Lucius Titius, stated that she had bought gardens at his request; and that she would convey the property to him as soon as she was paid the price with interest; and Lucius Titius agreed to pay the money and take over the gardens before the kalends of April. He failed to pay the whole of the money by that day, but shortly afterwards tendered the whole. Seia refused. Could he compel her to take the money and deliver up the gardens, although the time had passed within which, in strictness, the condition could be fulfilled? The judge had power to allow him a little time, if it entailed no inconvenience on Seia. (D. 45, 1, 135, 2.)

Titius sold a library to Gaius on condition that the *Decuriones* of Campanus gave him a site for it. Gaius never applied for a site. Could Titius compel him to carry out the sale, as if the condition had been fulfilled? Certainly, when it was the fault of Gaius that a site was not obtained. (D. 18, 1, 50.)

IV. Suspensive and Resolutive Conditions.—A condition suspends an "investitive fact." But some conditions do not exactly bear that character; they are rather divestitive facts than limitations of investitive facts. They are called *resolutive conditions,* as opposed to the other conditions that really suspend investitive facts, and are called *suspensive conditions.* This distinction, although not the terminology, was known to the Roman jurists. "Whether the purchase is unconditional, but

is rescinded subject to a condition, or whether the purchase is rather conditional?" is a question propounded by Ulpian. (D. 18, 2, 2, pr.)[1] It is in the contract of sale chiefly that examples of resolutive conditions occur. Their importance is confined to the question of ownership. In a suspensive condition, the ownership of the thing sold cannot vest in the buyer until the event happens; in a resolutive condition the sale is complete, and the thing sold, if delivered, becomes the property of the buyer, subject to his liability to be divested on the happening of the event. Thus a buyer under a suspensive condition cannot acquire by *usucapio*, and he is not entitled as owner to the produce. (D. 18, 2, 4, pr.; C. 4, 54, 3.) On the contrary, a buyer under a resolutive condition acquires by *usucapio*, is owner of all the produce, and must bear the loss if the thing should wholly perish. (D. 18, 2, 2, 1.) It must be observed, however, that the resolutive condition, if the event happens, does not divest the buyer of the ownership; it operates as a divestitive fact of the contract of sale, not of the ownership. Hence the seller must sue the buyer, if he refuses to give up the purchase, not as owner (by *vindicatio*), but as seller (by *actio ex vendito*). (D. 18, 5, 6; C. 4, 54, 3; D. 18, 5, 2.)

A farm is sold to Gaius on condition that the sale shall hold good if no better offer is made within six weeks. This is a suspensive condition. (D. 18, 2, 2, pr.)

A farm is sold to Gaius on condition that if he changes his mind within six days the sale will be off. This is a resolutive condition. (D. 18, 1, 3.)

"You may have the farm for 100 *aurei;* but if anyone before the kalends of January next offers better terms the sale is to be off." (D. 18, 2, 1.) Is this a suspensive or resolutive condition? Ulpian answers that it depends on the intention of the parties. If they intended the sale to be complete, but to be rescinded if a better offer were made, it is a resolutive condition; if, on the other hand, that the sale would be completed only if no better offer were made, the condition is suspensive. (D. 18, 2, 2, pr.) This condition was called *in diem addictio.*

In diem Addictio.—The sale was not broken off unless within the time agreed upon a *bona fide* purchaser was found (D. 18, 2, 4, 5) who offered a higher price, or speedier payment, or payment at a more convenient place, or better security for payment, or better terms in any respect (*melior conditio adferri*). (D. 18, 2, 4, 6.) The offer must be accepted by the seller (D. 18, 2, 9), and the buyer must have declined to make an offer as good. (D. 18, 2, 7.) Hence the seller was bound to give notice to the buyer of the new offer. (D. 18, 2, 8.) If those conditions are fulfilled, the buyer must give up the produce (*fructus*) to the seller (D. 18, 2, 6, pr.), and the thing sold to the new purchaser. (D. 18, 2, 14, 4.) On the other hand, the buyer is entitled to his expenses for all beneficial expenditure on the thing sold. (D. 18, 2, 16.) The

[1] *Utrum pura emptio est, sed sub conditione resolvitur, an vero conditionalis sit magis emptio.*

buyer has, however, no claim against the new purchaser for the restoration of what he paid to the seller; his only remedy is against the seller. (D. 18, 2, 20.)

A farm is sold on condition that if the purchase-money is not paid within a certain time, the sale shall be off. (*Si ad diem pecunia soluta non sit ut fundus inemptus sit.*) This is a resolutive condition, and is called *lex commissoria*. (D. 18, 3, 2; D. 18, 3, 1.)

Lex Commissoria.—The condition was that if the price were not paid within the time fixed, the sale should be rescinded, and the buyer should forfeit the earnest (*arrhae*). (D. 18, 3, 8; C. 4, 54, 1.) Generally, also, it was agreed that if there was any loss on a second sale, the buyer should make it up. (D. 18, 3, 4, 3.) When such a condition is made, a seller has the choice of adhering to the sale, and suing the buyer for the residue of the price (D. 18, 3, 2; Vat. Frag. 3), or of rescinding the sale. But for this option he would occasionally be at the mercy of the buyer. Thus if a house sold were burned down, the buyer, under a resolutive condition, must sustain the loss (D. 18, 2, 2, 1; D. 18, 3, 2); but if by the simple expedient of not paying the residue of the price he could rescind the sale, the seller would be deprived of his rights. Once, however, the seller has made his election, he cannot afterwards alter his choice. (D. 18, 3, 4, 2; D. 50, 17, 75.) An acceptance of part of the purchase money after the time fixed by the condition, was held to imply an adherence to the contract of sale. (D. 18, 3, 6, 2.)

V. Impossible and Illegal Conditions.—Suppose the event making a condition is one that cannot or ought not to occur, what is the effect upon the contract? An event physically impossible, and an event forbidden by law, stand, in reference to this question, on exactly the same footing. What is illegality will be considered hereafter; at present it is enough to point out the effect of an impossible or illegal condition in a contract.

If an impossible condition be added to obligations, the stipulation is altogether invalid. Now a condition is held to be impossible if the very nature of things forbids its existence; as if a man said, "If I touch the sky with my finger, do you undertake to give it?" But if he stipulates thus: "If I do not touch the sky with my finger, do you undertake to give it?" the obligation is understood to be made unconditionally, and therefore he can claim fulfilment at once. (J. 3, 19, 11; G, 3, 98.)

But a legacy left under an impossible condition the teachers of our school think just as valid as if that condition had not been added. The authorities of the opposing school, however, think the legacy as void as the stipulation. And in truth it is hard to give a satisfactory reason for making any distinction. (G. 3, 98.)

The argument of the Sabinians was, that when a man was dead he could not make his will anew so as to avoid the evil consequences of having it declared void; but that living persons could, if they pleased, make a new contract, and omit the impossible or illegal condition. But the law of legacy and contract rested upon the same foundation, the intention on the one hand of a testator to make a gift, and the intention on the other of a promiser to bind himself; and there appears no reason why a different rule of interpretation should be adopted in the two cases. Justinian, however, supported the rule of the Sabinians.

Again, if any one had stipulated thus: "If a ship comes from Asia, do you

undertake to give to-day?" the stipulation is void, because it is framed so as to put what should be first last. But since Leo, of illustrious memory, thought that in the case of dowries this same stipulation, called *praepostera*, ought not to be rejected, we have decided to give it full force; so that not only in dowries, but in every case, a stipulation so framed is valid. (J. 3, 19, 14.)

Again, a mandate given me to be carried out after my death is void. For it is held to be a general principle that no obligation can begin with the person of the heir. (G. 3, 158.)

Possibly this rule was adopted to prevent evasions of the Statutes that prevented certain persons from taking as legatees, or limited the amount they could take. A stipulation that one's heir should pay a sum after one's death was in effect a legacy. That various devices were resorted to for the purpose of evading these Statutes appears from the Digest. (D. 22, 3, 27.)

No man can stipulate that a thing shall be given him after his death, nor yet after the death of him with whom he makes the stipulation. (J. 3, 19, 13; G. 3, 100.)

But a stipulation framed thus, as if Titius were to say, "At my death do you undertake to give it?" or "at your death?" was not void among the ancients, and is valid now. [It means that the obligation is imposed at the very latest moment of the stipulator's or promiser's life; for it seemed inconsistent that an obligation should begin with the person of the heir.] Again, we can rightly stipulate for a thing to be given after the death of some third person. (J. 3, 19, 15-16; G. 3, 100.)

And not even a man in another's *potestas* could stipulate for a thing after his death, because he seems to speak with his father's or master's voice. Again, if a man stipulated for a thing "to be given the day before I die or before you die," the stipulation was void. [For the day before a man's death cannot be told till death has followed. And again, when death has followed, the stipulation is reduced to one for past time, and is something of this sort: "Do you undertake that it shall be given to my heir?" which is certainly void.] (J. 3, 19, 13; G. 3, 100.)

Whatever we have said of death must be understood to be said also of *capitis deminutio*. (G. 3, 101.)

But since, as has been said, all stipulations come to be valid through the consent of the contracting parties, we have determined to introduce into this branch of law a necessary correction. And so, whether it is after death or the day before the death of either the stipulator or the promiser for which the stipulation is framed, it is a valid stipulation. (J. 3, 19, 13.)

The rule that a man could not contract in such a way as to benefit his heir only and not himself, was simply an instance of a wider rule that one freeman could not make a contract to bind or benefit another. (D. 2, 14, 17, 4.) (See Law of Agency.)

Third—Restrictions on Investitive Facts.

The reason why the law interferes to compel persons to perform their agreements, is the enormous advantage to mankind of the confidence that arises from the legal enforcement of contracts. That reason ought also to determine what contracts

should, and what should not, be enforced. In applying this reason, the first presumption is that every deliberate agreement should be sustained by the law. As a general proposition, it may be affirmed that every man is a fair judge of his own interest, and the mere fact of his making a promise is a strong reason for believing it to be for his advantage. But this rule is not without exception.

In the first place, a promise extorted by force or fraud will no doubt be favourable to the promisee, but equally it will be prejudicial to the promiser.

In the second place, the nature of the promise may show that it cannot be beneficial, or that while beneficial to the parties concerned, it may be prejudicial to the welfare of the State. Thus, no State could enforce an agreement to do an act forbidden by its law.

Lastly, the presumption that a contract is beneficial, is destroyed when it is made by a child or by any one incapable of estimating rightly the consequences of his acts.

The reasons for declaring contracts invalid may thus be considered under three heads: (1) On account of the inducements by which they were entered into; (2) on account of the promises conflicting with the welfare of the parties to the contract or of the State; and (3) on account of the absence of judgment in the persons binding themselves.

A. AGREEMENTS THAT ARE VOID ON ACCOUNT OF THEIR MODE OF ORIGIN. *Vis, Metus, Dolus, Sine causa, Injusta causa.*

It is sometimes said that force or fraud vitiates consent, and is therefore fatal to a contract; but it would be more accurate to say that force is inconsistent with free consent, and that consent should not bind anyone unless it is given freely. This distinction is taken by Paul with reference to the acceptance of an inheritance by a person appointed heir. Such an acceptance, even if procured by force or fraud, was irrevocable, until at some time the Prætor interfered and annulled the act (*restitutio in integrum*). For, says Paul, although if left to my own choice, I would not have accepted, still I preferred that to the threatened violence. (D. 4, 2, 21, 5.)[1] Again, the formal modes of manumission were not even to the latest times vitiated by force or fraud (p. 28). In like manner, the formal contracts were not void, although procured by force or fraud. Cassius, a

[1] *Quia, quamvis si liberum esset, noluissem; tamen coactus volui.*

Prætor, whose year of office is not known, introduced an equitable defence (*exceptio doli*), which appears to have been available also in cases of intimidation (*metus*). Ulpian says Cassius was content with the *exceptio doli, quae est generalis.* (D. 44, 4, 4, 3.) Cicero tells us that the *actio* and *exceptio metus* were introduced by a Prætor, Octavius (B.C. 71). (Cic. Ver. 2, 3, 65.) The alteration introduced by Octavius was that, whereas only a party to a contract could be met by the *exceptio doli* in case of violence or intimidation, the *exceptio metus* could be employed when the introduction had been caused by a person not a party to the contract. (D. 44, 4, 4, 3.) Finally, the *actio doli* was introduced by the Prætor Aquilius, a colleague of Cicero.

For instance, if you, constrained by fear or led on by fraud, or falling into a mistake, have promised to a stipulator, Titius, what you ought not to have promised, it is evident that by the *jus civile* you are bound, and the action whose *intentio* is "that you ought to give it" is of full force. But it is unfair that you should be condemned; and therefore you are given an *exceptio* grounded on that fear or wilful fraud, or one framed *in factum*, in order to resist his action. (J. 4, 13, 1.)

The non-formal contracts of the Roman law were said to be *bonae fidei;* in other words, they were *ipso facto* void if made through fear or fraud.

I. *Vis* (Violence) and *Metus* (Intimidation).

1. Definition of Violence and Intimidation (*Vis*, *Metus*).

"Violence" is when a contract is made in consequence of the actual exercise of superior force. (D. 4, 2, 2.)[1]

"Intimidation" is a threat of such present immediate evil as would shake the constancy of a man of ordinary firmness. (D. 4, 2, 5-7.)

Violence or Intimidation does not vitiate a contract, unless it is illegal.

A stipulation extorted by the threat of death or bodily torment is voidable. (C. 2, 20, 7.)

A man is shut up in a house, in order to induce him to make a promise. Such a promise cannot be enforced. (D. 4, 2, 22.)

A person compels me to give him money by threatening to destroy the title deeds of my freedom, which are in his possession. The money can be recovered. (D. 4, 2, 4; D. 4, 2, 8, 1.)

A usurer retains an athlete, and prohibits him from going to the games until the master of the athlete promises a sum not due to the usurer. This promise is void. (D. 4, 2, 23, 2.)

---

[1] *Vis est majoris rei impetus qui repelli non potest.*

A person sells his house or gardens to a man that threatens him, if he does not do so, with the loss of his nomination for municipal honours. The sale is not vitiated by the threat. (C. 2, 20, 8.)

In the course of an angry altercation, one of the parties uses threatening language to the other. This is not intimidation (*Metus*). (C. 2, 20, 9.)

An owner of land hearing that his neighbour is coming to dispossess him with an armed force, takes to flight, and his neighbour takes possession. This is not possession by violence, because the owner ran away from a danger not immediate. But if the owner remained until the armed men had entered on the land, then the dispossession was by violence (*vi et armis*). (D. 4, 2, 9, pr.)

A Prætor requires a defendant to make a stipulation to save his neighbours harmless if his house should fall down, and informs him that if he refuses he will give his house into the custody of the complainant. A stipulation made under this threat is valid, because it is in the exercise of the Prætor's jurisdiction. (D. 4, 2, 3, 1.)

A magistrate threatens to condemn an innocent person to death, but offers to let him off if he will promise by stipulation to give him a large sum. This promise is not valid, because it is extorted by the unlawful exercise of his power. (D. 4, 2, 3, 1.)

Titius threatens to accuse Gaius of the crime of stealing his cattle. Gaius, with the hope of escaping prosecution, offers a large sum to Titius. This promise is valid. (C. 2, 20, 10.)

A freedwoman wrongfully sued her patron, who threatened again to reduce her to slavery for her ingratitude. She induced him to refrain from doing so by promising him a sum of money. The promise is valid. (D. 4, 2, 21, pr.)

A person is caught committing a crime, as theft or adultery, and promises a sum under fear of assault. If the criminal is afraid not of the lawful punishment to which he has exposed himself, but of his life, which could not lawfully be taken, the intimidation is illegal. For it was not lawful to kill every one caught in adultery. (D. 4, 2, 7, 1.) Those who took money to conceal a discovered adultery were liable to punishment by the *lex Julia de adulteriis*. (D. 4, 2, 8, pr.)

2. Violence and Intimidation (*Vis*, *Metus*), whether caused by the promisee or by a stranger to the contract, makes it voidable. The defence of violence or intimidation was said to be conceived *in rem*—that is, was available by whomsoever the violence or intimidation was perpetrated. (D. 4, 2, 9, 1.) The terms of the defence were, "If there was no intimidation." (*Si in ea re nihil metus causa factum est.*)

II. Dolus.—Cicero relates a case where a Syracusan banker, Pythius, induced a Roman knight of the name of Canius to buy gardens from him. The price was so exorbitant that the sale would have been set aside on the ground of fraud. Pythius, knowing this, obtained the consent of Canius to enter the price in his books as a sum due, according to the form of the *expensilatio*. By this means the sale was merged in the written contract. Canius was sued on the written contract. Could he plead fraud? No, says Cicero, for my colleague Aquilius had not then introduced the equitable defence of fraud in formal contracts. (Cic. de. Off. 14, 58-60.)

1. *Dolus* is a word of many meanings. In the law of contract it covers every act or default against good conscience. The definitions given in the Digest[1] are neither very precise nor very accurate. *Dolus* occurs chiefly in two forms—either the representation as a fact of something that the person making the representation does not believe to be a fact (*suggestio falsi*), or the concealment of a fact by one having knowledge or belief of the fact (*suppressio veri*). Examples of both kinds will be found in the following illustrations. (D. 18, 1, 43, 2; D. 19, 1, 49, pr.; D. 40, 7, 10.)

A seller telling a lie to a buyer respecting the skill or *peculium* of the slave sold, must either make good the difference in value or submit to have the sale cancelled. (Paul, Sent. 2, 17, 6.)

A seller of land was liable to a penalty of double the value of the object sold if he told a lie concerning it. (Paul, Sent. 2, 17, 4.)

A seller, who sells a *statuliber*, supposing him to be a slave, must make good the loss to the buyer when the slave attains his freedom (D. 21, 2, 39, 4); but if he knew that the slave was a *statuliber*, he is bound to give compensation to the buyer, even before he attains his freedom. (D. 19, 1, 30, 1.)

Titius sold a slave, saying in a general way that he was a *statuliber*, but concealing the condition of his liberty, which he well knew. This agreement does not diminish his responsibility. (D. 21, 2, 69, 5.)

A creditor selling a pledge did not warrant against eviction, so far even as to be obliged to restore the price. But if he knew he had no right of sale, or that the property did not belong to his debtor, he was liable for concealing the flaw in the title. (D. 19, 1, 11, 16.)

Titius sells an estate, of which a certain part is not in his possession, and without informing the buyer of the fact agrees to sell the land within the limits of his possession. Titius must make good the loss. (D. 19, 1, 39.) The seller is bound to set forth truly the boundaries of the land. (D. 18, 1, 35, 8.)

Gaius in treaty for the purchase of the farm of Titius went out with Titius to see it. After the visit, and before the contract of sale, a number of trees are blown down by the wind. Can Gaius claim the trees? Not as buyer, because the trees were severed from the land before the date of the contract; but if Titius knew, and Gaius did not, that the trees had been thrown down, then Titius must pay the value of the trees. (D. 18, 6, 9.)

Titius in selling land to Gaius does not inform him of a rent on the land (*tributum*). Titius must give compensation if he knew the fact. (D. 19, 1, 21, 1.)

Titius sells a house in Rome to Gaius, saying nothing about an annual sum payable for an aqueduct. In an action for the price, Titius, having deceived the buyer by concealing the fact, must submit to a deduction from the price. (D. 19, 1, 41.)

A seller was not responsible for servitudes on the land, unless he knew of their existence, and did not inform the buyer. (D. 21, 2, 75; D. 19, 1, 1, 1; D. 18, 1, 66, pr.)

Titius, knowing that his land was subject to a particular servitude, made a special agreement that he would not be responsible for any servitude that might be

---

[1] *Dolum malum* Servius quidem ita definit, *machinationem* quandam *alterius decipiendi causa, cum aliud simulatur et aliud agitur.* Labeo autem . . . sic definit *omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam.* Labeonis definitio vera est.—(Ulpian.) (D. 4, 3, 1, 2.)

found. This agreement, notwithstanding, he must give compensation for the servitude. (D. 19, 1, 1, 1; D. 21, 2, 69, 5.)

A seller who did not inform a buyer of servitudes belonging to the land, if he knew of their existence, was liable for damages, if the buyer lost them by non-use. (D. 18, 1, 66, 1.)

A seller knowingly sells a slave given to stealing. Although this is not within the edict if the seller is ignorant of the vice, he may be sued for damages, even before the slave has stolen anything. (D. 19, 1, 4, pr.)

Titius, taking advantage of the ignorance of Gaius, sells him a female slave as a virgin, she having given birth to children. Although this was not a case where the Ædile's edict required a warranty, yet Titius for his fraud must submit to a reduction of the price, or to have the slave returned. (D. 19, 1, 11, 5.)

A person lets a farm that he knows to grow noxious herbs, without informing the farmer of the circumstance. Some of the cattle put upon the land are poisoned by the herbs and die. The landlord must make good their value. (D. 19, 2, 19, 1.)

Titius sells Gaius some rotten wood for building. The result is that the house falls down. If Titius knew the wood was rotten, he must pay for all the damage caused by the rotten wood; if he did not know, then the price is reduced to the sum that the buyer would have given if he had known the state of the timber. (D. 19, 1, 13, pr.)

Titius sells an ox to Gaius. The ox is suffering from a contagious disorder, which affects and destroys all the cattle of Gaius. If Titius knew that the ox was diseased, he must pay the value of all the cattle of Gaius; if he did not know, he can exact only what Gaius would have given if he had known the ox was diseased. (D. 19, 1, 13, pr.)

Titius sells Gaius a slave that had a vice of running away. The slave runs away from Gaius with much valuable property. If Titius knew of the slave's vice, and did not mention it to Gaius, he must pay Gaius not only the price of the slave, but the value of the property carried away. If he did not know, he is bound to return only the price of the slave. (Paul, Sent. 2, 17, 11.)

2. The defence of fraud was available only when the fraud of the promisee was alleged (*Si in ea re nihil dolo malo actoris factum est*): and when the fraud was perpetrated by a third party, the only remedy of the promiser was against him in an action for fraud (*actio de dolo*). (D. 44, 4, 2, 1.)

The burden of proving fraud rested upon the person alleging it. (C. 2, 21, 6.)

III. *Dolus*, as want of valuable consideration (*sine causa*).

A formal contract did not need a consideration, and prior to Cassius was not vitiated even by fraud. His innovation was intended to remedy this inconvenience of the civil law, so that men should not be able to avail themselves of its strictness and formality to act against natural justice.[1] This remedy, having so wide a scope, applied where, although there was no fraud in the initiation of the contract, yet to insist upon its performance would have been against good conscience. This limit may be

[1] *Hanc exceptionem [doli mali] Prætor proposuit, ne cui dolus suus, per occasionem juris civilis, contra naturalem aequitatem prosit.* (D. 44, 4, 1, 1.)

defined by reference to the idea of valuable consideration. A formal contract did not require a consideration ; but if there actually was a consideration intended, without which the contract would never have been made, and such consideration failed, it would have been against good conscience to take advantage of the formal nature of the contract, and insist upon its performance. This is the meaning of saying that a stipulation made *sine causa* could not be enforced ; that it was *dolus* to ask its performance. Thus, in effect, a stipulation was voidable unless either it was made gratuitously, or for a consideration that did not fail.

Titius agrees to advance money to Gaius on loan ; and Gaius, before receiving the money, promises by stipulation to give the amount to Titius at a future day. The day arrives, but Gaius has never received the loan. If Titius sues Gaius on the stipulation, he will be repelled by the equitable defence of fraud (*exceptio doli*). (D. 44, 4, 2, 3.)

Maevius, when sick, promised by stipulation 100 *aurei* to his wife's cousin, with the intention that his wife should have the money after his death. He, however, recovered, and was sued by the cousin for the 100 *aurei*. The cousin could be repelled by the plea of fraud. (D. 44, 4, 4, 1.)

Gaius, under the false impression that he owed money to Sempronius, promised him the amount by stipulation. Sempronious, if he attempted to recover the money, would be defeated by the plea of fraud. (D. 44, 4, 7, 1.)

A father promised a dowry for his daughter, and agreed to support her and her servants. Not knowing that if he kept his daughter he was not bound to pay interest on the amount promised as dowry, he wrote to the husband admitting that he owed interest on the dowry. Could the husband maintain an action on the stipulation or chirograph for interest? Not without fraud, when the promise was made in error of law. (D. 44, 4, 17, pr.) If the promise were by chirograph, the promiser could require the written document to be delivered up to him. (D. 12, 7, 1, pr. ; D. 12, 7, 3 ; C. 2, 5, 1.)

IV.—Illegal Consideration (*Injusta* or *Turpis Causa*).

No contract could be enforced if it were made for an illegal consideration, in which the inducement, as distinguished from the promise, was illegal. (C. 4, 7, 5 ; C. 4, 7, 1.) The defence is either fraud, or a statement of the illegality (*Exceptio doli mali* or *Exceptio in factum*). (D. 12, 5, 8 ; D. 45, 1, 123.)

B. Impossible and Illegal Promises.

(A.) Impossible Promises.

A promise may be impossible to be performed either because the acts are physically impossible or legally impossible. Of the

[1] *Nil refert utrumne ab initio sine causa quid datum sit, an causa propter quam datum sit, secuta non sit.* (D. 12, 7, 4.)

latter sort, an instance is when I undertake to give the ownership of a thing to another, when the thing cannot be the object of ownership. *Impossibilium nulla obligatio est.* (D. 50, 17, 185.)

If a man stipulates that something shall be given him which, in the nature of things, does not exist or cannot exist,—Stichus, for instance, who is dead, but whom he believed to be alive [a freeman he believed to be a slave, a sacred or devoted spot he thought subject to man's law], or a hippocentaur that cannot exist,—then the stipulation will be void. (J. 3, 19, 1; G. 3, 97, 97A.)

Titius sells a locus religiosus pro *puro* to Maevius. There is no sale, but Maevius has an *actio in factum* against Titius on account of the misrepresentation. (D. 11, 7, 8, 1.)

Julius agrees to deliver 100 tons of copper to Maevius. Julius has not got the copper, and cannot perform his contract. The contract is valid. Impossibility exists only when no human being can perform the promise. (D. 45, 1, 137, 5.)

Titius and Gaius agree by stipulation that Gaius shall give Titius the same day 100 *aurei* at Carthage. The contract is made in Rome. If each party had previously notified to his agent in Carthage that such a promise was to be made, there is no impossibility in the performance, and the stipulation is valid. (D. 45, 1, 141, 4.)

The rule of law is the same if a man stipulates that there shall be given him an object that is sacred or devoted, believing it to be under man's law; or public and set apart for ever to the people's use, as a forum or a theatre; or a freeman believing him to be a slave; or a thing in which he has no right to trade (*commercium*), or that is his own. And the stipulation will not remain in suspense, because what is public may become private, because the freeman may be made a slave, because the stipulator may obtain a right to trade, or the thing that belongs to him cease to be his: but it is from that moment void. Again, conversely, although at first the thing is made the object of a stipulation that is valid, if afterwards it comes into the same case as those above mentioned, and this not by the promiser's doing, the stipulation is put an end to. And not even at the very first will such a stipulation as this be valid—"Do you undertake to give me Lucius Titius when he shall become a slave?" and the like. For what by its own nature is outside ownership by us, can in no way be reduced into an obligation. (J. 3, 19, 2.)

Everything that is the object of ownership can be brought into a stipulation, whether it is a moveable or landed property. (J. 3, 19, pr.)

Commercium is capacity to acquire or dispose of property according to the forms of the *jus civile.*

Titius buys two slaves for one price. At the time of the sale one of the slaves was dead. The sale is void as to both. (D. 18, 1, 44.)

Stolen goods, by the XII Tables, could not be sold. (D. 18, 1, 34, 3.)

A fugitive slave also, by a *Senatus Consultum,* was not capable of being sold. (D. 18, 1, 35, 3.)

Grain for public distribution could not be sold. (C. 4, 40, 3.)

Further, a stipulation is void in which a man through ignorance that

a thing is his, stipulates that it shall be given him. For what is a man's cannot be given him. (G. 3, 99.)

Again, if any man stipulates that a thing that will become his shall in that event be given him, the stipulation is void. (J. 3, 19, 22.)

Spots sacred or devoted, and also public places, as a forum or basilica, it is in vain for anyone to buy knowingly. But if he buys believing them, through the vendor's deceit, to be private property, or profane, he will have an *actio ex empto*, that since he may not have the object, he may yet recover what it would have been worth to him not to be deceived. The rule of law is the same if he buys a freeman for a slave. (J. 3, 23, 5.)

Gaius stipulates for a sword belonging to himself to be given to him if a certain event happens. Before the event happens the sword ceases to belong to him. The stipulation is valid. (D. 45, 1, 31.)

Titius is owner of an estate of which he has not the possession. From the person in possession he buys the right of possession, in order that in a suit for the recovery of the property he should be defendant, and so escape the necessity for making out his title. The sale is valid, although, *ex hypothesi*, the thing is his property. (D. 18, 1, 34, 4.)

Gaius sells a *hereditas* to which he has no right. If the hereditas sold actually exists, he must pay its value ; but if no hereditas exists, he must restore the price, and pay any expenses the buyer has incurred or other damages. (D. 18, 4, 8 ; D. 18, 4, 9.)

Titius buys Stichus from Gaius. Stichus, however, is really free. Is the sale valid ? If both Titius and Gaius believe that Stichus is a slave, many hold that the sale is valid ; so if Gaius, the vendor, alone knows ; but if Titius, the buyer, knows that Stichus is free, the contract is invalid. (D. 18, 1, 70 ; D. 18, 1, 4 ; D. 18, 1, 34, 3.)

Titius buys a slave that both he and the vendor believe to be alive. At the time of the sale the slave is dead. There is no contract. (D. 18, 1, 15, pr.)

Titius bought a house from Gaius, neither of them knowing that at the time of sale the house was burned to the ground. Nerva, Sabinus, and Cassius hold that the sale is void, and the price, if paid, can be recovered. Neratius says that if it is only partially burned, so that a half or more of it remains, the sale is good, and a fair abatement is to be made from the price ; but if it is more than half burnt, the sale is void. Suppose Gaius, the seller, alone knew, and Titius did not. If the whole house is burnt, the sale is void ; if any considerable part remains, the sale is valid, but the seller must pay damages. If Titius the buyer knew, but not Gaius the vendor, the sale is good, and the whole price must be paid. If both knew that it was burnt in whole or in part, both have made *dolus* and the contract is void. (D. 18, 1, 57, pr.–3.)

(B.) Illegal promises.

Promises are void when they are made against some law, or public policy, or morality. (C. 2, 3, 6.)

A promise for some base end, as to kill a man or to commit sacrilege, is not valid. (J. 3, 19, 24.)

No mandate is binding that is contrary to good morals, as when Titius gives you a mandate to steal, to do harm, or to injure any one. For although you undergo punishment on account of that very deed, yet against Titius you have no action. (J. 3, 26, 7 ; G. 3, 157.)

A person under twenty promised by stipulation to release his debtor if he manumitted

a slave. This is void, as against the policy, although not the precise terms, of the *lex Ælia Sentia*. A person above twenty could do so. (D. 45, 1, 66.)

An agreement that one of the parties to a contract should not be responsible for his wilful acts and defaults (*dolus*) is void. (D. 13, 6, 17, pr.; D. 2, 14, 27, 3.)

An agreement not to sue if any theft or *injuria* be committed is void. But after a delict is committed (as theft), an agreement may be made not to sue the wrongdoer. (D. 2, 14, 27, 4.)

Can a vendor impose on a purchaser an obligation not to sell without the consent of his neighbour, or not to bury anyone on his land? He could not, by mere pact, but he could by a stipulation with a penalty, because the prohibition was not illegal and the penalty could be enforced. (D. 2, 14, 61; D. 11, 7, 11.) But Justinian sanctioned all such pacts as had for their object to prevent the conversion of private property into a public or sacred thing. (C. 4, 54, 9.)

"If you do not make me your heir, do you promise me 100 *aurei?*" Such a stipulation is void, because it is discreditable (*contra bonos mores*) to be casting eyes on a living man's inheritance. (D. 45, 1, 61; D. 27, 6, 2, 2.)

An agreement between two that the survivor should have the whole of the deceased's property is void, unless between two soldiers taking the risk of a coming battle. (C. 2, 3, 19.)

An agreement among heirs expectant to take the property of the deceased in certain shares is void, unless the deceased agreed to it, and did not change his intention up to his death. (C. 2, 3, 30.)

An agreement in a marriage settlement (*pactum dotale*) that the wife should, along with her brother, take her father's inheritance in equal shares, is void, as depriving the father of freedom of testamentary bequest. (C. 2, 3, 15.)

A woman in marrying a man stipulated for 200 *aurei* with her husband, if he should renew his intercourse with a concubine he had at the time of the marriage. The contract is valid. (D. 45, 1, 121, 1.)

"If I marry you, will you give me 10 *aurei?*" This is void, unless the 10 *aurei* are to be a dowry, because it introduces a mercenary element into marriage. (D. 45, 1, 97, 2.)

"If by your fault a divorce occurs, do you promise to give 10 *aurei?*" This stipulation is void, because it interferes with the freedom of divorce (*libera matrimonia esse antiquitus placuit*), and because the parties ought to be content with the penalties fixed by law. (C. 8, 39, 2.) But it was valid if it reserved penalties not exceeding those fixed by law. (D. 45, 1, 19.)

Titia had a son Maevius by her first husband, and she married Gaius Seius, who had a daughter Cornelia. Titia and Seius betrothed Maevius to Cornelia, and both Titia and Seius agreed to pay a penalty if they obstructed the marriage. Gaius Seius died, and Cornelia refused to marry Maevius. Were the heirs of Seius liable for the penalty? No, because it was indecent to annex a penalty to the continuance even of an existing marriage. (D. 45, 1, 134, pr.)

A person promises by stipulation to marry his adopted sister. The contract is void, even if the sister is afterwards emancipated. (D. 45, 1, 35, 1.)

An agreement by which one person undertakes to conduct a lawsuit of another, receiving a certain share of the proceeds (*pactum de quota litis*), is void; but an agreement to advance money on loan to support litigation is valid, if nothing but the money lent with lawful interest is to be returned. (C. 4, 35, 20; D. 2, 14, 53; D. 17, 1, 7.)

An agreement for the sale of a poison that, even when mixed with other ingredients, serves no useful purpose, is void; if when so mixed it is of use, the sale is valid. (D. 18, 1, 35, 2.)

The chief physicians (*Archiatri*) could take a reward from their patients when recovered, but could not enforce any promise of remuneration made by them when sick. (C. 10, 52, 9.)

C. Incapacity of Person.

(A.) Incapacity arising from the civil law.

I. Slaves and freemen *in mancipio*.

As regards slaves and persons *in mancipio*, the rule of law is that they can come under no obligation, either to the person in whose *potestas* or *mancipium* they are, or to anyone else. (G. 3, 104, as restored.)

In every contract there are a creditor and a debtor. A person may be incapable of being a creditor, but capable of being a debtor; or he may be capable of being a debtor without being capable of being a creditor. Incapacity must be considered with reference to those points separately.

1. A slave could not be a creditor, so as to bring an action.

Even a *statuliber*, a slave to whom freedom has been given subject to the happening of an event, cannot make himself a creditor. (C. 4, 14, 1.) Nevertheless in some instances effect was given to contracts made by slaves.

A slave is manumitted and instituted heir, subject to a condition by the will of his master. Before the condition was fulfilled, he made a compromise with the creditors of the estate. Afterwards the event happened, and he entered on the inheritance. Could the heir now meet the creditors, if they sued for their whole debts, with the plea that they had by agreement waived their rights? (*Exceptio pacti.*) No, because a slave was as incapable of making a pact as a contract. But he was not left without remedy. He could use the defence that the demand of the creditors was against good conscience (*exceptio doli*). (D. 2, 14, 7, 18.)

A master owes (as a *naturalis obligatio*) a sum to his slave, which on the slave's manumission he pays to him, thinking he was compelled to do so by the law. In this the master was wrong, but he cannot recover the money, because the debt was binding in conscience (*quia naturale agnovit debitum*). (D. 12, 6, 64.)

2. A slave cannot be a debtor. The promises made by a slave do not bind him, after attaining freedom, so as to subject him to any action. By their contracts, slaves cannot bind themselves, according to the civil law; but according to the law of nature they can be either creditors or debtors.[1] (D. 44, 7, 14.) In a few other cases, also, as deposit and mandate, good conscience requires slaves who have been freed to deliver up that which is not their own, but is held in confidence.

A woman appointed her husband her heir, and gave freedom by way of trust to her slaves; among others, to Stichus, her husband's steward. She dies, and in the absence of her husband Stichus obtains his freedom by decree. No action lies at the instance of the husband against Stichus to make him account for his administration. (D. 40, 5, 19, pr.)

---

[1] *Ex contractibus autem civiliter quidem non obligantur; sed naturaliter obligantur et obligant.* (D. 44, 7, 14.)

Stichus induced his master, Sempronius, to manumit him, by promising a sum of money. After the manumission Sempronius neglected to require a stipulation. He has nevertheless an *actio in factum* against Stichus, on the equitable ground that he has manumitted Stichus. This is a considerable step, because although Stichus was free before he could be called on to perform his part of the contract, yet he was a slave when the agreement was made. But here the special character of the equitable contracts came into play. The duty imposed on Stichus arises from the performance of Sempronius, and it therefore does not exist until Stichus is free. (C. 4, 14, 3.)

Stichus receives a loan from Titius, and with the money buys his freedom. Titius has no action against Stichus to recover the loan (C. 4, 14, 2), but if Stichus pays Titius, he cannot ask back his money on the ground that it was not due. (D. 46, 3, 83.)

Stichus applies for a loan to Gaius. Gaius requires security. Stichus gives him in pledge another slave, forming part of his *peculium*. He also induces Titius, a freeman, to become surety for the debt, and another freeman, Cornelius, to mortgage a small farm. What remedies has Gaius? He cannot sue Stichus, but he can keep the slave, compel Titius to pay the debt, and Cornelius to surrender the farm—all, if necessary, until he has recovered the whole of the money lost. The reason is, that the debt of Stichus is binding in conscience (*naturalis obligatio*). (D. 12, 6, 13, pr.)

A silver vase is given to a slave Pamphilus for safe custody. Pamphilus is manumitted. The owner can sue him for the restoration of the vase. (D. 16, 3, 21, 1.)

A slave, Stichus, in obedience to a mandate executes certain orders. For what he does in slavery he cannot be sued on attaining his freedom, unless he continues to act after gaining his freedom on the same mandate, and what he does after manumission is so closely united with what he did before manumission as to be inseparable. Thus Stichus buys land and builds on it, and the building falls into decay. After manumission he lets the land. This alone can be made the subject of an action, not the purchase of the land, a quite different transaction, completed while he was still in slavery. (D. 3, 5, 17.)

3. The incapacity of a slave to contract is thus on a level with his incapacity to own property. But just as a slave could enjoy *quasi* rights of property, so he might have to the extent of his *peculium* a capacity for contract. We saw that as between the master and the slave the *peculium* had no substantial legal existence; as between the slave, however, and third parties, the *peculium* was treated as the slave's property. The slave, indeed, could not appear either as plaintiff or defendant in a court of law, but when he was creditor his master could sue, and when he was debtor his master could be sued, and was responsible to the extent of the *peculium*. Generally, then, it may be said, that to the extent of the *peculium* a slave could make contracts, and bind himself in every case where a freeman could do so. (D. 15, 1, 29, 1.)

Thus if the slave were under the age of puberty, he was bound only where a free boy would be bound, if he had not obtained the consent of his *tutores*. (D. 15, 1, 1, 4.) There were, however, two noteworthy limits to the remedy of a slave's creditor;

(1) the master had a right to deduct all claims he himself had against the slave (D. 15, 1, 9, 2); and (2) he was not liable if the slave gratuitously undertook to answer for the debt of another. (D. 15, 1, 3, 5.) A slave could, however, be a surety if it was for the sake of his own *peculium*. (D. 15, 1, 47, 1.) The remedy of the creditor of a slave was the *actio de peculio* against the master. It could be brought at any time while the slave was under his master, and for one year after his manumission. (D. 15, 2, 1, pr.)

When the amount of the *peculium* is in question, there is first deducted all that the slave owes to his master, or to anyone in his *potestas*, and what remains over is alone understood to be the *peculium*. Sometimes, however, a slave's debt to a person in his master's *potestas* is not deducted from the *peculium*, as when the debt is due to a person forming part of that very slave's *peculium*. Now the bearing of this is, that if a slave owes anything to his *vicarius* that sum is not deducted from his *peculium*. (J. 4, 7, 4; G. 4, 73.)

Vicarius is a slave held by another as part of his *peculium*.

There are, besides, certain actions in which we do not seek the entire sum that is owed us, but in which we sometimes obtain the entire sum, sometimes less. For example, if we bring an action against the *peculium* of a son or slave, and the *peculium* is not less than we seek, then the father or master is condemned to pay the entire sum. But if it is less, then the *judex* condemns him to pay so far as the *peculium* will go. How the word "*peculium*" is to be understood we will set forth in its own place. (J. 4, 6, 36.)

Merx Peculiaris.—When the *peculium* was employed by the slave, with the knowledge of his master, as capital in business, the liability of the master was somewhat increased. (D. 14, 4, 1, 2.)

Another action, too, has been brought in by the Prætor, called *tributoria*. [It lies against a father or a master, and was established by the Prætor's edict "Concerning retail trade and goods."] For if a slave engages in some special trade with his master's knowledge, and contracts any debts therein, then the Prætor lays down the law thus:—All the capital sunk in the trade and the profits he orders to be shared between the master (if anything shall be due to him) and the other creditors proportionally. The master is allowed to allot the amounts, and therefore if any creditor complains that his share is less than it ought to be, the Prætor gives him this action, called *tributoria*. (J. 4, 7, 3; G. 4, 72, as restored.)

The chief differences between the *peculium* simply, and when it was used in trade (*merx peculiaris*), in addition to the mode of distribution, are (1) that if the master forbids the slave making contracts, as by a notice in the shop, he cannot be sued by the *actio tributoria*, although he is still liable generally in respect of the *peculium*. (D. 15, 1, 47, pr.) (2) The *actio de peculio* can be brought against a purchaser of a slave, but not the *actio tributoria* (D. 14, 4, 10). (3) The *actio tributoria* is not limited to a year after the manumission of the slave, but is perpetual. (D. 14, 4, 7, 5.) A creditor could not bring both actions; he must elect between them. (D. 14, 4, 12.)

II. Persons under *potestas* or *manus*.

As we have made mention above of the action that is brought against the *peculium* of *filiifamilias* and of slaves, we must needs call for more careful attention to this action and to the rest that are usually given on the same account against parents or masters. Now, whether it is with slaves or with persons in the *potestas* of a parent that business is transacted, the rules of law that are observed are pretty much the same. To avoid, therefore, a wordy discussion, let us direct our remarks to the case of slave and master, with the understanding that the same remarks apply also to children *in potestate* and their parents. If any special rule is observed in regard to the latter, we will point it out separately. (J. 4, 7, pr.; G. 4, 69.)

But just as we saw, in the case of property, that a son could become a true owner to all intents and purposes (*peculium castrense*); so again, under contract, the disabilities of a son are not so great as those of a slave. One distinction is obvious. The disabilities of a son under *potestas* were temporary; the death of his father released him; a slave was a slave for ever, unless released by manumission. The distinction is brought out in *Adstipulatio.*

Again, a slave in becoming an *adstipulator* acts in vain, although by a stipulation in any other case he acquires for his master. The same rule holds for a person *in mancipio*, according to the better opinion; for he is in the position of a slave. He, again, that is in a father's *potestas*, acts not in vain, but he acquires nothing for his parent, as he would by stipulation in any other case. And even against himself an action is available only if he goes out of the *potestas* of his parent without a *capitis deminutio*—by his father's death, for instance, or by being himself installed as *Flamen Dialis.* What we have said must be understood to apply to a *filiafamilias* and to a wife *in manu* as well. (G. 3, 114.)

1. A person under *potestas* cannot be either creditor or debtor to his *paterfamilias.*

Again, a stipulation is void if made by you with a person in your power; or conversely, if made by him with you. But a slave can come under no obligation either to his master or to anyone else; whereas *filiifamiliias* can come under obligation to others. (J. 3, 19, 6; G. 3, 104.)

2. In respect of other persons, the general rule is that a son cannot be a *creditor*, but may be a *debitor*, and can be sued on his contracts. This makes a marked difference between the son and the slave. (D. 44, 7, 39.)

(1.) *Filiusfamilias* as *creditor.*—The general rule was that a son acquired for his father, not for himself. We have already seen under what circumstances a son could sue for injuries done to him (p. 50). He could also sue in the action for *depositum* (D. 16, 3, 19); *commodatum* and the interdict *quod vi aut clam*

(D. 44, 7, 9); and generally the innominate equitable contracts. (D. 44, 7, 13.)

(2.) *Filiusfamilias* as *debitor.*—When a son makes a promise, he can be sued exactly as if he were a *paterfamilias.* (D. 45, 1, 141, 2; D. 46, 4, 8, 4.) If he has a *peculium,* his *paterfamilias* may also be sued. (D. 15, 1, 44; D. 15, 1, 45.)

Gaius, son of Titius, is a member of a firm. Titius emancipates him. Does this dissolve the partnership, and against whom have the other partners a remedy? The partnership is not dissolved, although it would have been if Gaius had been a slave. (D. 17, 2, 58, 3.) The partners have an action against Titius (so far as Gaius has any *peculium*) for all obligations incurred before the emancipation. Also Gaius can be sued in respect of all his transactions with the firm before or after the emancipation. (D. 17, 2, 58, 2.)

It must be remembered that in respect of *peculium castrense* a son was as perfectly capable of making contracts as if he were not under *potestas.*

It is most probable that between a son and a daughter under *potestas* the Roman law recognised no difference in respect of the capacity to contract. (D. 14, 6, 9, 2.)

III. Women *in tutela.*

The rule of law is the same for women *in tutela.* (G. 3, 108.)

It will be convenient to defer this head of incapacity until the "Perpetual Tutelage of Women" is examined. (See Div. II.)

(B.) Incapacity arising from Mental Weakness.

I. Mental alienation (*furiosi, mente capti*).

A madman can transact no business, because he does not understand what he is doing. (J. 3, 19, 8; G. 3, 106.)

The incapacity of the insane is absolute. They are incapable of either judging prudently of their own affairs, or of understanding the effect of their own acts. They cannot, therefore, acquire any rights that involve consent; they cannot be creditors any more than debtors. (D. 44, 7, 1, 12; D. 50, 17, 40.) For this purpose, acute insanity (*furor*) or imbecility (*dementia*) has the same effect. (C. 5, 4, 25.) In the case, however, of those subject to paroxysms of insanity, separated by lucid intervals, there was no reason why their legal incapacity should be sustained; and, accordingly, it was held that a person, sometimes insane, could, when in a rational mood, bind himself and others by contract. (C. 4, 38, 2.) A question arose in regard to those under curators, whether in a lucid interval the office of curator was only suspended, or whether the return of the patient to sanity, although he was not per-

manently recovered, made the appointment altogether void. Justinian enacted that the curator's office should not be affected, but that while the lucid interval lasted the curator should refrain from acting. (C. 5, 70, 6.)

II. Persons under the age of puberty (*impuberes*).

1. Could they be creditors? The answer is clearly and indisputably in the affirmative.

A *pupillus* can bring another under obligation to him even without authority from his *tutor*. But what we have said of *pupilli* is true only of those that already have some understanding. For an infant, or very nearly so (*infantiae proximus*), differs little from a madman, because *pupilli* at such an age have no understanding. But in the case of those that are not infants, but only very nearly so, for their benefit the law is interpreted very favourably, so that they have the same rights as those that are very near puberty. (J. 3, 19, 9-10; G. 3, 107-109.)

According to the text, a child that can speak can be a stipulator, but not a promiser; a creditor, but not a debtor. (D. 26, 8, 9, pr.; C. 8, 39, 1.)

2. Could they be debtors?

A *pupillus* can rightly transact business of any kind, if only his *tutor* is employed, whenever his authority is needed, as when the *pupillus* himself is coming under an obligation. (J. 3, 19, 9; G. 3, 107.)

But a child under puberty in his parent's *potestas* cannot, even with his father's authority, come under an obligation. (J. 3, 19, 10.)

What legal effect, if any, belonged to those promises made by children, under the age of puberty, without the sanction of a tutor? Did such promises give rise to natural obligations, or were they absolutely void? On this question may be ranged in controversy the classical jurists as well as their modern commentators.

Rufinus, a jurist who seems to have been a contemporary of Paul and Ulpian, answers the question with an unqualified negative (D. 44, 7, 59), and Neratius, who attained promotion under Trajan and Hadrian, clenches his view by the statement, that even if a *pupillus* pays a debt contracted without the sanction of a *tutor*, he may recover the money, because it is not even a debt due by conscience (*quia nec natura debet*). (D. 12, 6, 41.) On the other hand, the names of three far greater jurists, Papinian, Paul, and Ulpian, can be quoted on the opposite side. (D. 46, 3, 95, 4; D. 46, 2, 1, 1; D. 35, 2, 21, pr.; D. 3, 5, 3, 4.) The weight of authority, therefore, rests with the view that a *pupillus* contracts a natural obligation, when he acts without the sanction of his *tutor*.

III. Minors (*minores viginti quinque annis*).

The Roman law, which in its earlier stage left women all their lifetime either under *potestas* or *tutela*, was singularly indulgent to the male sex, and a boy sufficiently mature to be capable of marriage at once attained his legal majority. In the course of time the inconvenience of so vague a standard led to the fixing of fourteen years as at once the age of puberty and of legal majority. Before B.C. 183, a law (*lex Plaetoria*) was passed deciding that those who took fraudulent advantage of minors under twenty-five should be criminally punishable. (C. Th. 8, 12, 2.) This remedy was too severe to be of much practical use, and accordingly we find that the law was finally determined by the edict of the Prætor, who provided a remedy more suited to the necessities of the case. The intervention of the Prætor was guided and limited by a spirit of equity. It was his object to prevent minors being taken advantage of, while avoiding the equally great danger of nullifying their legal acts, and so depriving them of the benefits, as well as the snares, of contract. (D. 4, 4, 24, 1.) We must start, therefore, with the proposition that, except in so far as the Prætor interfered, a person above the age of puberty had full legal capacity for every species of contract. Moreover, if a minor chooses to have a curator, he could not bind himself without the consent of his curator; but if such consent was given, the contract could upon no pretext be upset. (C. 2, 22, 3.) If, however, no curator was appointed, a minor could enter into any contract, and bind himself effectually, even as surety for another (D. 4, 4, 7, 3), subject to this qualification, that if an undue advantage had been taken of his youth, or by his own imprudence, without the fault of the creditor, he had unwisely contracted an obligation, he could apply to the Prætor to have the transaction rescinded (*restitutio in integrum*). (D. 4, 4, 49; D. 4, 4, 7, 1.) It was not necessary that the creditor should have taken in the minor; it was enough if the minor by his own folly had contracted an obligation that would inflict upon him serious loss. (C. 2, 22, 5, pr.; C. 2, 22, 5, 1; D. 4, 4, 44.) In considering this point, the Prætor was not tied down to the event; the question was whether, having regard to the circumstances at the time, the contract was an imprudent one. (D. 4, 4, 11, 4.) No relief was given when the minor had himself been guilty of fraud. (D. 4, 4, 9, 2.) If on attaining twenty-five a minor ratified any contract previously made

by him, the contract could not be called in question. (C. 2, 46, 2.)

IV. Spendthrifts (*Prodigi*).

Spendthrifts interdicted from the management of their property are at the same time disabled from making contracts that would impair their estate. (D. 50, 17, 40.)

Fourth—Extension of Investitive Facts—Agency.

A perfect type of agency implies three things—(1) that the authority of the agent is derived from the consent of the principal; (2) that the agent can neither sue nor be sued in respect of the contracts he makes for his principal; and (3) that the principal alone can sue or be sued. If A. acts for B. without B.'s knowledge or consent, he may make himself responsible to B., but he is not an agent. If the agent alone can sue or be sued, there is no real agency. Thus in an ordinary mandate, if A. asks B. to buy the farm of C., and B. does buy it, A. cannot sue C. on the contract; he can only compel B. to sue C., or rather compel B. to allow him to sue C. in B.'s name. In like manner C. cannot sue A. the principal, but must sue B., who has in turn an action against A. for indemnity. Again if either the agent or the principal may be sued, then the agent is personally responsible for the performance of the contract, and in effect is a surety. In order, therefore, to have true agency, it is necessary that the agent should act by the authority of the principal, that the agent should be entirely irresponsible, and the principal exclusively responsible.

The early Roman law of Contracts was absolutely destitute of the notion of agency. Two reasons may be assigned for this poverty. In the first place, the rule that everything acquired by a slave or son under *potestas* belonged to the *paterfamilias*, removed to a certain extent any urgent necessity for an elastic law of agency. But, in the second place, it must be remarked that the absence of agency characterises every department of the ancient law. We have seen that no agency was admissible in the formal modes of conveying property (p. 178); we shall see that under the old forms of Civil Procedure (*legis actiones*) the principle was rigorously enforced that one freeman could not represent another. In the law of Property, agency was admitted through the doctrine of possession; in the law of Procedure attorneys or procurators were admitted through the introduction of a more flexible form of proceeding

(*Formulæ*). The prohibition of agency is thus directly connected with the important distinction that runs throughout the whole Roman law,—the distinction between formal and non-formal. No agency was ever admitted in the Roman law in respect of any formal transaction; and where agency was introduced, it was by superseding the formal by a non-formal element.

It is not difficult to understand how the idea of agency or representation should appear incongruous in respect of formal transactions. The old forms of *mancipatio, cessio in jure, stipulatio, legis actiones*, were highly solemn and dramatic. They possessed in the eyes of the Romans a species of sacramental efficacy. How, then, could the benefit of one of these ceremonies be given to a person that had taken no part in them, had repeated none of the sacred words, nor performed a single act in the ceremony? We can easily understand how to an old Roman it was absolutely inconceivable that the duty or right acquired through the observance of the solemn forms of law could be transferred to a person taking no share in the performance. We have now to consider the steps by which the Roman law approached—it never reached—a true law of agency.

I. To what extent did the old law provide, within the circle of the family, a substitute for agency?

For the present purpose no distinction exists between slaves, persons under the *potestas*, wives *in manu*, and free persons *in mancipio*. To all alike the rule applies, that all rights they acquire (whether *in rem* or *in personam*) belong to the person in whose power they are.

After setting forth the kinds of obligations that arise from contract, or as if from contract, we must note this—that we can acquire not only through ourselves personally, but through those persons that are in our *potestas* [*manus* or *mancipium*]; our slaves, for instance, or sons. But between those there is a distinction. What we acquire through our slaves becomes entirely ours; but what we acquire through our children *in potestate*, as the result of an obligation, must be divided after the fashion of the distinction made by our constitution between the ownership and the usufruct of property; so that of all the advantages coming to him from the action, the father may have the usufruct, while the ownership is reserved for the son. (It is understood, of course, that the father brings his action in accordance with the division made by our recent constitution.) (J. 3, 28, pr.; G. 3, 163.)

In the case of children under the *potestas*, the disability in contracts, as it flows from, so it does not go beyond, the disability in property. To the extent to which a child is an independent proprietor, he can contract freely.

Whether it is for his master or for himself, or for his fellow-slave, or without naming any person, that a slave stipulates, what he acquires goes to his master. The same rule of law applies to children, too, in a father's *potestas*, in the cases in which they can acquire. (J. 3, 17, 1.)

Here there are two of the elements of agency, but the third is wanting. The owner alone can sue, the slave cannot: so far that agrees with the correct idea of agency. But the great difference between this case and agency is, that the acquisition takes effect by operation of law, without the knowledge or authority of the master, and even in opposition to his express command. (D. 45, 1, 62.) The slave is a conduit-pipe, not an agent; he is a mechanical medium for transmitting rights, not an authorised agent to contract them. The slave is regarded as the mere voice of his master. (D. 45. 1, 45, pr.) This relation has sometimes been explained by the terms "unity of person:" there is a unity of person between slave and master, father and son, such as to make the act of the slave or son the act of the master or father respectively.[1] A more successful attempt at darkening counsel by words without understanding could scarcely be imagined. The word "person" has at least four distinct juridical meanings, and when we add to so equivocal a term the additional idea of "unity," ambiguity attains a climax. We had better, therefore, be content to state the rule in plain and intelligible language, as it is stated in the passage from the Institutes.

A slave belonging to Titius, under the false idea that he belonged to Gaius, made a stipulation for 10 *aurei* to be paid to Gaius. Neither Titius nor Gaius can sue for the money:—not Gaius, because he is not owner; not Titius, because the stipulation has been made *expressly* for Gaius, to whom alone the promiser intended to bind himself. (D. 45, 3, 30.)

Stichus stipulates with Pamphilus, a freedman of his master Titius, for the usual services required from a freedman (*operae libertorum*). The stipulation is void, because these services can be due only to the patron himself. (D. 45, 3, 38.)

Stichus being ill, is abandoned by his master. He recovers and stipulates for 1 *aureus* from Cornelius. This is void, for it does not accrue to his master, who has given him up; nor can it accrue to Stichus, who still continues a slave. (D. 45, 3, 36.)

EXCEPTION.—But when some act is one of the points in a stipulation, then in any case the person of the stipulator is a point also. If, for instance, a slave stipulates that he shall be allowed to pass on foot or drive,

[1] The phrase, indeed, occurs in the Code (C. 6, 26, 11, *Cum et natura pater et filius eadem esse persona pene intelligantur*—For by nature father and son are understood to be, one may almost say, the same person), but in a sense totally different. In that passage, it merely signifies that for certain purposes of substitution in Wills, father and son were to count as one person only.

then it is he only that ought not to be hindered from so doing, but not his master too. (J. 3, 17, 2.)

A slave or *filiusfamilias* stipulates for 10 *aurei* or Pamphilus, "whichever he chooses." The choice is a fact, and must be made by the slave; it cannot be made by the master. (D. 45, 1, 141, pr.)

1. Separation of Bonitarian and Quiritarian ownership (*nudum jus Quiritium.*)

But he that has the bare *jus Quiritium* in a slave, although he is his master, is yet understood to have less right over that property than he that has the usufruct, and than the possessor in good faith. For it is held, that what the slave acquires can in no case go to him. So far is this carried that some think that even if the slave stipulates that a thing shall be given to him by name, or accepts a thing conveyed by *mancipatio* in his name, yet nothing is acquired for him. (G. 3, 166.)

In this separation of the beneficial from the technical ownership, the slave acquired for the beneficial, not for the technical owner. The distinction itself, as we have seen, between the two kinds of ownership, was obsolete before the time of Justinian.

2. Slave held in joint-ownership.

It is certain that a slave held in joint-ownership acquires for each master according to his share. But to this there is an exception—when, namely, he acquires by stipulating for one by name; or by receiving what is conveyed by *mancipatio* for him alone, as when he stipulates thus, "Do you undertake that it shall be given to my master, Titius?" [or receives a thing conveyed by *mancipatio* thus, "This thing I assert to be the property *ex jure Quiritium* of my master, Lucius Titius, and let it be bought for him with this bronze and balance of bronze."] (J. 3, 28, 3; G. 3, 167.)

It is questioned whether the fact that an order comes in from one of his masters has the same effect as the addition of the name of one master. Our teachers think that what is acquired goes to him alone that gave the order, just as if the slave had stipulated for him alone by name, or had received a thing by *mancipatio* for him alone. The authorities of the opposing school, however, believe that the acquisitions go to both masters, just as if no one had come in to give an order. (G. 3, 167 A.)

But if by order of one master the slave makes a stipulation, then he acquires for him alone that ordered him to do this, as has been said above. The case was formerly doubtful; but it is perfectly clear after our decision. (J. 3, 28, 3.)

If a slave held in joint-ownership makes a stipulation, he acquires for each of his masters an amount proportioned to his share as master. But if he acted by the orders of one, or stipulated for one alone by name, then to that one alone what is acquired will go. And when a slave held in joint-ownership stipulates for something that one of his masters cannot acquire, it is acquired entire for the other,—as when the thing that he stipulates shall be given belongs to one master. (J. 3, 17, 3.)

Stichus is a slave of Lucius Titius and Gaius Seius, Titius having one-third share, and Seius two-thirds. Stichus makes this stipulation, "Do you promise to give

12 *aurei* to Lucius Titius and Gaius Seius?" In virtue of this stipulation, Lucius Titius and Gaius Seius, being named, will each get 6 *aurei*.

Stichus.—"Do you promise to give 12 *aurei* to my masters?" In this case, as they are not named, Lucius Titius and Gaius Seius will take according to their shares —Titius 4 *aurei* and Seius 8.

Stichus.—"Do you promise to give 12 *aurei* to Lucius Titius and Gaius Seius, my masters?" Here, as the masters are named, the additional words, "my masters," are treated as surplusage, and the two masters will divide the 12 *aurei* equally between them. (D. 45, 3, 37.)

Stichus is a slave of Julian and Cornelius. Julian allows Stichus a *peculium*. Out of that *peculium* Stichus gives a loan to Sempronius; and by stipulation, Sempronius promises to repay the amount to Cornelius. Which is the stronger claim—that of Cornelius, who is named in the stipulation, or of Julian, whose money has been lent out? Undoubtedly Cornelius can sue on the stipulation; but he will be repelled by the plea that his demand is against good conscience (*exceptio doli mali*), that he is taking advantage of a technical right to possess himself of money really belonging to Julian. (D. 45, 3, 1, 2.)

Pamphilus is a slave of Titius and Maevius. He makes the following stipulation: "Do you promise to give 10 *aurei* to Titius within twenty days? If you do not pay that amount to Titius within the time, do you then promise 20 *aurei* to Maevius?" These are two stipulations, the first simple and unconditional; the second conditional on the non-performance of the first. Therefore Titius can sue for the 10 *aurei* as well as Maevius for the 20, after the time has elapsed. But Titius will be repelled by the *exceptio doli mali*, and Maevius alone will be permitted to sue. (D. 45, 3, 1, 6.)

Stichus is a slave of Titius and Maevius, and stipulates thus:—"Do you promise to give Titius 10 *aurei*, or to give a farm to Maevius?" The rule is, that a stipulation is acquired for the master who is named, but here both are named in such a way as to make it impossible to determine which is entitled. The stipulation is therefore void for uncertainty. (D. 45, 3, 10; D. 45, 3, 9, 1.)

A slave belonging to two men stipulates for a right of way or other praedial servitude, without mentioning the name of either master. One of the masters has land to which such right of way or other servitude can attach; the other has not. The right of way or other servitude is acquired for the first only. (D. 45, 3, 17.)

Stichus belongs to Titius and Maevius. Maevius is about to marry, and Stichus stipulates for a dowry (*dos*). It accrues to Maevius alone. (D. 45, 3, 8.)

3. Slave or freeman *bona fide* possessed: slave held in usufruct or use.

What is acquired through freemen and slaves belonging to others, but in good faith in your possession, goes to you. But in two cases only,—when they acquire by their own toil, or by dealing with what is yours. (J. 3, 28, 1; G. 3, 164.)

What is acquired too through a slave in whom you have the usufruct or the use in like manner in those same two cases, goes to you. (J. 3, 28, 2; G. 3, 165.)

Stichus, a slave having a *peculium*, falls into the possession of Maevius, who thinks himself the heir of Stichus' master. Maevius gives a loan to Titius of a part of the *peculium*, and Stichus stipulates for repayment to Maevius. Gaius, the true heir, can, notwithstanding the stipulation, recover the money lent as his own property. (D. 45, 3, 1, 1.)

A father died intestate, having in his power a son Titius and a daughter Titia. Titia thought nothing was left by her father. Titius got possession of the whole

inheritance, including Arethusa, a slave-girl. Titius died, leaving an infant daughter. Her *tutores* sold the grandfather's inheritance, and by their order Arethusa stipulated with the purchaser for the price. Could Titia claim any part of the benefit of that stipulation, seeing that she was jointly entitled with the infant daughter of Titius to the slave? Although Arethusa was *bona fide* possessed by the infant daughter, still, says Paul, as the property of the grandfather was common to Titia and the daughter of Titius, the whole price cannot accrue to the infant daughter; but it must be equally divided between her and Titia. (D. 45, 3, 20, 1.)

Pamphilus, a slave of Titius, is stolen by Calpurnius. Pamphilus makes stipulations on behalf of Calpurnius. These are absolutely void. They cannot accrue for a thief. If, however, Pamphilus makes stipulations, not naming Calpurnius, Titius, as the owner of Pamphilus, will have a right to sue on them. (D. 45, 3, 14.)

4. A slave belonging to a vacant inheritance. (*Servus hereditatis jacentis*).

A slave in virtue of his master's *persona* has the right of making a stipulation. Now an inheritance in most respects stands in the place of the deceased person. Therefore what a slave belonging to the inheritance stipulates for before the inheritance is entered on, he acquires for the inheritance; and thus it is acquired also for him that afterwards becomes heir. (J. 3, 17, pr.)

The point here settled in the affirmative by Justinian was disputed between the Proculians and Sabinians. The Proculians asserted that a stipulation made by a slave before the entry of the heir was void, because the heir was at the time a stranger. The Sabinians got over the difficulty by the fiction, that once an heir entered, he must be regarded as succeeding his ancestor at the moment of his death. The stipulation, to be valid, must be made on behalf of the "inheritance" or the "future heir;" but if made for the person who afterwards became heir by *name*, the stipulation is void. (D. 45, 3, 16.)

II. By the *jus civile* a master could not be bound by the promises of his slave. "Our slaves can better our condition, but cannot make it worse."[1] The result was that a slave could not make any contract for his master, involving reciprocal duties, as a sale or letting on hire. But he could stipulate or lend for his master. This was, however, a poor set-off to the fact that he could neither buy nor sell.

The disabilities of the slave's position were removed, partly by treating him as a principal having a capacity to contract (*actio de peculio, actio tributoria*), and partly by treating him as an agent to bind his master (*actio quod jussu, actio de in rem verso*).

If, therefore, it was by the [father's or] master's orders that the business was transacted with the son or slave, the Prætor promises an action against

[1] *Melior conditio nostra per servos fieri potest, deterior fieri non potest.* (D. 50, 17, 133.)

the [father or] master for the entire sum. For he that contracts in such a case seems to look to the master's credit. (J. 4, 7, 1 ; G. 4, 70.)

Again, the Prætor has set forth an action concerning the *peculium* of slaves and of *filiifamilias*, and an action to try whether the plaintiff has made oath, and many others. (J. 4, 6, 8.)

The *actio de peculio* against a father or master has been framed by the Prætor, because, although by the contracts of children and slaves the parents and masters are not actually bound by the law, yet it would be only fair that they should be condemned to pay as far as the *peculium* will go ; for it is, so to speak, the patrimony of sons and daughters, and of slaves also. The Prætor too, when a man at his adversary's demand has made oath that the debt which he demanded is due to him, most rightfully gives him an action to try not whether the money is due him, but whether he has made oath that it is. (J. 4, 6, 10-11.)

And further, an action has been brought in concerning the *peculium*, and concerning what has been applied for the master's good (*de peculio deque eo quod in rem domini versum erit*). Although, therefore, the business was transacted without the master's wish, yet if anything has been applied for his good, for the whole of that he must answer ; or if it has not been so applied, he must yet answer for it so far as the *peculium* allows. The term, "applied for the master's good," is understood to include all that a slave necessarily expends for his good,—as when he borrows money and then pays creditors, or props up falling buildings, or buys corn for the household, or even purchases a farm or any other necessary. Therefore, if of (say) 10 *aurei* that your slave has received on loan from Titius he has paid five to a creditor of yours, and has spent the remaining five in any way he pleased, then for the first five you must be condemned in the entire amount ; for the rest, only so far as the *peculium* will go. Hence it is plain that if the whole 10 *aurei* had been applied for your good, Titius could recover the whole 10 *aurei*. For although the action concerning the *peculium* and concerning what has been applied for the master's good is but one action, yet it has two clauses of condemnation. The *judex*, therefore, before whom the action is brought, usually first looks narrowly whether the money has been applied for the master's good, and passes on to value the *peculium* only after it is understood that nothing was applied for the master's good, or, at any rate, not the whole. (J. 4, 7, 4 ; G. 4, 73—as restored.)

Lastly, our attention must be called to this, that when it is by the orders of a father or master that a contract has been made, and when the proceeds have been applied for his good, then a *condictio* may be brought directly against the father or master, just as if the business had been transacted with the principal in person. (J. 4, 7, 8.)

In the actions *de peculio* and *tributoria* the slave is not really agent—he is principal ; and the master may be regarded as a trustee for creditors to the extent of the *peculium*. The master can hardly be considered a principal, when even if he has actually forbidden a contract he can still be sued to the extent of the *peculium*. (D. 15, 1, 29, 1.)

1. *Actio quod jussu.*

Titius, who has a usufruct of Stichus, commands him to buy a house from Sempronius. Stichus does so. Titius and Sempronius can respectively sue each other on the contract of sale. The same result would follow if Titius were a *bona fide* possessor only of Stichus. (D. 15, 4, 1, 8.)

Stichus belongs to Titius and Gaius. They request him to enter a partnership with another. That person can sue either Titius or Gaius for the whole debts due by Stichus to the firm. (D. 15, 4, 5, 1.)

Ratification, after the contract, by the master, had the same effect as a previous command. (D. 15, 4, 1, 6.)

2. *Actio de in rem verso.*—The action *quod jussu* is the equivalent of mandate; the action *de in rem verso* is the equivalent of the *actio negotiorum gestorum.* It, therefore, lies whenever the slave, an unauthorised agent, has acted in effect for the benefit of his master's property. (D. 15, 3, 3, 2.) It includes all necessary or beneficial expenditure, such as cultivating the master's land, repairing his house, clothing or buying slaves, paying the master's debts. (Paul, Sent. 2, 9, 1.) The ratification of the master is not necessary; it is enough if the slave intended to bind his master.

A *filiusfamilias* defends an action brought against his father in his absence, and is condemned in costs. The father may be sued for the costs. (D. 15, 3, 10, 1.)

A slave or a *filiusfamilias* takes money to buy himself food and clothes, not exceeding the allowance made him by his master. Such money is considered as having been spent for the benefit of the master or father. (D. 15, 3, 3, 3.)

A sum borrowed by a slave to clear off a debt of his own is not considered to be *in rem verso*, although the master is thereby relieved from the action *de peculio.* The reason is that here the slave intends to bind himself, not his master. (D. 15, 3, 11.)

Stichus borrows money from Titius and lends it to Gaius. If the transaction was not done for the slave's *peculium*, his master must either pay Titius, or transfer to Titius his right of action against Gaius. (D. 15, 3, 3, 5.)

A slave purchases for his master slaves who, he thinks, are required, but are not. The master may be required to take them at valuation, but not to give the price agreed upon. (D. 15, 3, 5, pr.)

A slave borrows money to repair his master's house. Before the master returns, the house is burned down. The master must repay the money, although in the event he got no benefit from the expenditure. It is enough if the expenditure was calculated to benefit him, and was actually incurred for that purpose. (D. 15, 3, 3, 8.)

A slave ornamented his master's house with frescoes without his order. His master on returning from abroad refuses to pay for them. The master cannot be compelled to pay, but the creditor may take away the frescoes, if he can do so without injuring the house. (D. 15, 3, 3, 4.)

Titius gave his slave Pamphilus a small farm to cultivate, and some oxen to stock it. These oxen proved unsuitable, and Titius ordered Pamphilus to sell them and buy new ones. The new ones were 5 *aurei* dearer. Pamphilus never paid the money, but soon wasted all his capital. The seller had an action against Titius *de peculio* for what remained after the debts of the master were paid; but could he sue him *de in rem verso?* Alfenus answers, the oxen are indeed obtained on the master's account, but he must be credited with payment of so much as was got for the first oxen; because to the extent of their value he gains nothing by the new purchase. But he is liable for the additional 5 *aurei.* (D. 15, 3, 16.)

The slave or son, in cases where the *actio quod jussu* or *actio de in rem verso* lies, is truly an agent; he acts either with express authority, or by an authority implied by law; he is irresponsible, and the master or father alone can sue or be sued on the contracts.

III. The next step takes us out of the family. In two instances a sort of agency was recognised in the case of freemen, as well as of slaves and *filiifamilias*. These instances are found where the necessity of a law of agency was most acutely felt, namely, in commerce.

1. The master of a ship (*magister navis*) (whether a freeman or slave) was an agent to bind the owner (*exercitor*).

On the same principle the Prætor has framed two other actions for the entire amount, one called *exercitoria*, the other *institoria*. The *exercitoria* may be brought when a man has set his [son or] slave over a ship as master, and when some contract has been made with him relating to the business over which he has been set. [For since that business seems to be contracted by the wish of the father or master, the Prætor thought it altogether fair to give an action for the entire amount. Nay, even although it is an outsider that one sets over his ship as master, and whether a slave or a freeman, yet that Prætorian action is duly given against him.] The action is called *exercitoria*, because *exercitor* is the name for him to whom the daily profits of a ship belong. (J. 4, 7, 2; G. 4, 71.)

The *exercitor* need not be owner of the vessel; he may be a charterer. (D. 14, 1, 1, 15.) The *magister* or shipmaster is the person placed in command of the vessel. (D. 14, 1, 1, 1.)

For what contracts is the owner bound? In other words, to what extent does the authority of the captain to contract for the owner extend? He may make generally contracts relating to the ship, its seaworthiness and freight. (D. 14, 1, 1, 7.) Sometimes the authority of the captain was defined by the terms of his orders. Thus, if he has authority only to exact the fares and freight, he cannot let out the vessel on hire; so, *vice versa*, if he has authority to let the vessel simply, he cannot exact payment of the fares and freight. He may be ordered to take only passengers, in which case he cannot take goods; or only goods, in which case he has no authority to take passengers. (D. 14, 1, 1, 12.)

Lucius Titius made Stichus captain of his ship. Stichus borrowed money, stating in the written acknowledgment of debt that the money was required to repair the ship. Can the lender recover his money from Titius without proof that the money was actually employed for the purpose alleged? Africanus says yes, if the vessel required to be repaired. To require the lender to see the repairs executed, would be asking him to do the work of the owner. It must be observed, however, that the

owner cannot be liable for a sum considerably exceeding what is necessary for repair (D. 14, 1, 7, pr.)

A captain borrowed money for necessary repairs, but spent the money without doing anything for his vessel. Is the owner liable for the money borrowed? If the captain obtained the loan on the understanding that the money was to be applied to repair the ship, and afterwards, changing his mind, used it for a different purpose, the owner is liable. If, however, the captain from the first intended to embezzle the money, and there was no express agreement that the money should be applied for the ship, the owner is not liable. (D. 14, 1, 1, 9.)

If there is more than one owner, each is liable to creditors for the whole debts contracted by the captain (D. 14, 1, 1, 25), irrespective of his share. (D. 14, 1, 3.)

The *actio exercitoria* fails to come up to the perfect idea of agency, in two respects; (1) the creditors of the *magister* may sue him or the *exercitor* in their option. (D. 14, 1, 1, 17.) Thus the agent is not irresponsible.

Titius has a slave, Stichus, who is *exercitor* of a ship. Stichus appoints Maevius captain. Gaius lends money to Maevius. Gaius can sue Maevius for the amount. The effect is that the captain is to the creditor a surety for the owner. (D. 14, 1, 5, 1.)

(2) The *exercitor* cannot sue the debtors of the shipmaster, but, as in the case of mandate, has no direct remedy except against his own agent. To this rule there was but one exception. To encourage the transport of grain, the owners of vessels engaged in importing grain were allowed by the Prætor, in the exercise of his extraordinary jurisdiction, to sue the debtors of their captains. (D. 14, 1, 1. 18.)

2. An *institor* was an agent to bind his principal.

The *actio institoria* may be brought when a man has set his slave over a shop, or over a business of any sort as manager, and when some contract has been made with him relating to the business over which he has been set. It is called *institoria*, because persons set over businesses are called *institores*. Those two actions, however (*exercitoria* and *institoria*), are duly given by the Prætor, even if it is a freeman or another's slave that is set over the shop or business of any sort; of course because in that case too the same principle of equity came in. (J. 4, 7, 2; G. 4, 71.)

If a man is liable to an *actio exercitoria* or *institoria*, it is held that a *condictio* can be brought against him directly; because the contract is understood to have been made by his orders. (J. 4, 7, 8.)

The term *institor*, it is to be remarked, does not correspond to *exercitor*, but to *magister navis*. In the *actio exercitoria* the *exercitor* is the principal; but in this case the *institor* is the agent.

It was not necessary that the agent should be in a shop (D. 14, 3, 4): hawkers or pedlars were *institores* (D. 14, 3, 4, 5); and, generally speaking, any person was an *institor* who was employed to buy and sell. (D. 14, 3, 3.) Also persons in charge of mules might be *institores*. (D. 14, 3, 5, 5.) To that may be added a

concierge (*insularius*). (D. 14, 3, 5, 1.) A person employed in lending out money, or in managing sales or letting of land, is an *institor*. (D. 14, 3, 5, 2.)

A shopkeeper sends his slave abroad to buy stock for him. The slave is an *institor*. (D. 14, 3, 5, 7.)

A baker was accustomed to send his slave to a certain locality to sell his bread. The slave, getting payment in advance, embezzled the money. As he was authorised to receive payment, he is an *institor* for the purpose of discharging the customer. (D. 14, 3, 5, 9.)

A fuller, going from home, left one of his men in charge. This man received some clothes, and ran away with them. Was the fuller responsible? Not if the man was left as a procurator; but he was, if the man was left as an *institor* in charge of the business. If the fuller had himself told the customers to trust his workmen, then he is directly responsible on the contract of hire. (D. 14, 3, 5, 10.)

A steward or bailiff (*villicus*) was not regarded as *institor*, because his duty was simply to take in the crops, not to buy and sell. But if he, as part of his duty, also buys and sells, he is treated as agent (*exemplo institoriae actionis*) for his master. (D. 14, 3, 16.)

To what extent was the principal (*dominus*) responsible for the contracts of his *institor*? Clearly, only when the contract was within the scope of the business entrusted to him. Thus if a person is employed only to buy, he cannot sell; if only to sell, he cannot buy. (D. 14, 3, 5, 12.)

Titius assigned to his slave Stichus a sum of money to deal in animals. Titius is responsible not only by the *actio institoria*, but for the stipulations of double penalty, and also for all flaws in the things sold. (D. 14, 3, 17, pr.)

Stichus sold oil for his master, and took a gold ring in earnest of the bargain. The ring was not returned after the sale was completed. The master can be sued for the ring, unless the slave was forbidden to sell on credit, and so had no right to give credit and take earnest. (D. 14, 3, 5, 15.)

A slave in a shop, not forbidden to borrow money, did so to buy stock and pay the rent of the shop. The lender can recover the money from his master. (D. 14, 3, 5, 13.)

A slave empowered only to lend money becomes surety for another's debt. This contract does not bind his master. (D. 14, 3, 19, 3.)

Of several principals, each is liable for the whole debts of the *institor*; they have, however, as against one another, the rights of partners. (D. 14, 3, 13, 2.)

The *institor* has some, but not all the marks of a real agent. He is one in so far as he must have the authority of his principal. Hence a notice in plain characters forbidding contracts to be made with the manager of a shop, completely exonerated the owner of the shop. (D. 14, 3, 11, 2.) If the notice was legible and in a place where people generally saw it, creditors could not plead that they were unaware of it. (D. 14, 3, 11, 3.) But, in the second place, was the *institor* himself irresponsible? He could be sued (D. 14, 3, 7, 1), and could also

sue. This so far answers the last question, Was the principal directly responsible? That he should be directly sued for the debts of his *institor*, was the express object of the Prætorian intervention. Could he sue the debtors of his *institor?* If his slave were the *institor*, there was no difficulty. If anyone else were *institor*, the principal could compel him to transfer his action against the debtors. (D. 14, 3, 1.) Marcellus, however, said that when a principal could not avoid loss unless by direct action against the debtor, such action would be allowed. (D. 14, 3, 2.)

These two actions (*exercitoria* and *institoria*) seem at first to have been introduced for the benefit of masters of slaves. The advantage of them was to make the slave in certain cases an implied agent, where it would have been impossible to prove that the contract was specially authorised (*quod jussu*) by the master. The master was bound to pay the whole debt, and could not escape by surrendering merely the *peculium*. Nevertheless, it often happened that in the same circumstances one of several actions might be available to a slave's creditors.

No doubt a man that has contracted by the master's orders, to whom, therefore, the *actio exercitoria* or *institoria* is open, may also bring an action *de peculio deque eo in rem domini verso*. But it would be the height of folly to pass by an action in which he can with the greatest ease obtain the entire sum due under the contract, and to reduce himself to the hardship of having to prove that the money has been applied for the master's good, or that the slave has a *peculium*, and that too so large that he can have the entire sum paid him. A man, too, that has the *actio tributoria* open to him, can equally well bring an action *de peculio deque eo in rem verso;* and sometimes, certainly, it is for his advantage to do so, sometimes to bring the *actio tributoria*. To bring the latter may be advantageous, because in it the master is not preferred; that is, what is due to him is not deducted, but he is in the same legal position as the rest of the creditors; whereas in the action *de peculio* what is due to the master is first deducted, and the remainder is what the master is condemned to pay the creditor. It may be an advantage, again, to bring the *actio de peculio*, because in this action the whole *peculium* is taken into account; whereas in the *tributoria* that part only is reckoned that is employed in the business. Now a man may very well employ in the business a third perhaps of the *peculium*, or a fourth, or even a mere trifle, and have the greater part in lands or bondmen, or money out at interest. According to the advantage to be gained, therefore, each ought to choose either this action or that; and undoubtedly if a man can prove that the money has been applied for the master's good, he ought to bring the action *de in rem verso*. All we have said of slave and master must be understood also of the son and daughter, grandson or granddaughter, and the father or grandfather in whose *potestas* they are. (J. 4, 7, 5-6; G. 4, 74.)

IV. It thus appears, that while slaves or children under *potestas* might be agents to burden their masters or fathers with duties, in two cases only could freemen become partially agents. The master of a ship and the manager of a shop were agents to the extent that the persons with whom they made contracts could sue their principals directly; but their agency went no further. We find that in a very small number of cases an action was given against a principal after the analogy of the *actio institoria.*

Titius, desirous of borrowing money from Sempronius, sends Maevius, who receives the money, and promises by stipulation to return it. In this case Sempronius may sue Titius, even if Maevius is solvent. (D. 14, 3, 19, pr.)

A. has lent money to B.'s agent (*procurator*) to pay off a creditor of B., or to release a pledge belonging to B. An *actio negotiorum gestorum* lies against B. at the instance of A.; and A. cannot sue B.'s procurator. (D. 3, 5, 6, 1.)

A.'s agent (*procurator*) appoints an *institor.* The actio institoria lies against A. (D. 14, 3, 5, 18.)

Domitian has given a mandate to Demetrian to accept a loan from Titius. Titius can sue Domitian on the loan as if Demetrian were an *institor.*

A *procurator* has, by order of the owner, sold a house, and given the usual promise against eviction. The buyer can sue the owner, after the analogy of the *actio institoria,* and so a *utilis actio* is given to the owner against the buyer. (D. 19, 1, 13, 25.) Nevertheless the *procurator* can be sued by the buyer if he pleases. (D. 3, 3, 67.)

These examples show that under the pressure of commercial wants, the Roman law was gradually pushing towards the full recognition of agency in contracts, and the question arises, Did the Roman law ever come nearer to a true doctrine of agency than in the *actiones exercitoria* and *institoria?* These actions fall short of true agency: (1) in respect that they do not exonerate the agent from liability; and (2) that although they allow the principal to be sued directly, they do not enable him to sue directly the persons contracting with his agent. Nevertheless it would appear that this was the nearest approach made by the Romans to a law of agency.

Savigny contends, that while the old law of non-representation was maintained in regard to the formal contract of *stipulatio,* yet that in the later Roman law agency was universally allowed in the non-formal contracts. This view has been vigorously disputed by the German authorities that have followed Savigny, and indeed appears to be merely an example of overstrained ingenuity on the part of that distinguished author. The passage upon which Savigny rests is as follows[1]:—"Things may be acquired according to either the *jus civile* or the *jus naturale.* In the former case we

[1] *Ea quae civiliter adquiruntur, per eos qui in potestate nostra sunt adquirimus, veluti stipulationem: quod naturaliter adquiritur, sicuti est possessio, per quemlibet volentibus nobis possidere adquirimus.*

acquire them through persons in our *potestas*, as by stipulation ; in the latter, as in the case of possession, through possession by anyone at our wish." (D. 41, 1, 53.)

At the first blush this passage bears out Savigny's proposition to the utmost extent he can desire ; but a fair consideration of the passage and context shows that the author (Modestinus) had in his eye the law of property, and not of contract. (1.) This passage occurs under the heading, "Concerning the Acquisition of Property," not under Contract. (2.) In interpreting such passages it is safer to narrow the extent of the proposition to the examples cited, rather than to expand the examples to the breadth of the proposition. (3.) There is a perfectly satisfactory explanation of the text. It has been suggested that Modestinus wrote *mancipatio*, and not *stipulatio*, as the example of acquisition by the *jus civile*. If so, the passage would be quite exact and pertinent in respect of the law of property. When, however, the Digest was composed, the *mancipatio* no longer existed, and the only example of civil acquisition that Tribonian could insert was *stipulatio*. This would explain how one of the examples is taken from the law of contract, and the other from the law of property. (4.) There are passages in which it is expressly laid down that "possession" is the only case where an acquisition may be made by a free person. "Possession," it is said by Diocletian and Maximian, "is the only exception to the undoubted rule of law, that nothing can be acquired through a free person not subjected to another's power." [1] (C. 4, 27, 1.) The passages (D. 44, 7, 11 ; D. 50, 17, 73, 4) may also be looked to. (5.) If the Roman law had really attained to a true conception of agency, the fact must have been patent in many texts. Agency is one of the commonest instances of contract, and there must have been numerous passages illustrating different phases of the disputes that arise respecting agency, if agency had ever been universally recognised.

Savigny thinks that the notion of agency made its way into the Roman law through the consensual element in the non-formal contracts. Thus all the consensual contracts could be made by messenger (*nuntius*). (D. 18, 1, 1, 2 ; D. 2, 14, 2, pr. ; D. 29, 2, 25, 4 ; D. 13, 5, 14, 3.) Savigny observes that it is difficult, if not impossible, to distinguish between a "messenger" in these cases and a true agent. Suppose I bargain with a horsedealer, and refuse his price, but afterwards, when he has gone away, send a messenger to say that I agree to the price, it is obvious that I, and not the messenger, will be able to sue the horsedealer for the horse. Suppose, again, I send a person to buy a particular horse, telling him not to go beyond a certain price, is that person an agent or a messenger ? The answer to Savigny is, that although, upon particular states of fact, a doubt may arise whether a person is an agent, yet that there is a broad distinction between a messenger (*nuntius*) and an agent. A messenger, like a letter, is simply a medium of communication ; he exercises no judgment of his own, but merely repeats what is told him. An agent, on the other hand, acts on his own judgment, of course within the limits of his instructions. These instructions may be minute and precise, leaving little to the exercise of the agent's judgment, but unless they do away with the necessity of his exercising his judgment altogether, the agent is distinguishable from a mere messenger. This distinction is clearly stated in a text much relied on by Savigny. "Although it is through a free person that I have made this *constitutum* with you, the fact that we are acquiring through a free person will be no hindrance ; because he seems in this case to be acting only as a servant." [2] (D. 13, 5, 15.) This passage clearly shows that in the

[1] *Excepta possessionis causa, per liberam personam quae alterius jure non est subdita, nihil adquiri posse, indubitati juris est.*

[2] *Et licet libera persona sit, per quem tibi constitui, non erit impedimentum quod per liberam personam adquirimus ; quia ministerium tantummodo hoc casu praestare videtur.*

Roman law a distinction, not to be got over by any ingenious refinement, was drawn between the mere messenger and the true agent.

The different fate of the law of agency in property and contract is worthy of remark. Agency made its way into the law of property through "possession," and it found its way into possession from the necessity of allowing a possessor to retain by another, as by a tenant. If one could keep possession by a tenant as agent, so one could acquire possession by the same means. Thus it was that possession, and through it property, could be acquired or lost by an agent.

The history of the law of contract was widely different. The law of agency was created by the Prætor through the expansion of a principle of the *jus civile*. Slaves and sons could acquire for their masters or fathers according to the *jus civile*, and by enabling them to bind their masters or fathers, the Prætor established a law of agency that was probably found to meet nearly all the necessities of the case. In accordance with the unfailing tradition of Prætorian innovation, the law of agency never advanced far beyond the original lines. Freemen were allowed as agents in respect of the *actiones exercitoria* and *institoria*, but beyond that the Prætor did not go. His measures seem to have been sufficient for the public wants, and Justinian found no occasion to introduce one of those glittering generalisations of which he was so fond, and by a stroke of the pen convert the contract of mandate into a true agency. In respect, therefore, of agency, the Roman law falls conspicuously short of the systems of law prevailing in modern Europe.

Fifth—Cases analogous to Agency.

We have now to consider the effect of an agreement by A. that B. shall receive from, or pay something to C., when A. has no authority from C. to make such a bargain.

Further, a stipulation is void if we stipulate that something shall be given to a man to whose power we are not subjected. And hence the question has been raised, how far a stipulation is valid in which a man stipulates that something shall be given to himself and another to whose power he is not subjected. Our teachers think that it is binding in every point, and that the entire sum is due to the stipulator alone, just as if he had not added the name of an outsider. But the authorities of the opposing school hold that half only is due him, and that as regards the stranger's portion the stipulation is void. They cite the parallel case of a legacy left to two persons *per damnationem*. In that case, if one is wanting, his share is not sought

for his co-legatee, but remains in the inheritance as not being due. Clearly this is a like case. (G. 3, 103, as restored.)

If a man undertakes that another shall give or do anything—as, for instance, that Titius will give 5 *aurei*—he comes under no obligation. But he does if he undertakes that he will get Titius to give them. (J. 3, 19, 3.)

If a man stipulates for a person to whose power he is not subjected, it is in vain. Clearly, however, payment can be bestowed even on an outside person; as when a man stipulates thus:—"Do you undertake to give me or Seius?" so that the stipulator acquires an obligation. To Seius, however, payment may rightly be made, even against his will, so that the debtor comes to be actually freed at law; but the other creditor will have against Seius an *actio mandati*. But if a man has stipulated that 10 *aurei* shall be given to himself and another to whose power he is not subjected, the stipulation will indeed be valid; but whether the whole sum that was brought into the stipulation is due, or only half, has been doubted. It is now held, however, that not more than half is acquired for him. If, again, you have stipulated for a person subjected to your power, you acquire for yourself; because your voice is as your son's, just as your son's is as yours in those things that can be acquired for you. (J. 3, 19, 4.)

No one, as has been said above, can stipulate for another. For obligations of this sort came in to enable each man to acquire for himself what he had an interest in. But if the thing is to be given to another, the stipulator has no interest. Evidently, then, if one wishes to do this, it will be well for him to stipulate for a penalty; for then, unless all is done that the terms of the stipulation include, the stipulation begins to be binding for a penalty, even though it is to be paid to a man that has no interest. For when one stipulates for a penalty, no investigation of his interest is made, but all that is asked is what is the amount set down in the condition of the stipulation. If, then, a man stipulates that something shall be given to Titius, it is in vain. But if he adds a penalty, "Unless you give it, do you undertake to give so many *aurei*?" then the stipulation begins to be binding. If, however, a man stipulates for another when he himself has an interest, it is held that the stipulation is valid. For if he that began to administer the affairs of a *pupillus* as *tutor*, retires in favour of his fellow-*tutor*, and stipulates that the property of the *pupillus* shall be safe,—then, since it is the stipulator's interest that what he has stipulated for should be done (since he would himself have been under obligation to the *pupillus* if he managed affairs ill), the obligation binds him. If therefore a man stipulates that something shall be given to his procurator, the stipulation will come into force. And so, too, if he stipulates for his creditor, when he himself has an interest—to avoid bringing a penalty into play, for instance, or having his lands given in pledge sold off—the stipulation is valid. Conversely, he that has promised that another will do something, seems not to be liable unless he has himself promised to pay a penalty. (J. 3, 19, 19-21.)

I buy a farm for myself and Titius. The addition of Titius is treated as surplusage, and I am entitled to the whole farm. (D. 18, 1, 64.)

Seius stipulates for a farm to be given to himself or Titius. The farm is delivered to Titius. Seius has still an action to obtain a promise against eviction, and he can recover the farm from Titius by *actio mandati*. But if Seius' intention was to make a gift of the farm to Titius, the promiser is released by delivery to Titius. (D. 45, 1, 131, 1.)

Titius and Maevius jointly owe a sum to Gaius. At the request of Maevius, Gaius agrees to release both Titius and himself. Afterwards Maevius dies, and Titius becomes his heir. Titius cannot, even if he afterwards becomes heir to Maevius, claim the benefit of the release, because the agreement was not made for him. (D. 2, 14, 17, 4.)

"Do you promise for yourself and Titius your heir to pay 10 *aurei?*" Titius is one of two heirs. He is not obliged to pay the whole, for his name is treated as surplusage. (D. 45, 1, 56, 1.)

A. stipulates that a usufruct of a farm shall be given to himself *and his heir*. The heir can claim the usufruct by an action on the stipulation. (D. 45, 1, 38, 12.)

A. stipulates that neither B. (the promiser) nor his heir Seius shall hinder him in using a certain right of way. This binds not only Seius but his coheirs. (D. 45, 1, 131, pr.)

Sempronius is surety for Galbus for 100 *aurei*. Galbus makes a verbal agreement with the creditor to release Sempronius. Can Sempronius plead that agreement if he is sued by the creditor? Paul says yes. (D. 2, 14, 27, 1.) Suppose Galbus had obtained a release for himself, without mentioning Sempronius. Unless there was a special exemption, Sempronius is released also, because otherwise, if he paid, he could compel Galbus to repay him, who would thus be no better for his release. (D. 2, 14, 22.)

A *tutor* agrees with a creditor of his *pupillus* that the creditor shall waive a right of action against the *pupillus*. This gives the pupillus a good defence, if an action is brought. (D. 2, 14, 15.)

Titius promises a *dos* to Cornelia, daughter of his *filiusfamilias* Gaius. Afterwards by verbal agreement he obtained a release for himself and also for Gaius. This is valid for Gaius, because the agreement was made for him in his capacity of heir to Titius. (D. 2, 14, 33.)

Maevius has agreed by stipulation to build a house for Julius. Maevius hires Titius to build the house for Julius. This is valid, because Maevius had an interest under contract in the execution of the work. (D. 45, 1, 38, 21.)

Gaius has promised to Titius, under a penalty, the farm of Maevius. Gaius stipulates with Maevius to deliver it to Titius. This is valid. (D. 45, 1, 38, 21.)

The daughter of Titius died in marriage, and Titius agreed with her husband as follows:—One-half of the dowry to remain with him as a provision for the son of the marriage; the other half to go to the grandson of Titius, if he were alive, otherwise to Julian. Titius can sue the husband for damages for not giving the half to Julian. (C. 8, 39, 3.)

A. makes a gift to B. of a house for ten years, and B. accepts it on the understanding that at the end of the period he will give it to C. At first C. had no right to sue, as he was not a party to the contract; but some time before A.D. 290 a *utilis actio* was given to C. to recover the property from B. (C. 8, 55, 3.)

A. deposits property with B., and B. undertakes to give it to C. on his return. C. had a *utilis actio depositi*. (A.D. 293.)

Titius lends money of his own on account of Maevius as and for the money of Maevius. Maevius is wholly ignorant of the transaction. Maevius, nevertheless, can recover the money by *condictio*. (D. 12, 1, 9, 8.)

Chrysogonus, a slave-steward of Flavius Candidus, wrote in the presence of his master, who signed the writing and added his mark, that he had received from Julius-Zosas, agent for the absent Julius Quintilianus, a loan of 1000 *denarii*. Zosas, a freedman of Quintilian, and acting for him in his absence, stipulated for the return of the loan to Quintilian or his heirs before the kalends of next November; Candidus promised. Julius Zosas also stipulated, in the event of non-payment, for interest—naming 8 *denarii*. Candidus promised, and subscribed his name. In this case the contract was void, because the stipulation was made by Zosas for repayment to Quin-

tilian ; but as no name was mentioned for the interest, Zosas could sue for it, and was compellable to hand over the proceeds to Quintilian. Why this result? If there had been no stipulation at all, the agreement would have been valid. Whenever a loan is made, with the understanding that it is to be returned to a given person, whether that person actually delivered that money or not, or whether it was his money or not, in any case he is entitled to repayment. This is easily understood, because the duty of the borrower arises from the actual receipt of the money, and it is perfectly immaterial to whom he is directed to return it. But unluckily, in this case, the equitable obligation was merged in the stipulation. For when a loan is actually given, and a stipulation made for its return, only one obligation arises, namely, that upon the stipulation. (D. 45, 1, 126, 2.)

TRANSVESTITIVE FACTS (*Novatio*).

In contract, the transvestitive facts present a certain degree of complication. There may be a change in the person of the creditor, or in the person of the debtor, or in the nature of the obligation. Suppose A. owes B. 10 *aurei* as the price of a horse. If now B. transfers to C. his right to the 10 *aurei*, we have a change in one of the elements, the two others remaining constant. The creditor is changed, but the debtor and the debt remain the same. That is one kind of transvestitive fact. If, again, A. induces B. to accept D. as his debtor by stipulation instead of himself, we have another kind of change. A new debtor is substituted, and in substituting him the debt is turned into a stipulation from a sale. In this case the person of the creditor alone remains constant. Lastly, both B. and A. may remain, but the nature of the obligation may be altered; as if B. stipulates with A. for the 10 *aurei*, and so merges the contract of sale in the stipulation.

These three kinds of transvestitive facts are thus named. The substitution of a new creditor is by *cessio nominum vel actionum*. The second change has no other name than *novatio* (D. 4, 4, 27, 3); but the substitution of a new debtor has the specific name of *expromissio* or *delegatio*.

First—Substitution of New Creditor (*Cessio nominum vel actionum.*)

Definition.

The object of a substitution of a new creditor was, as far as possible, to turn mere debts, as well as property, into marketable commodities that could be bought and sold. The Roman law favoured this increase in the value of rights arising from contract, allowing a similar latitude in the transfer of a

mere action *in rem* (C. 4, 39, 9), and also of a sum due by way of legacy. (C. 6, 37, 18.)

Rights and Duties.

A. Duties of Old Creditor to New Creditor.

1. In the absence of express agreement, a person selling a right *in personam* (*nomen*) must transfer all his subsidiary and accessory rights against the debtor. (D. 18, 4, 23, pr.)

A *filiusfamilias* owes a sum to Titius. Titius transfers his right to Gaius. Titius must also transfer his action against the *paterfamilias*. (D. 18, 4, 14, pr.)

A vendor of a *nomen* must transfer all mortgages, even those acquired after the date of the sale. (D. 18, 4, 6.)

2. In the absence of express agreement, a vendor of a *nomen* does not warrant the solvency of the debtor, but only that the sum alleged to be due is really due. (D. 18, 4, 4.)

B. Duties of Debtor to New Creditor.

1. The new creditor, after giving notice of the transfer to the debtor, can, and the old creditor cannot, sue the debtor. If, however, notice has not been given, the debtor must pay at the suit of the old creditor, but the old creditor in that case must transfer what he gains to the new creditor. (C. 8, 17, 4; C. 8, 42, 3.)

2. The debtor can avail himself as against the new creditor of all the defences he had against the old creditor.

Transvestitive Facts.

1. *The Mode of Transfer.*

Obligations, no matter how contracted, do not admit of any form of transfer. If I wish what is due to me to become due to you, I cannot bring it about in any of the ways by which corporeal things are transferred to another. But it is necessary that by my orders you should stipulate with him; and the result is that he is freed from liability to me, and at once becomes liable to you. This is called *novatio obligationis*. Now, without this *novatio* you will not be able to sue in your own name, but must take proceedings, like an attorney or procurator acting on my behalf (*ex persona mea*). (G. 2, 38-39.)

Until the time of Antoninus Pius a transfer could be effected only by *novatio*, or by the old creditor giving the new creditor a mandate to sue the debtor in his name. Suppose Gaius owed money to Titius, and Titius wished to transfer his claim to Maevius, he gave Maevius authority to sue Gaius in his name (D. 17, 1, 8, 5; D. 46, 3, 76), (*praestare vel mandare*

actiones). Under the formulary system this was effected by putting the name of the transferrer in one part of the formula, and of the transferree in another; thus, "if it appear that Gaius owes Titius 10 *aurei*, then let the *judex* condemn Gaius to pay 10 *aurei* to Maevius." (G. 4, 86.) In this case Maevius is called attorney for himself (*procurator in rem suam*). (D. 2, 14, 13, 1.) This system was necessarily imperfect, for until the *litis contestatio* the assignee of the claim (*nomen*) had no direct relation with the debtor. The next step was taken in the case of a sale of a *hereditas*. Antoninus Pius enacted that direct actions (*utiles actiones*) should be given between the buyer of the inheritance and the creditors and debtors of the estate. (D. 2, 14, 16; C. 4, 39, 1.) Between the time of Antoninus Pius and Diocletian, this priority was extended to the sale of any sum due (*nomen*). (C. 4, 15, 5; C. 4, 39, 7): and also to actions *in rem*. (C. 4, 39, 9.)

2. *The Consent of the Debtor* was not required to make the transfer valid, nor was it necessary that he should even know of the transfer. (C. 4, 39, 3.) A debtor paying his creditor without notice of the assignment, could not be compelled to pay over again to the assignee. (C. 8, 17, 4.)

3. *Restrictions on Transfer.*

Generally, there was no impediment to a transfer, except in the case where the transfer was made in order to vex a debtor with a more powerful creditor. (C. 2, 14, 2.) But Anastasius introduced a more effective protection to debtors. The evil that he redressed was the sale of debts for less than their amount to persons that made a trade of harassing debtors. He enacted that no transferree of a debt should recover more from the debtor than he had paid to the transferrer, with lawful interest. The exception was when coheirs or legatees divided debts among them, assigning to them a value in the division below their real amount. Anastasius did not interfere with transfers made by way of gift (C. 4, 35, 22), and this opened the door to evasion. Part of the debt was transferred for a sum intended really to be the price of the whole, and the residue of the debt was transferred as a gift. Justinian put a stop to this evasion by enacting that if a person meant to transfer a debt as a gift, he must give the whole, and not a part of it; and when anything was paid at all, the transferree was prohibited from receiving any more. (C. 4, 35, 23.)

Second—MERGER (*Novatio*).

Merger is the substitution of a new obligation for an old.[1]

Gaius gives Titius a loan of 100 *aurei*, and as part of the transaction requires Titius to promise the return of the money by stipulation. Is this a novation of the loan by the stipulation? If there were no stipulation, still Titius would be bound to restore the money lent (as *mutuum*): is not this equitable obligation then merged in the subsequent formal contract? Ulpian and Pomponius regard the stipulation as the principal obligation, and the payment of the money as merely the performance of the tacit condition upon which the stipulation is made. If an interval of time elapsed, and the parties at first relied upon the equitable obligation arising from the loan, then the making of a stipulation would undoubtedly be a novation. (D. 46, 2, 6, 1; D. 46, 2, 7.)

A slave receives a loan of 5 *aurei*, and after being manumitted promises to the borrower by stipulation to return the 5 *aurei*. This is a novation, although the loan created only a natural obligation upon which, after manumission, the slave could not have been sued. (D. 46, 2, 1, 1.)

1. Forms of Novation. Two contracts, and two only, had the effect of merging prior debts, namely, stipulation and the literal contract (*expensilatio*). As regards the latter, it is sufficient to refer to Gaius. (G. 3, 128-130.) When it fell into disuse, the stipulation remained the only contract by which novation could be made.

Maevius and Cornelius enter into a partnership to teach Grammar and share the profits. The agreement was concluded in writing, in these words:—"The above-mentioned things, it is agreed, shall be given and done, and nothing contrary to them; and if anything is not done according to this agreement, 20,000 *sestertii* shall be paid." This is a stipulation as to the penalty only. There is, therefore, no novation of the agreement, but each can sue the other by the action for partnership (*actio pro socio*). If it had been a stipulation to give and do in terms of the agreement, the *actio pro socio* would have been merged in the action on the stipulation. (D. 17, 2, 71, pr.)

2. The stipulation of the identical subject-matter of a previous contract had the effect of novation, only when it was intended to have that effect. Before the time of Justinian this question was determined by certain legal presumptions. In some cases such an intention was inferred; in others the presumption was rejected.

If it is the same person with whom you afterwards stipulate, novation takes place only if there is something new in the later stipulation; a condition, perhaps, or a day, or a surety [or *sponsor*] added or withdrawn. (J. 3, 29, 3; G. 3, 177.)

But what I have said about the *sponsor* is not a settled point; for the

[1] *Novatio est prioris debiti in aliam obligationem vel civilem vel naturalem transfusio atque translatio: hoc est, quum ex praecedenti causa ita nova constituitur ut prior perimatur.* (D. 46, 2, 1, pr.)

authorities of the opposite school hold that to add or withdraw him does nothing to make a novation. (G. 3, 178.)

Gaius stipulates with Cornelius for a carriage-road, and afterwards for a foot-path. The second stipulation is void. But if he had stipulated first for a footpath (*iter*), and then for a waggon-road (*actus*), there would have been a novation. (D. 46, 2, 9, 2.)

Gaius stipulates for the Cornelian farm, and afterwards from the same person for its value (*quanti fundus est*). As the objects of the first and the second stipulation are different, the one being for a farm, the other for its value, there is no novation, unless specially so intended. (D. 46, 2, 28.)

Gaius stipulates for a ship to be built, and if it be not built, for 100 *aurei*. If these two terms are taken as independent promises, then, supposing the ship was not built, Gaius could sue for the penalty, and afterwards for the non-performance of the contract to build. The second, however, is taken as a novation of the first, and thus the penalty is alone recoverable. (D. 44, 7, 44, 6.)

In saying that if a condition be added this makes a novation, we must be understood to mean that this is so if the condition is fulfilled. If it is not, but fails, then the former obligation still continues. (J. 3, 29, 3; G. 3, 179.)

But let us see whether he that brings an action on that score cannot be repelled by an *exceptio* of fraud or of agreement (*pacti conventi*); whether in fact this does not seem to have been done between them on the understanding that the thing should be demanded only when the condition in the later stipulation was fulfilled. Servius Sulpicius, however, thought that novation takes place at once, even while the condition is still in suspense, and that if the condition fails, no action can be brought on either ground, and that thus the property is lost. As the result of this view he also gave an opinion, that if a man stipulates with a slave for what Lucius Titius owes him, a novation takes place, and the property is lost, because no action can be brought against the slave. But in both these cases the law in use is different. For novation no more takes place in these cases than it would if, for a debt you owe me, I were to stipulate with an alien by the word SPONDES (Do you undertake?), though he can take no part in a *sponsio*. (G. 3, 179.)

When the obligation merged is conditional (*sub conditione*), the obligation in which it is merged is not binding until the condition is fulfilled. (D. 46, 2, 14, 1.) So, on the other hand, if the obligation merged is unconditional, and the stipulation is conditional (*sub conditione*) no novation takes place until the condition is fulfilled. (D. 46, 2, 8, 1; D. 46, 2, 14, pr.)

The ancients agreed that novation took place when that was the intention of the parties in entering into the second obligation. It was thus doubtful when they did so with that intention, and certain presumptions on this point were accordingly brought in at various times and in various cases. For this reason our constitution was issued, which determined most clearly that novation took place only if it was expressly declared by the contracting parties that this was the aim of their agreement. But if not, then both the original obligation remains and the second comes in besides; so that an obligation remains on two grounds, as our constitution decides, and as may be more clearly learned by reading it. (J. 3, 29, 3 A.)

This constitution (C. 8, 42, 8) applies to *delegatio* or *expromissio* as well as to *merger*.

Third—Substitution of a New Debtor.—*Novatio, Delegatio, Expromissio, Intercessio.*

Delegatio is when a debtor gives a creditor a new debtor to take his place. It also applies to a simultaneous change of debtor and creditor, the cause of obligation alone remaining the same. Thus it is delegation when a debtor of B., by the order of B., gives C. as debtor to D. (D. 46. 2, 11, pr.)

Further, novation takes away an obligation, as when you are in debt to Seius, and he stipulates with Titius for payment. For when a new person comes in a new obligation arises, and the first obligation is taken away and passes into the latter,—so much so, that sometimes, even although the later stipulation is useless, the first is taken away by the legal effect of novation. For instance, if Titius stipulates with a third party after his death, or with a woman or a *pupillus*, acting without authority from his *tutor*, for payment of your debt to him, in that case the property is lost. For the former debtor is freed, and the later obligation is no obligation at all. But the rule of law is not the same if a man stipulates with a slave ; for then the earlier debtor remains bound, just as if no stipulation had afterwards been made. (J. 3, 29, 3 ; G. 3, 176.)

B. owes money to A., and C. to B. B. delegates C. to A. The effects are, (1) B. is released from his debt to A. ; (2) C. is released from his debt to B. (C. 8, 42, 3); (3) C. is debtor to A. in place of B.

A. owes B. money. A. fraudulently induces C. to become debtor to B. in his stead, and accordingly C. makes the necessary stipulation. C. cannot plead the fraud committed by A. when sued by B. (D. 44, 4, 4, 20.)

A. owes money to B. C. owes money to A., but can defeat A. by a defence of fraud. C., however, allows himself to be delegated to B. in place of A. C. cannot resist the action of B., even if he allowed himself to be delegated by mistake, but he has an *actio mandati* against A. for the amount. (D. 46, 2. 12.)

A. owes B. money. C. owes A. nothing, but wishing to oblige him, becomes his delegate by stipulation. B. sues C. Can C., inasmuch as his intervention is gratuitous, plead that he ought not to be compelled to pay more than he can afford (*ut quatenus facere potest condemnetur*) ? No, although he could so defend himself as against A. (D. 46, 2, 33.)

A. thinks he owes money to B., but does not. C. thinks he owes money to A., but does not. C., by the order of A., promises to pay to B. the sum A. thought he owed him. In this case B. cannot compel C. to pay, but must on demand give him a formal release from the stipulation. (D. 39, 5, 2, 4 ; D. 44, 4, 7, pr.)

A. owes money to B. C. thinks he owes money to A., but does not. C. is delegated to B. as a debtor of A. Can C. refuse to pay B. ? No ; his only remedy is against A., for the money as paid by mistake. (D. 46, 2, 13.)

1. Novation or delegation was made either by stipulation or (when it existed) by *expensilatio*, or by *litis contestatio*. (D. 46, 2, 11, 1 ; D. 13, 5, 24.)

Titius owes money to Seius, and Maevius to Titius. Titius being pressed by Seius,

gives him a mandate to sue Maevius. Until Seius sues Maevius, or accepts payment of part of the debt from him, or informs him of the mandate, there is nothing to hinder Titius from suing Maevius. But if Maevius is delegated by stipulation to Seius, Titius is at once released from Seius, whether Seius receives anything from Maevius or not. (C. 8, 42, 3.)

Titius asks Sempronius, "Do you promise to pay me what Gaius and Seius owe me?" The debt of Gaius is quite unconnected with the debt of Seius. But, nevertheless, the effect of the stipulation is to relieve Gaius and Seius, and put Sempronius in their place. (D. 46, 2, 34, 2; D. 46, 2, 32.)

2. Although the consent of a debtor was not necessary in the cession of actions, the consent of the creditor was essential to delegation. (C. 8, 42, 1.) (*Nec creditoris creditori quisquam invitus delegari potest.*) (C. 8, 42, 6.) The reason is manifest. If a new debtor could be substituted without the consent of the creditor, an insolvent might be foisted upon him.

3. There must be an intention to make a novation.

Gaius is a creditor of Titius for 10, and of Seius for 15 *aurei*. He stipulates with Attius, who promises to pay what either Titius or Seius owes him. Paul says this is a novation of both debts. (D. 46, 2, 32, pr.) Marcellus held that the stipulation liberated neither Titius nor Seius, but that Attius could choose for which he would pay, and so determine who should be released. (D. 46, 2, 8, 4.) Celsus, who so far agrees with Marcellus, put it, however, on the right footing. He says if the intention was, as the words seem to express, to give Attius "choice," there is no novation; but if the understanding was that Attius was to pay for both, then both are at once released. (D. 46, 2, 26.)

Gaius promises a dowry to Titia, the wife of Maevius. Afterwards Sempronius, by stipulation with Maevius, promises a dowry. Gaius is relieved, and Sempronius becomes bound by the stipulation. The presumption is against any intention to double the dowry of Titia. If another agree to pay my debt, he releases me, if such was the intention; if not, he becomes a surety, and releases me only by payment. (D. 46, 2, 8, 5.)

Calpurnius stipulates with Telemachus for the farm of Sempronius, and afterwards with Licinius, for the same farm, reserving the usufruct to Licinius. This is not a novation, but if Licinius delivers the farm, keeping the usufruct, Telemachus must give the usufruct. If Telemachus gives the farm, Licinius is released. (D. 45, 1, 56, 7.)

4. In *expromissio* the same rules apply as in merger, when either contract is conditional. (D. 46, 2, 14, 1; D. 46, 2, 5; D. 46, 2, 8, 1.)

DIVESTITIVE FACTS.

The divestitive facts of contract may be grouped in five classes. The first class is "Actual Performance, or its Equivalents." The second class consists of the modes of "Release:" the debtor has not performed his duty, but the creditor waives his right. The third group is Prescription, or the extinction of obligations by lapse of time. The fourth class is "*Confusio*,"

or the extinction of an obligation when creditor and debtor become one and the same person. This mode occurred in inheritance. Lastly, an obligation was extinguished when an action was brought to enforce it (*litis contestatio*).

First—Actual Performance and its Equivalents (*Solutio*).

I. Actual Performance (*Solutio*).

Every obligation may be removed by the discharge of what is due, or if the creditor consents, of something else in its room. [But it is a question in this case whether (as our teachers hold) the debtor is legally freed; or whether (according to the view taken by the authorities of the opposing school) he is still legally bound as before, but ought to defend himself against the claim by an *exceptio doli mali*.] It matters nothing who discharges it, whether the debtor, or some one else for him; for he is freed even if some one else discharges it, and that whether the debtor knew it or not, and even if it was done against his will. Again, if the principal discharges it, those that came in on his behalf are thereby freed. Conversely, if the surety discharges the obligation, not only is he himself freed, but his principal as well. (J. 3, 29, pr.; G. 3, 168.)

(I.) Payment of Whole Debt.

The term "*solutio*" is sometimes used in a larger sense, not merely as equivalent to actual performance (D. 50, 16, 176), but to every divestitive fact (*liberatio*). (D. 50, 16, 47; D. 46, 3, 54.) The following points in regard to Actual Performance deserve special notice.

1. Generally, what amounts to or falls short of performance.

1°. When the promise is of personal service, performance by another than the promiser is not performance. Thus, if one has promised with his own labour to build a house, or make a boat, or the like, and has a surety, performance of the work by the surety, without the consent of the stipulator, does not acquit the promiser. (D. 46, 3, 31, pr.)

2°. When the contract is for delivery of the ownership of a thing, the promiser cannot obtain release by delivering something that cannot be the undisputed property of the receiver. (D. 50, 17, 167.) A creditor is entitled to the very thing promised, and is not bound to accept what the debtor may think a fair equivalent. (D. 46, 3, 99.) An exception was introduced by Justinian. In certain cases a creditor was required to take land, in payment of his debt, at a fair price, unless he could find a purchaser for it. (Nov. 4, 3.)

A lender is not bound to accept in lieu of payment a debt due to the borrower by

another person. (C. 8, 43, 16.) If the lender, however, consents, the borrower is released. (C. 8, 43, 17.)

Gaius promised Titius gold, and paid him in bronze. Gaius is not discharged, but he is not bound to give Titius the gold, unless Titius is willing to give him back the bronze. (D. 46, 3, 50.)

Gaius has promised by stipulation either Stichus or Pamphilus. In a fit of passion he wounds Stichus. The stipulator is not obliged to take Stichus, but may insist upon obtaining Pamphilus. (D. 46, 3, 33, 1.)

Sempronius has agreed to give Eros to Titius, but Eros is hypothecated to Maevius for 5 *aurei*. Titius receives Eros in ignorance of the hypothec. Can he, on finding it out, sue Sempronius? Yes, because Sempronius has not performed his contract. (D. 46, 3, 20.)

Gaius owes Maevius 10 *aurei*. Maevius agrees to accept Arethusa in payment. Titius has, unknown to Maevius, a usufruct of Arethusa. Maevius can sue Gaius for the 10 *aurei* without waiting until Titius actually claims his usufruct. (D. 46, 3, 69.)

Gaius agrees to give Titius the slave Stichus, the property of Maevius. Titius acquires the ownership of Stichus by *usucapio*. Gaius is released. (D. 46, 3, 60.)

Julius has by stipulation promised to give Pamphilus, who belongs to Sempronius. Sempronius dies, leaving to Pamphilus his freedom conditionally. Julius delivers Pamphilus. Is this a valid discharge, when Pamphilus, on the happening of the condition, acquires his freedom? Yes, because in this case, if Pamphilus had been freed (as will be seen presently, p. 638), Julius would have been released. (D. 46, 3, 33 pr.; D. 40, 7, 9, 2.)

Julius promises a slave. He gives Stichus *a statuliber*. This is not a good discharge (D. 46, 3, 72, 5); and the creditor, without waiting for the enfranchisement of Stichus, can sue Julius. (D. 46, 3, 38, 3.)

2. As stated in the text, payment may be made by a stranger without the consent or knowledge, and even against the wishes, of the debtor. This is an example of the principle that without a man's consent one may enrich but not impoverish him. (D. 46, 3, 23; D. 46, 3, 53; D. 3, 5, 39.) The payment, however, must be in the name and on account of the debtor. (D. 46, 3, 17.)

3. Who can accept payment, and give a valid discharge?

Throwing out of account the case of *tutores*, curators, and the like, we may say generally that only the creditor, or, if the creditor is dead, his heirs, or some person authorised by them, can accept payment (D. 50, 17, 180), unless in the contract the name of some other has been specially inserted, to whom payment could be made. (D. 46, 3, 12, 1.)

A procurator—that is to say, a person specially authorised to accept payment, or one to whom the entire affairs of another have been entrusted—can give a valid discharge (D. 46, 3, 12, pr.), but not a person engaged simply to conduct a lawsuit. (D. 46, 3, 86.)

Gaius requests Titius his debtor to pay the amount of his debt to Seia, the wife of Gaius, intending to make her a gift of the amount. Although Seia, in consequence of the rule prohibiting gifts between husband and wife, did not become owner of the money, still Titius was released. (D. 24, 1, 26, pr.).

Lucius Titius had a claim against Seius for 400 *aurei* on 2 *chirographa;* one for 100, and the other for 300. Titius wrote to Seius asking him to send the amount of one of the *chirographa* (for 100) by Maevius and Septicius. Seius sent by them also the 300 due on the other *chirographum*. Seius is discharged for the 100, but not for the 300, unless Titius actually receives the money or ratifies the payment. (D. 46, 3, 89, 1.)

Maevius stipulates for 10 *aurei* to himself or a slave to be given to Titius. If a slave is given to Titius, the promiser is released; but until that is done, Maevius can sue him for the 10 *aurei*. (D. 46, 3, 34, 2.) Titius cannot sue for the slave, neither can he release the promiser, except by actually receiving the slave promised. (D. 46, 3, 10.) Nor can payment be made to the heirs of Titius. (D. 46, 3, 81, pr.; D. 45, 1, 55.)

Julius stipulates for the payment of 10 *aurei* to himself or to Stichus, the slave of Sempronius. Payment may be made to Stichus, but not to Sempronius, who cannot give a valid discharge. Only the person named can accept payment. (D. 46, 3, 9, pr.)

A stipulation to give 10 *aurei* to A. (the *stipulator*), or to B., if a certain event happens, is good; so that, if the event happens, B. as well as A. can give a valid discharge. (D. 46, 39, 8, 4.) But a stipulation to give 10 *aurei* to A. (the *stipulator*), if a certain event happens, or 10 *aurei* to B., is void unless the event happens. If it does, either A. or B. can receive payment; if it does not, neither can. (D. 45, 1, 141, 7.)

"If my ship comes from Africa within three months will you give me or Titius 100 *aurei?*" Here the condition is ascribed to both, and if it is fulfilled, either can give a valid discharge for the money. (D. 45, 1, 141, 7.)

(II.) Payment of Part of the Debt.

Could a creditor be compelled to accept a part only, and not the whole of his debt? This question, we are told, gave rise to a difference of opinion, but it was held to be in the jurisdiction of the Prætor to diminish lawsuits, by requiring creditors to accept part as a discharge of part, of course not of the whole of the obligation. (D. 12, 1, 21.)

(III.) Apportionment of Payment among Several Debts.

When the same debtor owes to the same creditor more than one sum, and pays less than the whole amount due, which debt is wiped off, or are all the debts diminished *pari passu?* The following are the chief rules for determining this question:

Rule I.—The debtor may at the time of payment state which debt he intends to discharge. If he does not do so, the creditor may apply the payment to whichever debt he pleases. (C. 8, 43, 1.) But if the creditor makes election, he must apply the payment to the debt, that, if he were himself debtor, he would wish to have discharged. (D. 46, 3, 1.)

A. is creditor of B. for two different sums. For one sum C. has become surety, for the other D. B. pays a sum to A. A. can apply it to wipe off the debt for which C. is surety, or for which D. is surety, whichever he pleases. (D. 46, 3, 5, 1.)

A dispute arose between Titius and Gaius as to interest for a sum lent by the former to the latter. Gaius paid a certain amount, saying it was for reduction of the

principal, but Titius held it to be merely in payment of interest. When the cause was tried, the Court held that the money paid by Gaius for interest could not be recovered, but that no interest could in future be exacted. The question then came to be whether the amount paid by Gaius was for interest or principal. It was held to be part of the principal, because Gaius had paid it as such. (D. 46, 3, 102, 1.)

Titius owed Maevius 20 *aurei*, about which there was no dispute, and 30 *aurei* if the risk of a slave who was killed attached to him. Titius paid 15 *aurei* without saying which debt he desired to have discharged. Maevius must apply it to the discharge of the amount not in dispute. (D. 46, 3, 1.)

Cornelius owed Julius 10 *aurei*, the price of a young slave, and he had also promised, without stipulation, to make Julius a present of 5 *aurei*. Cornelius paid 5 *aurei* without saying it was in part payment of the price of the slave. Could Julius apply it to discharge the promise of 5 *aurei*? Prior to Justinian such a promise could not be enforced, but the money, if paid, could not be recovered. Could, then, Julius apply the money in payment of the present? No; because he was bound to apply it to the discharge of the debt that the debtor would wish to see released. (D. 46, 3, 94, 3.)

RULE II.—If neither party has specifically assigned the payment to any debt, and if the debtor is in arrear for interest, the interest must first be paid off; but as between principal debts, that is to be discharged which is most onerous for the debtor. (C. 8, 43, 1.)

Titius accepted a loan, and promised interest at 5 per cent., at which rate he paid for a few years. Afterwards by mistake he paid at the higher rate of 6 per cent. Could the excess paid as interest be applied to reduce the principal debt? Yes, if paid by mistake. (D. 46, 3, 102, 3.)

Titius has made several contracts with Seius. Under some of the contracts Titius has already become debtor to Seius; under others he will be debtor for given amounts within a certain time; while others are conditional, and it is uncertain whether they will ever take effect. If Titius pays anything, it must be applied first to the sums already accrued due, and next to those certain to be due, but not yet matured. (D. 46, 3, 3, 1; D. 46, 3, 103.)

Gaius owed Sempronius 20 *aurei* for a horse. He also owed him 15 *aurei* that had been deposited with him for safe custody, and which he had, by gross negligence, lost. Gaius paid 20 *aurei*. It must be applied as to 15 *aurei*, to pay the deposit, for non-payment of which Gaius is exposed to infamy. (D. 46, 3, 7.)

Maevius owes Titius 10 *aurei*, and 20 *aurei* on a contract secured by a pledge. He pays 10 *aurei*. In the absence of any statement by Maevius, he is understood to discharge the secured debt, and thereby partly relieve his property. (D. 46, 3, 5, pr.)

Galbus owes Cornelius 100 *aurei*; he is also surety for Titius to Cornelius for 80 *aurei*. Galbus pays 50 *aurei*. It must be employed to reduce his own debt, not the sum for which he is only surety. (D. 46, 3, 4; D. 46, 3, 97, pr.)

A. is surety to D. in behalf of B. for 10, and of C. for 20 *aurei*. A. pays D. 10 *aurei*. Whose debt is it to be applied to? If A. has said nothing, it is to be taken in discharge of the debt of longest standing. (D. 46, 3, 24.)

RECEIPTS (*Apochae*).

A written acknowledgment of payment of debt (*apocha*) was not conclusive, but was binding only in respect of the sum actually received. (C. 8, 43, 6.) It was, however, esteemed

a more unequivocal evidence of payment than the restoration of a chirograph, or written obligation to the debtor. (C. 8, 43, 14.)

II.—Tender (*Oblatio; Depositio et Obsignatio*).

A distinction existed between a simple offer to pay (*oblatio*) and a formal tender. The latter was made by depositing the money due in a sealed bag (*depositio et obsignatio*), either in a temple, or in some place by order of a court. (C. 8, 43, 9; C. 4, 32, 19.) From certain passages it might be inferred that a formal tender or deposit was unnecessary. (C. 4, 32, 6; D. 45, 1, 122, 5.) Other passages seem to deny any effect to such offer unless followed by formal deposit. (D. 26, 7, 28, 1.) A reconciliation is suggested to this effect, that an informal offer is a discharge of the debt, and stops the currency of interest, when interest results from the delay (*mora*) of the debtor; but that the accessories of the debt, pledges, interest due by agreement, etc., were not released without the formal tender. (C. 4, 32, 9.)

Titius promised Dama or Eros. Titius offered to deliver Eros, but the *stipulator* delayed acceptance. Then Eros died. Titius was not obliged to deliver Dama, because it was not his fault that the *stipulator* did not take Eros. (D. 45, 1, 105.)

Gaius owed Cornelius 10 *aurei*, and visited him with the money in order to pay him. Cornelius, without any good reason, refused to take it, and Gaius, taking home the money, accidentally lost it. Gaius could not be compelled to pay the 10 *aurei*. (D. 46, 3, 72, pr.)

A *tutor* who offers and deposits, under seal, the amount he owes, is released from the obligation to pay interest. (D. 22, 1, 1, 3.)

When money had been so deposited the debtor was released, and the remedy of the creditor was only against the person with whom the deposit was made in order to recover what had been deposited.

III.—Impossibility of Performance is occasionally equivalent to actual Performance. (*Interitus rei.*)

A promise to do that which was from the first impossible, is void; is it also void if the thing becomes impossible only after the promise is made? Here we do not speak of the inability of a particular man to do what he promised, as if he becomes insolvent, but the impossibility of anyone doing what has been promised. When the impossibility has arisen from no fault of the promiser, as when he has agreed to deliver a thing, and the thing perishes, generally he is discharged.

Titius promises to Gaius, by stipulation, so many coins contained in a particular chest. Owing to no fault of Titius the chest and money are lost. Titius is not obliged to pay an amount equal to the sum lost. (D. 45, 1, 37.)

Stichus is promised to Maevius by Seius. Stichus dies. Is Seius released? If it was not the fault of Seius that Stichus died, he is released. (D. 45, 1, 33.) If the slave, however, had been asked for by Maevius, and refused, or if Seius killed him without a reasonable excuse, he must pay the value of Stichus. (D. 45, 1, 23; D. 45, 1, 96.)

Titius promises Arethusa to Gaius. Arethusa is manumitted. Is Titius released? Not if Arethusa belonged to Titius. But if Arethusa did not belong to Titius, and the manumission was not due to his fraud or fault, Titius is no longer bound. (D. 45, 1, 51.)

Maevius promises Eros to Sempronius. Eros is taken captive. Is Maevius released? If Eros did not belong to him, certainly. If Eros did, then it would appear that Maevius was bound only in case Eros was recovered, or again fell under his control. (D. 46, 3, 98, 8.)

Gaius promised Pamphilus to Cornelius. Gaius did not give Pamphilus, and compelled Cornelius to resort to legal proceedings, pending which Pamphilus died. Gaius in compelling Cornelius to take legal proceedings, is guilty of undue delay, and must pay the value of Pamphilus. (D. 45, 1, 82, 1-2.)

Sempronius promises to give a small plot of ground to Maevius. After doing so, he buries a dead body in the place, and thus makes the land *extra commercium*. Sempronius must pay its value. If the land had belonged to another, who had buried a body in it, he would have been released. (D. 45, 1, 91, 1.)

Julius promises to Titius a plot of building ground belonging to Gaius. Gaius builds upon it. Can Titius sue Julius on the stipulation for the value of the ground? Celsus gives an opinion in the negative (D. 32, 1, 79, 2), but Paul disputes and denies his opinion. (D. 46, 3, 98, 8.) The opinion of Celsus was grounded on the change in the condition of the thing being such as to render delivery of the ground without the building impossible. Paul replies that the ground is a part of the house, and indeed the principal part, to which the building is in law only accessory, and that, therefore, the value of the land must be paid.

Seius promises a usufruct of his farm to Maevius for the next ten years. By the fault of Seius, Maevius is kept out of the farm five years. Maevius can, nevertheless, sue for the ten years. (D. 7, 1, 37.)

Second—Releases—Formal and Non-formal.

Actual performance is called the natural mode of dissolving an obligation (*naturalitur resolvitur*), in contrast with a formal release (*civiliter resolvitur*) by the provisions of the law. The maxim was that every contract had its appropriate divestitive fact, just as it had its appropriate investitive fact, and that these two classes of facts, the investitive and divestitive, must correspond.[1] Hence a contract formed *per aes et libram* must be dissolved *per aes et libram;* a contract by stipulation must be dissolved by a contrary stipulation; a contract formed by writing (*expensum ferre*), by written release (*acceptum ferre*).

[1] *Prout quidque contractum est, ita et solvi debet* (D. 46, 3, 80); *nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est.* (D. 50, 17, 35.)

Such was the maxim with regard to formal releases, and when the obligation was thereby taken away, all the collateral securities (sureties, pledges, etc.) were at the same time released. The obligation was extinguished as if it had never existed.

(I.) Formal Releases.

1. Release of stipulation—*Acceptilatio.*

1°. This is the mode of release primarily adapted to verbal contracts, and hence applies not only to the stipulation, but also to the verbal contract of services of a manumitted slave (*obligatio operarum*). (D. 46, 4, 13.)

An obligation may be removed by crediting the debtor with payment (*acceptilatio*). This is done by an imaginary payment. If Titius has a debt due him on a contract made by words, and wishes to remit it, he can do so by allowing his debtor to say these words :—"What I have promised you, do you regard as received?" and by himself answering, "I do." This acknowledgment may be in Greek as well, provided only it be done in the same form of words as is usually employed in Latin. (J. 3, 29, 1 ; G. 3, 169.)

Acceptilatio is the formal and solemn acknowledgment by the creditor that his claim has been satisfied ; and having made such an acknowledgment, the creditor was estopped from alleging that in point of fact there was no payment. *Velut solvisse videtur is, qui acceptilatione solutus est.* (D. 46, 4, 16, pr.) Hence it is called by Gaius a fictitious payment (*imaginaria solutio*). English lawyers would probably explain such a release as operating, like the *expensilatio*, by estoppel.

Several stipulations could be dissolved at the same time by an *acceptilatio.* (D. 46, 4, 6 ; D. 46, 4, 18, pr.) It could not be conditional or postponed. (*Sub conditione* or *in diem.*) D. 46, 4, 4 ; D. 46, 4, 5.)

2°. *The Aquilian Stipulation.*—A wide extension was given to *acceptilatio* by *formulae* introduced by Aquilius Gallus, the colleague of Cicero, of whom mention has been already made.

In this fashion, as we have said, contracts by words are dissolved, and these only, not the rest. For it seemed fitting that an obligation made by words might be dissolved by words. But a debt due on any other ground may be reduced to a stipulation, and dissolved by crediting the debtor with payment (*acceptilatio*). As a debt may properly be paid in part, so a debtor may be credited with part payment. (J. 3, 29, 1 ; G. 3, 170.)

A debt may be properly paid the creditor in part. But whether a debtor can be credited with part payment is questioned. (G. 3, 172.)

A form of stipulation has been handed down to us, commonly called *Aquiliana*, by which any obligation whatever can be reduced to a stipulation, and so taken away by crediting the debtor with payment (*acceptilatio*). It works a novation on every obligation, and was framed by Gallus Aquilius as follows :—"Whatever, on whatever ground you are, or shall be bound to give me or do for me now or on some after day, and all for which I may now or hereafter bring an action or make a claim, or

for which I may follow you up before a magistrate, and all you have, hold, or possess of mine, or which only your wilful wrongdoing keeps you from possessing, all this, according to the value to be set on each item, Aulus Agerius has stipulated shall be given to him, and Numerius Negidius has undertaken so to do." Again, conversely Numerius Negidius put the question to Aulus Agerius, "Whatever I have undertaken for you this day by the *stipulatio Aquiliana*, do you regard as received in full?" and Aulus Agerius answered, "I regard it as received," and, "I have entered it as received." (J. 3, 29, 2.)

The *acceptilatio*, even if wholly gratuitous, extinguished the obligation. It was thus convenient even when the obligation was discharged by payment. If the debtor paid what he owed, and obtained a written discharge (*apocha*), he might be troubled by the allegation that, in point of fact, although he had got a receipt, he had not paid the debt. If, however, the release were by *acceptilatio*, this objection could not be raised, and hence *acceptilatio* was the safest form for receipts. (D. 46, 4, 19, 1.)

3°. *Acceptilatio* of part of a debt.

Ulpian resolves the difficulty stated by Gaius in the following manner: If the obligation is divisible, then it may in part be released by *acceptilatio;* but if it is indivisible, the *acceptilatio* is void unless it covers the whole obligation. (D. 46, 4, 13, 1.) The distinction between divisible and indivisible obligations may be illustrated by the following examples:—

"Of the 10 *aurei* I promised you, do you admit five as received?" I do. This release is valid for 5 *aurei*. (D. 46, 4, 9.)

Titius owes *a slave* to Sempronius. He asks Sempronius whether he will release him from giving *Stichus*. Sempronius agrees. Is the release from Stichus a release from the general obligation of giving a slave? Yes; the question of divisibility does not arise, for inasmuch as Titius could perform his obligation by giving Stichus, the release from Stichus is a discharge of the whole obligation. (D. 46, 4, 13, 4.)

Titius owes Arethusa to Gaius. Gaius dies, leaving as heirs Maevius and Julius. Can Maevius release Titius in respect of his share of the inheritance? Yes, although Arethusa cannot be divided. (D. 46, 4, 10.)

Titius owes Maevius a slave or 10 *aurei*. Maevius releases him from 5 *aurei*. What right remains to Maevius? He can sue Titius for 5 *aurei* or a share of the slave. (D. 46, 4, 17.)

Titius owes an urban or rural praedial servitude. Can he be released from part of the servitude? No, because such a servitude is indivisible. (D. 46, 4, 13, 1.)

Titius owes a usufruct of his estate. Can he get a release in respect of part of the estate, while remaining bound to give a usufruct of the remainder? Yes. (D. 46, 4, 13, 1.)

Titius is bound to give a carriage-way (*via*). The creditor releases him from a footpath (*iter*). This is wholly invalid; because, although a footpath is included in a roadway, and in a sense a part thereof, it is a part not of a physical whole, but of a legal or imaginary whole; but if released from *iter* and *actus*, the debtor is released from *via*. (D. 46, 4, 13, 1.)

Titius has promised a farm simply, which, of course, meant the ownership of it. He is released from it in respect only of a usufruct or right of way. This is invalid, because a usufruct is not a part of the ownership in the sense required. (D. 46, 4, 13, 2.)

Titius promises a usufruct of land, and accepts a release of the use (*usus*) of it. Is this valid? If the creditor thought a use only was due, his release is void. If, however, he knew that the usufruct was due, and intended to reserve the produce (*fructus*), releasing only the use, the release was valid. This shows that the relation between usufruct and use was much closer than between ownership (*dominium*) and usufruct. Usufruct and use are considered as more readily interchangeable, or rather they are regarded less as distinct species than as one species varying in the liberality of its interpretation according to the terms of the grant. (D. 46, 4, 13, 3.)

Titius has promised Stichus. He is released by the same *acceptilatio* from Stichus, and also from Pamphilus, who is not due. The release is valid for Stichus, the addition of Pamphilus being treated as surplusage. (D. 46, 4, 15.)

4°. Who can release by *acceptilatio?*

Although we have said that *acceptilatio* is accompanied by an imaginary payment, yet a woman, without authority from her *tutor*, cannot credit a debtor with payment, although payment can be made her in any other form without authority from the *tutor*. (G. 3, 171.)

One of several co-creditors can release a debtor by *acceptilatio* without the consent of the rest. The Aquilian law, as we have seen, imposed a penalty on an *adstipulator* who took this means of defeating the *stipulator*.

2. Release *per aes et libram*. *Nexi liberatio.*

There is, too, another sort of imaginary payment, by means of a piece of bronze and a balance. This kind is received in certain cases only, as when the debt that is due has been so contracted, or is grounded on a judgment. (G. 3, 173.)

There are employed not less than five witnesses and a balance-holder. Then he that is being freed ought to speak thus:—"Whereas I am condemned to pay you so many thousand *sestertii* on such and such a ground (as according to the terms of the conveyance), with this bronze and balance of bronze I pay and free this balance both first and last in accordance with public law." Then he strikes the balance with an *as*, and gives it him from whom he is freeing himself, as if by way of payment. (G. 3, 174.)

As a will was made anciently *per aes et libram*, it followed that a legacy also could be discharged by this mode of release. Thus the form applied to the release (1) of contracts made *per aes et libram* (*nexum*); (2) of judgment debts; and (3) of legacies. The propriety of this mode of discharge is evident in the case of *nexum* and legacies, but is not so clear in the case of judgment debts. (G. 3, 175.) Gaius, also, informs us that this mode of release was confined to what could be counted or weighed; or, as some add, measured. He says nothing, in the text as it remains, regarding the formation of the contract of *nexum;* and the whole subject, on account of the paucity of evidence, is involved in obscurity. This formal release seems, as in the case of *acceptilatio*, often to have accompanied actual payment. (Livy, 6, 14.)

3. The literal and real contracts should be dissolved by methods analogous to their investitive facts. An entry (*acceptum ferre*) wiped out a written debt, and formed, doubtless, the correct mode of release. So, as a contract *re* was formed

by the delivery of some article, it was dissolved by the return of the same article.

4. The consensual contracts.

Further, obligations contracted by consent may be dissolved if both change their minds. If Titius and Seius mutually agree by mere consent that Seius shall have a farm at Tusculum on buying it for one hundred *aurei*, and thereafter, while performance has not yet followed—that is, while the price has not been paid, and the farm not delivered—they determine to depart from the contract of sale, then mutually they are freed. It is the same with hiring and letting, and with all the contracts that come down from consent, as has already been said. (J. 3, 29, 4.)

(II.) Non-formal Releases (*Pactum de non petendo*).

The special importance of pacts in reference to the divestitive facts of contract has been already pointed out. The pact not to sue practically superseded the formal releases. But, nevertheless, some differences remained, and it was occasionally important, whether a formal contract was dissolved formally or by mere pact.

1. A defective *acceptilatio* was construed as a pact not to sue, if the intention of the creditor was to release the debtor, and the form merely of the *acceptilatio* was defective. (D. 2, 14, 27, 9.) If, however, the creditor did not intend to release the debtor, but went through the form of *acceptilatio*, knowing it to be void, it was held that he could sue the debtor, as he had never really consented not to sue. (D. 46, 4, 8, pr.) In like manner, if a contract *re* were dissolved by *acceptilatio* simply, without resorting to the Aquilian stipulation, according to the old law, the *acceptilatio* had no effect. But in this case also a favourable construction was adopted: the formal release was held to imply an agreement not to sue, and an action to enforce the original contract would be defeated by the *exceptio doli mali* or *pacti conventi*.

2. A formal release must be unconditional; an agreement not to sue (*pactum de non petendo*) might be limited and conditional.

Titius owes Maevius 10 *aurei* at the end of six months. Maevius offers to release him if he pays 8 *aurei* at the end of the second month. The agreement is not made by stipulation. Can Titius, by offering the 8 *aurei* at the proper time, protect himself from liability for the 10 *aurei* at the end of six months? Yes. If Maevius sues him, he can plead the agreement as a defence. (D. 2, 14, 41.)

3. A formal release either wholly extinguishes the obligation or does not affect it; an agreement not to sue may operate as

a release to some of the parties bound, and not to others. If the pact is in favour only of the person making it, or of some definite person, it is said to be a pact *in personam;* but if it operates generally in favour of all persons bound, it is said to be *in rem.* (D. 2, 14, 7, 8.) If the agreement is restricted (*pactum in personam*), it avails only for the persons in whose favour it is made, and not even for their heirs. (D. 2, 14, 25, 1.)

Titius owes money to Gaius. Gaius writes to Titius, "I will not sue you." The heir of Titius cannot plead this agreement. But if Gaius wrote, "I will release that debt," the heir of Titius and all others interested are protected. (D. 2, 14, 17, 3.)

"I will not sue," may mean I will not, but my heirs may. "You will not be sued," may mean you will not, but your heirs will be sued. The question is as to the intention of the parties: the words used have effect only in so far as they indicate such intention. (D. 2, 14, 57, 1.)

4. A formal release of one of several co-obligees releases all; an agreement not to sue may be limited to the release of one only, the others remaining bound.

If one of several co-creditors (*correi stipulandi*) formally releases a debtor, the debt is wholly extinguished, and the debtor is at the same time released from the claims of the other creditors. (D. 46, 4, 13, 12.)

If one of several co-debtors is formally released, all the other debtors are at the same time discharged. This follows from the nature of *acceptilatio.* (D. 46, 4, 16, pr.)

Such was the rule applicable to formal releases; but the same technical reasoning was not extended to informal agreements not to sue. As such agreements were not recognised except in equity, so by equity must that recognition be modified and interpreted. The object of the Prætor was to give effect to the intentions of the parties as against the strictness of the old legal formalities, and therefore the real agreement between the parties formed the law that was made to govern the case. If the agreement were restricted to the person making the release, or to whom release was given, unquestionably the others would not be affected. But suppose the agreement were quite general, that the creditor agreed not to sue at all, was such an agreement effective in regard to the other debtors or creditors, who were ignorant of it?

(1.) Does a pact not to sue, made by one of two co-creditors, release the debtor from the other creditor? It would of course be manifestly unjust to give a creditor the power of destroying his co-creditor's claim. With this appears to agree a somewhat difficult text of Paul. According to the ingenious interpretation of Savigny, the text reads thus:—"If one of two bankers in partnership makes a pact not to sue a debtor of the firm, is

the defence accruing to the debtor from this pact available against his partner? Neratius, Atilicinus, and Proculus say it is not, even although the pact is perfectly general (*pactum in rem*); for all that the imperial constitutions have settled is that each partner can sue for the whole debt. [The same rule holds in the case of two co-creditors.] Labeo also is of the same opinion, for one of them cannot make a novation, although one can give a valid discharge; just as payment of money that has been borrowed from those under our *potestas* may lawfully be made to them, although they cannot make a novation. And that view is correct." (D. 2, 14, 27, pr.) In the Digest the sentence enclosed in brackets comes after the text, but Savigny thinks the writer meant to carry back the proposition to the place in which it is put.

(2.) Does a pact not to sue made to one of two co-debtors release both? Here the difference between a formal and informal release becomes apparent. By *acceptilatio* the legal chain is broken, and hence both are released; but when there is only an agreement having no other force than equity gives to it, the Prætor applies a different rule. Generally speaking, the release of one is not the release of the other. But if they are so connected that the release is not effective unless it is in favour of the co-debtor also, then both are released. (D. 2, 14, 21, 5.) Suppose A. and B. are jointly bound for a debt, and that each is a surety for the other, then neither of them can be effectually released unless both are. Here it might fairly be presumed that the creditor intended to release both, for unless he did so, his general release had no effect.

5. A formal release of the principal is a release of the surety, and a formal release of the surety is a release of the principal; but an informal release of one of them may have no effect on the other. (D. 46, 4, 13, 7.)

In the case of pacts a technical difficulty arises that is not felt in *acceptilatio*. *Acceptilatio* operates as an annihilation of the debt, but a pact only as an equitable defence. Now it was a rule of the Roman law that one freeman could not act for another. How, then, could a surety reap the benefit of a pact made with his principal, and not with himself, or how could a principal avail himself of a pact made only by his surety? The answer was that such a pact made by A. on behalf of B. could be pleaded in favour of B. only when it was A.'s interest, and so in effect the pact was for A. solely. (D. 2, 14, 27, 1.)

Generally speaking, a pact not to sue (*in rem*) made with a debtor was available as a defence to the surety. The exception was when there was an express or an implied understanding that the debtor alone should be released. (D. 2, 14, 22.) The reason is manifest. If the surety could be sued, he could turn back on the debtor and compel him to make good the amount paid on his behalf, and so the release of the debtor would be nugatory. Hence if the surety had released the debtor from his obligation to refund what the surety might be compelled to pay, he could not avail himself of any agreement made with the debtor. (D. 2, 14, 32.)

Such reasoning did not apply when a general agreement not to sue was made with the surety. It was immaterial to the surety whether the debtor continued bound or not. Hence, as a general rule, a pact made with the surety was no defence to the debtor. (D. 2, 14, 23.) If, however, it were understood that the debtor also was to be included in the release, the debtor, although he could not directly plead the agreement, which had not been made with himself, could allege that the action was brought against good conscience, and so under that wide defence (*exceptio doli*) find shelter. (D. 2, 14, 25, 2 ; D. 2, 14, 26.)

The rules may be thus summarised. A general agreement not to sue made with a principal debtor operated in favour of the surety, unless the contrary was proved to be the intention of the parties ; a general agreement not to sue made with a surety did not operate in favour of the principal debtor, unless it was proved that the parties intended it to have that effect.

Third—Prescription.

In considering the subject of prescription, or the extinction of rights through lapse of time, a vital difference is to be remarked between property and obligation, between rights *in rem* and rights *in personam*. In the case of property the early Roman law had *usucapio ;* but *usucapio* operated directly as an investitive fact, as a mode of converting an imperfect into a perfect title ; it directly established the possessor, and so only indirectly and inferentially disestablished the owner. In the case of obligations, or rights *in personam*, which consist of duties to do or forbear, the *debitor*, from the nature of the case, cannot have possession. Prescription, therefore, if it exists at all, must operate in the first instance against the creditor, and so

indirectly in favour of the debtor. Prescription, as applied to obligation, can take no other form than a refusal to give the creditor an action. It thus happened that while the Roman law had prescription in regard to property—namely, *usucapio* —it had no analogous provision for obligations. The first dawn of a law of prescription as applied to rights *in personam* was when the Prætor, in introducing new actions, limited them to a fixed period, generally a year. This limit was in perfect harmony with the general principles of Prætorian intervention. His jurisdiction was regarded as essentially extraordinary, evoked by some clamant injustice, and not to be stretched further than was necessary. If, therefore, an aggrieved person did not choose to apply for relief within the year, the old civil law was simply allowed to take its course.

We must here observe that actions proceeding from a statute or *senatus consultum*, or imperial constitution, were available for all time, until imperial constitutions fixed certain limits both for actions *in rem* and actions *in personam;* those that depend on the Prætor's peculiar jurisdiction live, for the most part, for a year only (for the power of the Prætor was for a year only), but sometimes they are extended to all time, that is now up to the limit introduced by the constitutions [copying the regular law]. Of these latter instances are the actions given to the *bonorum possessor* and the rest that stand in the place of the heir. The *actio furti manifesti* too, although proceeding from the Prætor's own jurisdiction, is yet given for all time. For the Prætor thought it absurd that such an action [fixing a money penalty instead of a capital penalty] should be limited to a year. (J. 4, 12, pr.; G. 4, 110-111.)

Constantine enacted that a claim of ownership should be barred after forty years (C. 7, 39, 2), but the first enactment establishing prescription for obligations generally was made in A.D. 424, by Theodosius II. It fixed a period of thirty years for the extinction of all actions, whether *in rem* or *in personam*. (C. Th. 4, 14, 1; C. 7, 39, 3.) Another law passed by Anastasius (A.D. 491) makes a prescription of forty years for the cases not included in the previous enactment. (C. 7, 39, 4.) It is difficult, considering the general terms of the first enactment, to say what these cases were. Finally, Justinian made the term thirty years for all actions, except the *actio hypothecaria*, which had a special prescription of forty years; but claims for freedom were imprescriptible (p. 185). In order that prescription should operate as a divestitive fact, the following conditions were necessary :—

(1.) A right of action accrued.
(2.) Absence of claim for
(3.) A certain time.

The effect of incapacity to sue on the part of the creditor, and of *mala fides* of the debtor, will be considered separately.

1. Prescription begins to run from the moment that the right of action exists, and is not exercised. (C. 7, 40, 1, 1; C. 5, 12, 30.) Recurring to the technical language already explained, it is from the time when *dies venit*, not from the time when *dies cessit*. Hence, if an obligation is conditional, prescription begins to run, not from the date of the agreement, but from the moment when the condition is fulfilled; in a deferred obligation (*in diem*), only when the time has elapsed, and the creditor can sue. (C. 7, 39, 8, 4.) It is a more difficult question, at what moment prescription began to run when no time or condition was fixed in the contract. The general rule in contracts was, that if no time was fixed, performance could be at once demanded. (J. 3, 15, 2.) But does a right of action arise before a demand is made? In one passage, Ulpian adopts the view of the English law, against which Austin argues strenuously, that the action is itself a demand. (D. 16, 3, 1, 22.) From this it follows that a plaintiff will not be defeated in an action, merely because he has not, previous to the commencement of the action, made a demand for performance. It would therefore follow that, for the purpose of prescription, time begins to run from the moment the contract is made, unless either the contract is conditional or it fixes a time for performance. Austin's criticism of the rule is quite justified from the standpoint of theoretical jurisprudence. But the point is one of small practical importance, except as affecting the question of costs. A creditor who sues a willing debtor without first asking him to perform his contract, ought to be made to pay the costs incurred by the debtor.

A case of special importance is in obligations of periodical payments. These payments may be either of principal or of interest.

(1.) Prescription of a principal debt through non-payment of interest. When a debt bears interest, prescription begins to run from the date of the last payment of interest, not from the time that the debtor could have brought an action to recover the principal debt. If, however, the loan is made for a definite period, prescription does not run until that period is expired, even although interest may have been due and not paid, because prescription cannot run before the right of action accrues, although it need not begin until afterwards. (C. 7, 39, 8, 4.)

(2.) When the periodical payment is not of interest but of principal, as when a perpetual rent is imposed upon land by testament, prescription begins from the last payment. (C. 7, 39, 7, 6.)

2. The prescription must not be interrupted; there must be a continuous non-claim.

(1.) An acknowledgment of the debt (*agnitio*) by the debtor interrupts the prescription, and forms a new point of departure, from which the prescription is to run. Giving a new written security (C. 7, 39, 7, 5), payment of part of the debt, or "constituting" for the payment (D. 13, 5, 18, 1), are such acts of acknowledgment. If there are several creditors or debtors, acknowledgment by one binds or releases all the rest. (C. 8, 40, 5.) But a mere demand of the debt, or a transfer of the debt to a third party (*cessio actionis*), did not break or interrupt the prescription.

(2.) Action brought by the creditor. Anciently no action availed to interrupt prescription until it had reached the *litis contestatio* (see V., Divestitive Facts), but under the later procedure, it was the summons and transmission of the plaint (*libellus conventionis*) that broke the prescription. (C. 7, 40, 3.) A reference to arbitration also interrupted the prescription (C. 2, 56, 5, 1); but not a demand made before the wrong tribunal. (C. 7, 21, 7.)

Once a case was before the court, it was subject to the rules laid down with reference to *legitima judicia* (G. 4, 104-105), or else was imprescriptible. (D. 50, 17, 139, pr.) It would appear, however, that the thirty years' prescription was applied; (C. Th. 4, 14, 1, 1), a term changed by Justinian to forty years from the last-brought action. (C. 7, 40, 1, 1.)

3. The length of time required.

(1.) In Prætorian actions, as stated in the text, the prescription was generally for a year. Paul (D. 44, 7, 35, pr.; D. 25, 2, 21, 5) and Ulpian (D. 4, 9, 3, 4) drew the line thus:—Penal actions introduced by the Prætor were confined to one year's prescription; but actions for the recovery of property, even when due entirely to the Prætor, were perpetual, like the actions of the civil law. The *actio doli mali* was penal, and at first prescribed in a single year, but the period was extended by Constantine to two years. (C. 2, 21, 8.) Prætorian actions, if originally unlimited, fell under the prescription of the next class—the civil actions.

(2.) In all other actions the period was thirty years, with the following exceptions:—

1°. Justinian extended the prescription to 100 years when the action was by a church or pious foundation, and related to succession, legacies, gifts, or contracts of sale. The same time was given when money was left for redemption of captives

(C. 1, 2, 23.) This privilege was extended (A.D. 535) from the East to the West, to the whole *Ecclesia Romana.* (Nov. 9.) Afterwards (A.D. 541) the time was reduced to forty years. (Nov. 111.)

2°. Actions by municipalities were included in the foregoing, but it may be inferred from Nov. 111 and Nov. 131, 6, that in this case the time was reduced to thirty years.

3°. Such actions as the imperial exchequer (*fiscus*) could bring in common with private persons were subject to the usual prescription of thirty years (D. 49, 14, 6); but actions exclusively competent to the exchequer were barred by the lapse of twenty years, even when other penal actions were not subject to any prescription. (D. 44, 3, 13, pr.; D. 49, 14, 1, 3.) To this rule two exceptions existed: (1) taxes were always imprescriptible (C. 7, 39, 6); and (2) the right of succession to vacant inheritances was limited to four years. (C. 7, 37, 1.)

The *bona fides* of the debtor or capacity of the creditor.

In *usucapio* there must be *bona fides* of the possessor; and when Justinian extended to the *longi temporis possessio* all the incidents of *usucapio*, he enacted a similar condition. (C. 7, 39, 8, 1.) But in prescription of actions the condition of *bona fides* was immaterial; the defence lies not in the positive claim of the debtor to release, but in the denial to the creditor of his remedy for his remissness. Manifestly the debtor need not plead *bona fides* to take advantage of the plea of prescription.

Prescription ran against women and persons who were out of the jurisdiction, or engaged in military service: but not against persons under the age of puberty, even when they had *tutores.* (C. 7, 39, 3.)

Fourth—Confusio.

Confusio occurs when a creditor becomes heir to a debtor, or a debtor becomes heir to a creditor. This result arose from the old conception of inheritance—the idea, namely, that the heir was not a new person, but continued the legal personality of the deceased. It will therefore be convenient to postpone what has to be said on the subject of *confusio* until the subject of inheritance is approached. We may, however, observe that by the law as amended by Justinian (C. 6, 30, 22, 14), an heir making an inventory escaped the operation of this rule, and remained after accepting the inheritance, as regards sums due by him to the estate or *vice versa*, in the same position as before acceptance.

Fifth—*LITIS CONTESTATIO.*

In the Roman law, for reasons to be afterwards stated (Law of Procedure, *Litis Contestatio*), taking a debtor into court operated as an extinction or abandonment of the debt. The creditor obtained, in lieu of his original right, a new claim against the debtor, which he could prosecute until he obtained full satisfaction. The appearance of the parties before a *judex* constituted a new departure. This is shown in a striking way by the rule regarding penal actions. A penal action could not be brought against the heir of the wrongdoer; but if the delinquent were sued, and he died after the stage of *litis contestatio*, then the action went on against his heirs. (D. 44, 7, 26.) Again, a stipulator sues for a slave. After the *litis contestatio*, the slave dies, the debtor is not relieved, as he would have been if the slave had died *before* the *litis contestatio*. (D. 42, 1, 8.)

REMEDIES.

I. Descent of Obligations to Heirs.

The general rule was that the rights of a creditor descended to his heirs, and the duties of a debtor descended to his heirs. (J. 3, 24, 6.)

It is not all the actions against a man available at strict law or given by the Prætor that are equally available or are usually given against his heir. For it is a most certain rule of law that penal actions arising from wrong (as, for instance, *furti*, *vi bonorum raptorum*, *injuriarum*, *damni injuria*) are not available against the heir. But actions of this sort are available by heirs, and are never denied them—except, indeed, the *actio injuriarum*, and any like action that may be found. Sometimes, however, even an *actio ex contractu* is not available against an heir [nor to an heir, for the heir of an *adstipulator* has no action; and, on the other hand, the heir of a *sponsor* or *fidepromissor* is not liable]; as when the testator has acted fraudulently, and nothing gained by that fraud has come to his heir. But the penal actions of which we have spoken above, if once actually joined (*contestatae*) by the principal persons, are both given to heirs, and pass on as against heirs. (J. 4, 12, 1; G. 4, 112-113.)

Three exceptions are pointed out in the text. But (4) the contract of letting on hire of service was necessarily extinguished by the death of the workman; also (5) partnership was regarded as so essentially personal that, except in the case of *societas vectigalis*, the death of a partner dissolved the association even among the surviving partners, and the heir of a partner could not succeed in his place.

II. The Measure of Damages.

This subject has been illustrated in detail elsewhere: but we may here recapitulate and bring together the several standards of damages known to the Roman law. We may reckon

three distinct kinds :—(1) ordinary damages, including consequential damages; (2) sub-ordinary, or a certain lenient measure adopted in a few specified cases ; and (3) penal or conventional damages, as fixed by the parties in their agreement.

1. The ordinary standard was the loss sustained by the complainant in consequence of breach of contract by the defendant. This is either *verum rei pretium* (the market value) or *quanti actoris interest* (how much the plaintiff has lost), which may exceed the price of the thing. *Quanti ea res est*, in *actiones arbitrariae*, means sometimes one and sometimes the other of those measures of damage. (D. 50, 16, 193; D. 39, 2, 4, 7.) When the breach of contract was wilful, the defendant was responsible for much more than if the breach was due to no fault of his. Thus a person selling a diseased ox that infects a herd is liable for the value of all in the herd that die if he knew of the disease at the time of the sale ; if he did not, he was liable only for the difference in value between a sound and an unhealthy animal.

2. A lower standard existed when the damages were limited to the amount the defendant was able to pay.[1] This is expressed by the terms *quantum facere potest;* and several examples have been already mentioned, as in the action on partnership. The idea was, that the relationship out of which the action sprung was not to be governed by strict commercial considerations ; that it was one of such mutual confidence and esteem that even when a party was wrong he was not to be pressed too hardly.

3. A third measure of damages may be termed conventional or penal; that is, an amount may be agreed upon as the equivalent of the loss likely to be sustained by entire breach of contract. This was especially necessary or convenient when the object of the contract was not a *thing*, the value of which could readily be ascertained, but *acts* the value of which might be very much a matter of opinion.

Not only things but acts may be brought into a stipulation, as when we stipulate that something shall be done or not done. In stipulations of this sort it will be best to throw in a penalty at the end, lest the amount of the stipulation should be uncertain and the plaintiff be forced to prove what his interest is. So, if a man stipulates that anything shall be done, the penalty ought to be added ; thus, "If it is not done, then do you undertake to give 10

[1] *Imo nec totum, quod habet, eis extorquendum puto, sed ei ipsi ratio habenda est, ne egeat.* (D. 42, 1, 19, 1.)

aurei as a penalty?" But if the stipulation is so framed as to require by one and the same agreement that some things shall be done and that others shall not, a little clause of this sort ought to be added: "If anything is done against the foregoing, or if anything is not so done, then do you undertake to give 10 *aurei* as a penalty?" (J. 5, 13, 7.)

The amount named as a penalty was not, however, conclusive; for if it were inadequate, more might be obtained; and if it were excessive, it might be reduced.

Titius sold Gaius some land, and by stipulation it was agreed that Gaius should do something, subject to a penalty. If Titius sues first on the sale and recovers less than the penalty, he can afterwards sue on the stipulation for the penalty. But if he recovers as much as the penalty, and afterwards sues on it, he is repelled by the *exceptio doli mali*. By proceeding on the *bonae fidei* action of sale, he is not precluded from going on with the stipulation for the penalty. If Titius sued first on the stipulation, he could not afterwards sue on the sale, because the stipulation included the whole agreement; but if the penalty was less than the damage actually suffered, he was allowed to proceed with an action on the sale, and recover enough to give him complete satisfaction. (D. 19, 1, 28.)

Cornelius compromised a claim against Maevius for 60 *aurei*, but Maevius inconsiderately agreed to a penalty of 100 *aurei* if he did not keep the terms of the compromise. Cornelius could not recover more than was really due—namely, 60 *aurei*; and if he demanded more, could be defeated on the ground of bad faith (*exceptio doli mali*). Thus a penalty might be reduced. (D. 44, 4, 4, 3.)

But penal stipulations in the contract of sale were rigidly enforced. They were not intended to be an estimate of damages.

III. Interest (*usurae*, *fenus*, *versura*). (*Sors*, *caput* = principal). Interest, according to the teaching of political economy, is an equivalent for two things—first, for the use of money or any other property; and, secondly, for the risk of losing the money or other property. The rate of interest, under free competition, is principally determined by these two considerations. This analysis is so simple, and the advantages of interest to both borrowers and lenders are so obvious, that we can with difficulty realise to ourselves the feelings of some ancient nations upon the subject. Jews were forbidden to take usury from Jews, but might lawfully do so from Gentiles. The idea evidently was that from friends or fellow-citizens it was mean to exact a reward for a loan. For centuries the Christian Church struggled to suppress interest, but in commercial nations without lasting success. Among the Romans we find an identical spirit of hatred of usury or usurers going the length of prohibiting the acceptance of interest altogether; and when that was found too much, of keeping it within fixed limits. By the law of the XII Tables, interest was limited to 12 per cent. per annum (*unciarium fenus*). In B.C. 345 or 347 this rate was reduced to one-half (*semiunciarium fenus*); and in

B.C. 340 it was altogether prohibited by the *lex Genucia*. This law was confined to Rome; but another statute extended the prohibition to Italy. Such legislation, as might be expected, overshot the mark, and in spite of the law, the recognised *maximum* in the time of Cicero was 12 per cent. per annum.

Justinian fixed the following rates for loans of money (C. 4, 32, 26, 1):—

1. Maritime loans (*pecunia trajectitia*), maximum,	12	per cent. per annum.
2. To merchants and business men,	8	„
3. To ordinary persons—not in business,	6	„
4. To high personages (*illustres, etc.*),	4	„
5. To agriculturists (Nov. 32),		

It was also a rule that in no case should the interest exigible exceed more than twice the amount of the principal debt. (C. 4, 32, 27, 1; C. 4, 32, 29; C. 4, 32, 30.)

Compound interest (*usurae usurarum*) was prohibited by the ancient law; but the rule was evaded by an agreement to turn interest into principal bearing interest. This evasion Justinian emphatically prohibited, and allowed only simple interest to be added to the principal. (C. 4, 32, 28.)

If the interest charged or paid exceeded the legal rate, the contract was not void; but the excess paid was taken to reduce the principal, or if that were paid, could be recovered as money not due. (D. 22, 1, 20; D. 22, 1, 29.)

Interest might be due by agreement as part of the terms of the contract. In contracts *bonae fidei* interest could be attached by a mere pact without stipulation; but this could not be done in contracts *stricti juris* (*i.e.* in stipulation and *mutuum*). In the case of loan, a verbal promise to pay interest without stipulation amounted only to a natural obligation. To this rule, however, exceptions were made in loans by bankers (Nov. 136, 4), in loans by municipalities (D. 22, 1, 30), and in loans of corn or barley (C. 4, 32, 12).

IV. *Mora* and its consequences (*Laches*).

In the opinion of the jurisconsults, *mora* was a difficult term to define. A rescript of Antoninus Pius is quoted to this effect:—"Whether *mora* exists, is a question that cannot be determined by any imperial constitution or response of a jurisconsult, since it is a question of fact rather than of law." A person is in *mora* generally when he does not perform his promise until after the time that he is bound to do so, and for the most part that time was after a demand for performance had been properly made and refused. (D. 22, 1, 32, pr.) There

was no *mora* if the existence of an obligation was in good faith disputed, and the creditor challenged to his legal remedy.[1] (D. 22, 1, 24, pr.; D. 22, 1, 47.)

A husband bequeathed to his wife the usufruct, and, if they had any children, the ownership, of a third of his property. The heirs of the husband accused the wife of forging the will, and of other crimes. Until she was acquitted of those charges, she could not recover her legacy. The charges were unfounded; and a child was born, thus giving her a right to the ownership of a third. It was held that she could demand the income for the period during which she was kept from her property by false charges. (D. 22, 1, 48.)

Gaius owes the slave Stichus to Titius, but Titius agrees not to sue him for a certain period. After this pact, and before the time expired, Stichus died. Could *mora* be attributed to Gaius? No, because Titius by agreement divested himself of his right to demand Stichus. (D. 2, 14, 54.)

Maevius promises Eros after two months to Sempronius. At the end of one month Sempronius demands Eros. Before the end of the two months Eros dies. Has Maevius made *mora?* No, because the demand was premature. (D. 45, 1, 49, 3.)

1. The effect of *mora* by a debtor.

(1.) In legacies, *fideicommissa*, and *bonae fidei* contracts, *mora* by a debtor subjected him to the payment of interest. (D. 22, 1, 32, 2.) But no interest was due from *mora* in the formal contracts and *mutuum;* that is, in contracts *stricti juris*. Interest was due, however, not as a matter of right, but only of judicial discretion. If the judge thought interest ought to be given, he could give it, but he was not compelled in every case of *mora* to do so. (D. 19, 1, 49, 1.) The amount was determined by the rate of interest current in the place (D. 22, 1, 1, pr.), but must in no case exceed the limits fixed by law. (C. 4, 32, 26, 1.)

(2.) *Mora* throws on the debtor all loss arising from the destruction of the thing promised by accident without the fault of the creditor or debtor (*periculum rei*). (D. 44, 7, 45; D. 45, 1, 91, pr.; D. 7, 1, 37; D. 45, 1, 91, 3.)

2. Effect of *mora* by creditor.

A creditor by improperly refusing to accept a discharge of the debt, not only releases the debtor from paying interest for delay, but must bear the loss of the accidental destruction of the thing promised. (D. 46, 3, 72.)

Gaius stipulated for Dama or Eros. Titius, the debtor, brought Dama. Gaius refused to take Dama, who afterwards died. Gaius cannot then sue for Eros. (D. 45, 1, 105.)

Julius owed Cornelius 10 *aurei*, and took the amount to him, and he, without good reason, refused to take it. By mischance Julius lost the money. If Cornelius sues he can be defeated by the *exceptio doli mali*. (D. 46, 3, 72, pr.)

---

[1] *Qui sine dolo malo ad judicium provocat, non videtur moram facere.* (D. 50, 17, 63.)

Second Division.

QUASI-CONTRACT AND STATUS.

Rights *in personam* arising from the consent of the persons bound have now been examined. But rights *in personam* may exist without the consent of the persons bound. Such rights were said by the Roman jurists to arise *quasi ex contractu.* Rights *in personam* arising from consent are contracts; rights *in personam* arising by operation of law are quasi-contracts. It seems, however, desirable to subdivide this last-mentioned class. Some quasi-contracts come very near contract, and are governed by precisely the same considerations. Others, such as *tutela,* have very little in common with contract. In some cases the relationship created by quasi-contract is temporary, and for a single transaction; in other cases it is permanent, lasting even for the whole life of the parties. It would seem expedient, therefore, to confine the term quasi-contract to those cases where the legal duties created by law are closely analogous to those of contract. The term "*status*" may be taken to apply to those cases where a permanent relationship is created by the law, where the duties imposed upon a person are imposed upon him as a member of a class. This group includes the following heads:—Patron and freedman; Parent and child; Husband and wife; *Tutela; Cura.*

QUASI-CONTRACT.

The examples to be given of quasi-contracts all resemble the equitable contracts. If a bilateral agreement not enforceable by law is performed by one of the parties, we have seen that by means of the *actio in factum praescriptis verbis* the other party could be compelled to perform his promise or pay damages. But in certain cases the law did not go quite so far, and when the performance took the shape of delivering property, contented

itself with ordering restitution. In these cases the remedy was by *condictio*.

Restitution was given in several cases, which are thus enumerated by Paul:—(1) where money not due has been paid by mistake (*ob indebitum*); (2) where property has been given in terms of a compromise never carried out (*ob transactionem*); (3) or when given under a condition that has been broken (*ob conditionem*); or (4) for a past consideration (*ob causam*) (D. 12, 6, 65, pr.); or (5) for a future consideration (*ob rem*). (D. 12, 6, 65, 4.) Generally, when a person had given anything in order that something might be done, and it was not done, or that something might not be done, and it was done, there was an equitable ground for restitution. This is the meaning of the phrase, *Causa data causa non secuta*.

Trusts.—One of the most important cases of restitutory procedure was in trusts. It was possible during the Empire, by means of *fideicommissa*, to establish trusts, but at no time could trusts be created by act *inter vivos*. The examples presently to be cited will show to what extent trusts were recognised, but the leading facts may be briefly stated. Suppose A. agreed to give property to B., which B. undertook to sell, and to give the proceeds to C. As between A. and B., all the ingredients of a contract are present; but neither could A. force B. to accept the property, nor could B. compel A. to deliver it, if meanwhile A. had changed his mind. The trust could not be enforced as between A. and B., and still less at the instance of C., who was no party to the contract.

But suppose A. has given the money or other property agreed upon to B., but B. has not given the proceeds to C. Here two possibilities have to be considered. B. may refuse to do anything, and simply keep the property as it was given to him; or A. may repent of his intended liberality, and desire B. to give him back his money. In both cases the remedy is the same. Neither C. nor A. can compel B. to execute the trust, but A. can require B. to restore his property. So if A. repents, B. must give him back the property; and he has no right, nor has C. any right, to enforce the trust. At what point A. could intervene and change his mind before the trust was executed, depended upon the circumstances of the case. (D. 12, 4, 3, 2.)

The father of Sempronius gave lands to his sister Claudia, on condition that she should satisfy his creditors. Claudia accepted the lands, but did not satisfy the creditors. Sempronius, the father's heir, being liable for the debts, was entitled to have the gift set aside and the property returned to him. (C. 4, 6, 2.)

Tryphon, an heir, is ordered by his testator to erect a monument according to an amount to be settled by Dama, a freedman. Tryphon gives Dama a sum of money to raise the monument, which Dama does not apply for that purpose. Dama must return the money to Tryphon. (D. 12, 4, 11.)

Titius gives his slave Stichus to Gaius to manumit him. Before the manumission takes place, Titius sends a messenger to request Gaius not to manumit Stichus, but to give him back. Gaius disregards this message and manumits Stichus. What remedy has Titius? According to Ulpian (D. 12, 4, 5, 1), Titius can sue Gaius for the value of the slave, as the manumission was irrevocable. But Julian treats this as a case of mandate, and adds an important qualification to the answer. If Stichus had been found out with some great wickedness, as falsifying his accounts or plotting against the life of his master Titius, Gaius was bound to act upon the message sent him; but if there was nothing against the character of Stichus, he was justified in manumitting, even after the express orders of Titius to the contrary. (D. 17, 1, 30.)

Sempronius gives Titius 10 *aurei* to buy a slave and manumit him. Titius buys a slave for the money. Before the manumission the slave runs away. Sempronius now sends a message to Titius requesting him not to manumit the slave. Sempronius may require Titius to promise to give up the slave if he should catch him. (D. 12, 4, 5, 2.)

Calpurnius gives to Julius a sum of money to manumit his slave Pamphilus. Julius accepts the money, and sets out with Pamphilus to go before the Prætor to manumit him. On their way they are attacked by robbers, and Pamphilus is killed. Can Calpurnius demand back his money? No; because the failure of Julius to manumit Pamphilus was not his fault.[1] (D. 12, 4, 3, 3.)

Titius gives Gaius money to manumit his slave Stichus. Gaius accepts the money, but before the manumission Stichus deserts. Can Titius demand back his money? The answer depends on circumstances. If Gaius intended to sell Stichus, and Titius paid the money to stop the sale, he cannot ask back his money. Gaius must, however, promise to return the money if the slave is caught, less his depreciated value in consequence of running away. If Gaius had no intention of selling Stichus, and the intervention of Titius was purely voluntary, Gaius must refund the money, unless he can show that the prospect of manumitting Stichus made him keep an insufficient watch over him. If Gaius refuses to manumit Stichus on account of his having run away, Titius may require him either to give up Stichus, or to restore his money. (D. 12, 4, 5, 3.)

In the case of trusts, there is no consideration on the part of the trustee, or of the beneficiary. In other cases a consideration may be present.

Titius gives Gaius 5 *aurei* not to sue him. Gaius sues Titius. Titius can then demand the restitution of his money. (D. 12, 4, 3, pr.)

Sempronius gives Maevius a sum of money to build a house for himself on his own land. Maevius takes the money, but does not build the house. Unless it appears that Sempronius would not have given the money except for that purpose, the mere fact of Maevius not building will not entitle him to revoke the gift. (D. 24, 1, 13, 2; C. 4, 6, 8.)

Money paid by Mistake.

The proper place for this topic caused considerable perplexity to the Roman jurists. Gaius makes out an analogy with the contracts *re.*

[1] *Pecunia a te data, si haec causa, pro qua data est, non culpa accipientis, sed fortuito casu non est secuta, minime repeti posse certum est.* (C. 4, 6, 10.)

The man, too, that has received money not due to him from one that paid it by mistake, incurs an *obligatio re*. And if an action is brought against him to obtain repayment, the plaintiff is given an *actio condictitia*. For a *condictio* SI PARET EUM DARE OPORTERE is allowed, just as if the money had been received on loan. Hence [some think] that a *pupillus* [or a woman] to whom money not due has been paid by mistake, without the authority of the *tutor*, is not liable to an *indebiti condictio* any more than for money given on loan. But this kind of obligation does not really arise out of contract. For he that gives the money with the intention of paying a debt, wishes to break off old business rather than to contract new. (J. 3, 14, 1; G. 3, 91.)

Justinian brings it under the general head of Quasi-Contract, but also remarks on the analogy with *Mutuum*.

Again, he to whom a man has by mistake paid money that is not due, is held to owe the money as if by contract. Strictly, indeed, it is not by contract that he has incurred the obligation; so much so, that if, as we have said above, we are to follow out the *rationale* of the case more precisely, he may be said to have incurred the obligation by breaking off business (*ex distractu*) rather than by contracting it (*ex contractu*). For he that gives money with a view to paying a debt, seems to give it in order to break off old business rather than to contract new. And yet the receiver incurs an obligation just as if a loan were given him, and is therefore liable to a *condictio*. (J. 3, 27, 6.)

A right to recover money paid by mistake existed when the following circumstances concurred:—

I. The thing given or money paid must not be for a debt, either civil or natural.

II. The belief in the existence of the debt must have been due to a mistake of fact, and not of law, except in certain specified cases.

I. There must be no real debt, either civil or natural.

Although performance of a *naturalis obligatio* will not be enforced by a court of law on the application of the creditor (*naturalis creditor*), yet if the debtor voluntarily performs the obligation, he cannot ask restitution. (D. 12, 6, 51.)

A master owes his slave money, and after manumitting the slave pays him the amount, under the erroneous idea that he was bound to do so. He cannot recover the money, because the debt constituted a natural obligation. Tryphoninus remarks that the relation of debt between master and slave is one recognised only by natural law (*jus naturale*). (D. 12, 6, 64.)

A woman, under the erroneous belief that she is bound to give a *dos*, settles some of her property. She cannot recover the money settled, because, throwing out of account her error, she ought to adhere to the settlement out of a proper feeling (*pietatis causa*). (D. 12, 6, 32, 2.)

Titius thinks he has promised 10 *aurei* to Gaius when he has promised to Maevius. Titius pays to Gaius. Titius can recover the money from Gaius. (D. 12, 6, 22, pr.)

A legacy is paid under a will. It is afterwards discovered that the will is not genuine, or that it is void. The amount paid can be recovered (D. 12, 6, 2, 1), subject to the rule that the error is one of fact only. (C. 4, 5, 7.)

Gaius buys his own slave from Sempronius. Sempronius must restore the price paid by Gaius, whether he knew that the slave was not his own or not. (D. 12, 6, 37.)

Two sureties promised 10 *aurei* for a debtor. The debtor paid three, and afterwards the sureties paid five each. The surety who paid last can recover three from the creditor. (D. 12, 6, 25.)

Two sureties are jointly liable for 10 *aurei*. At the same time they each pay 10 *aurei*. Each can recover 5 *aurei* from the creditor. (D. 12, 6, 19, 4.)

Gaius bought land from Titius. Before delivery, Gaius died, leaving an injunction to his heir that Titius should not be required to deliver the land. In ignorance of this, Titius delivered the land. He can recover it, because the obligation to deliver it was released by the will of Gaius. (D. 12, 6, 26, 7.)

An agreement has been made between a patron and his freedman of release from service (*operae*). If after that the freedman by mistake renders service, he can recover the value. (D. 12, 6, 40, 2.)

A debtor pays to a person who falsely pretends to be the agent of his creditor. He is not released, but can recover the money from the false agent. (C. 4, 5, 8.)

A robber lets a house and receives the rent, or lets a ship and receives the freight, or lets the services of slaves and receives their wages. In all these cases payment cannot be recovered, and the debtor is discharged. But if the owner let the house or the ship or the slaves, and the robber merely took the rents, then the debtors are not discharged, but they can sue the robber for the recovery of their money. (D. 12, 6, 55.)

Titius thinks he owes either Stichus or Pamphilus. He really owes Stichus, but delivers Pamphilus. He can recover Pamphilus, for that is not an equivalent for the delivery of Stichus. (D. 12, 6, 19, 3.)

A vendor delivers land free from servitude, when, according to agreement, it ought to have been burdened with a right of way (*iter*). The vendor can sue to have the right of way set up. (D. 12, 6, 22, 1; D. 19, 1, 8, pr.)

An heir is bound to give a part of a house to a legatee on a particular day. Before the day named, the house was partly burned, and it was repaired by the heir. At the proper time he delivered the part of the house without reserving what he had spent on its restoration. He can sue the legatee for the expense. (D. 12, 6, 40, 1.)

Money paid by order of a court, even when the order is wrong, is not money paid by mistake. (C. 4, 5, 1.) So money paid to avoid a penalty is not considered as paid by mistake.

There are certain cases, however, in which repayment cannot be demanded, although the money was not due, but was paid by mistake. The ancients have determined that this is so in cases where the amount to be sued for (*lis*) increases if liability is denied, as under the *lex Aquilia;* and also in the case of a legacy. This the ancients indeed wished to apply to those legacies only that are definite in amount, and bequeathed *per damnationem.* But our constitution, since it has allowed all legacies or trusts one and the same nature, has extended this increase to all. It has not, however, granted this right to all legatees, but only in the case of legacies or trusts left to consecrated churches, and the other places worthy of veneration, that are honoured in view of their religion or piety. If these legacies are paid, although not due, repayment cannot be demanded. (J. 3, 27, 7.)

As to the *lex Aquilia* and double damages, see p. 331. Legacies *per damnationem* will be explained subsequently. (Book III., *Legatum.*)

II. The money paid must be parted with in ignorance of some fact, not of law. (C. 4, 5, 6; C. 1, 18, 10; D. 12, 6, 1, 1.) Every one was taken to know the law. (C. 1, 18, 12.) *Regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere.* (D. 22, 6, 9, pr.) The reason assigned is that law can and ought to be definite; but the most circumspect cannot know everything. *Cum jus finitum et possit esse, et debeat; facti interpretatio plerumque etiam prudentissimos fallat.* (D. 22, 6, 2.)

A. does not know that B. is his cognate. Is this an error of law or fact? If A. knows that both he and B. are free, and from whom they are born, but is not aware that B. is thereby a cognate, it is an error of law. But if A. was exposed by his parents, and did not know them, or served as a slave, the error would be one of fact. (D. 22, 6, 1, 2.)

He that in ignorance of his rights as heir neglects to claim the Falcidian fourth, and pays the legatees in full, cannot recover the excess from them. (D. 22, 6, 9, 5.)

A debtor knowing facts that amount to an absolute equitable defence (*perpetua exceptio*) promises a sum of money as the price of his release from the debt. He cannot avail himself of the *condictio indebiti.* (D. 12, 6, 24.) *Secus,* if the error was of fact. (D. 12, 6, 26, 7.)

Every error of fact does not excuse, but only such errors as a man might fall into notwithstanding ordinary care. If the error implies a want of due diligence, no relief is given. A man cannot plead ignorance of what everybody but himself well knows. The true standard is not that set by the most inquisitive or the most careless man, but by the man of ordinary diligence. (D. 22, 6, 9, 2.) Sabinus said, error of fact, to excuse, must not be the error of a foolhardy speculator. (D. 22, 6, 6; D. 22, 6, 3, 1.)

EXCEPTIONS.—Some persons obtain relief even from errors of law.

1. Minors (under twenty-five) and, *a fortiori,* those under the age of puberty (acting without their *tutores*), are not fastened with the consequence of ignorance of law. (D. 22, 6, 10; D. 22, 6, 9, pr.) A minor giving a loan to a *filiusfamilias* was relieved from the effect of the *Senatus Consultum Macedonianium.* (D. 22, 6, 9, pr.).

2. Women are sometimes excused. (D. 22, 6, 9, pr.) Thus ignorance of procedure—as in the production of documents—did not expose women to the usual penalty. (D. 2, 13, 1, 5.) Leo (A.D. 469) confined the relief to cases where women were expressly exempted from the provisions of any statute. (C. 1, 18, 13.)

3. Soldiers. A *filiusfamilias* soldier is made heir by his comrade, but fancies he cannot enter on the inheritance without his father's permission. He is relieved from the consequence of this error. (D. 22, 6, 9, 1.)

4. Generally a man was excused if he had no opportunity of taking the advice of a *jurisconsult,* and was not himself acquainted with the law. (D. 22, 6, 9, 3.)

5. A peasant (*agricultor*), or like ignorant person, was excused. (D. 22, 3, 25, 1.)

6. When there was a difference of opinion between the two great schools (Sabinians and Proculians) on a point of law, a person was safe in following either.

Remedy (*Condictio Indebiti*).

1. *The Burden of Proof.*—If the defendant admits receiving the money sought to be recovered by the *condictio indebiti*, but affirms that it was paid for a subsisting debt, then the plaintiff must prove that the money, although paid, was not really due. If the defendant denies receiving the money, and it is proved to have been given him, the burden of proving that the money was due rests upon him. (D. 22, 3, 25, pr.) When, however, the plaintiff is a minor, or woman, or other person excused from errors of law, the burden of proving the fairness and legality of the transaction rests wholly upon the defendant. (D. 22, 3, 25, 1.)

2. *The measure of damages* depended on the nature of the performance it was sought to rescind. Thus, if corn had been given by mistake, the quality of the grain must be taken into account; and if it is used, the price of it must be paid. (D. 12, 6, 65, 6.)

If by mistake a house is given, the measure of damages is not what the plaintiff would have let it for, but how much the defendant would have given for it. (D. 12, 6, 65, 7.)

A. by mistake gives B. a slave. B. manumits the slave. If B. knew that the slave was not due to him, he must pay the price of the slave; but if he did not, he is bound only to surrender the rights he has acquired as the *patronus* of the slave. (D. 12, 6, 65, 8.)

A slave not due has been given to a man, who, ignorant of the mistake, sold the slave for a trifle. He is liable to pay only the price he actually obtained. (D. 12, 6, 26, 12.)

When a freedman has done work from which he was released, the measure of damages is the wages he would have got. (D. 12, 6, 26, 12.)

NEGOTIORUM GESTIO.

The *negotiorum gestor* is one that has done something for another without being asked. He may be compared with the *mandatarius.* (D. 44, 7, 5, pr.) The *Actio negotiorum gestorum* was introduced by the edict of the Prætor. He gave an action to a person that had acted for another, whether that other were alive or not at the time of the transaction.[1]

Therefore when a man manages the business of another that is away, on both sides actions arise between the parties, called *actiones negotiorum gestorum.* The owner of the property managed may bring against the manager an *actio directa;* the manager in turn an *actio contraria.* These actions, it is clear, do not arise strictly from any contract, for they arise only when without any mandate a man voluntarily comes in to manage another's business. They, therefore, whose business is managed, incur an obligation, and that without knowing it. It was for the sake of expediency that this was received; lest when men were forced to hurry away suddenly, and went from home without giving anyone a mandate to administer their affairs, their business should be neglected. And certainly no one would look after it, if he were to have no action for what he spent. Again, as he that has managed the business for the good of its owner has put the owner under

[1] *Si quis negotia alterius, sive quis negotia, quae cujusque cum is moritur fuerint, gesserit; judicium eo nomine dabo.* (D. 3, 5, 3, pr.)

an obligation to him, so he, too, in turn, is bound to give an account of his administration. In this case every man is compelled to give an account with the utmost possible diligence; for it is not enough to display the same diligence that he usually displays in his own affairs, if anyone else of greater diligence would have administered the business to greater advantage. (J. 3, 27, 1.)

Rights and Duties.

A. Duties of the *Negotiorum Gestor.*

I. As in the analogous case of mandate, the *gestor* must account to the person for whom he acts. (D. 3, 5, 2.)

The *gestor* recovers from a debtor a sum exceeding the debt. He must give up the excess, although he could not recover from the principal any sums that he paid, which the principal did not really owe. (D. 3, 5, 23.)

The *gestor* must pay interest to the principal for the balances that he retains in his hands. (D. 3, 5, 31, 3.)

II. The responsibility of the *Negotiorum Gestor.*

1. Responsibility for Omissions.

The *gestor* was in a materially different position from a *tutor*, *curator*, or agent. These undertook particular duties, the non-performance of which exposed them to an action. But the *gestor* undertakes nothing, and consequently, *prima facie*, cannot be sued for omissions. (C. 2, 19, 20.) But this statement must be limited by the requirements of good faith (*bona fides*); and therefore, if he neglected to sue a debtor of the principal, and the debt was lost, he must make good the amount to the principal. (D. 3, 5, 8, pr.) More particularly was this the case when the *gestor* himself owed anything to the principal. It was necessary, however, to the responsibility of the *gestor*, that the principal should be in a position to exact the performance of the obligation. Thus, if the *gestor* has an article belonging to the principal in his custody as a pledge, he was not bound to give it up unless he had under his control money belonging to the principal sufficient to discharge the debt. (D. 3, 5, 35, 1.)

The *gestor* was bound to discharge the creditors of the principal, if it was the interest of the principal that they should be paid.

A debtor of Gaius died owing him 50 *aurei*. Gaius, although not the heir, undertook the administration, which left him 10 *aurei* out of pocket. On a sale of the inheritance, a sum of 100 *aurei* was deposited in a chest, and lost without the fault of Gaius. Can Gaius recover from Titius the heir, either the debt of 50 *aurei*, or the 10 *aurei* that were spent? This depends on whether it was the duty of Gaius to pay himself out of the 100 *aurei* procured by the sale. If it was, then Gaius not only loses his 50 *aurei*, but must make good the other 50 to Titius, less the 10 *aurei* he had

spent. But if there were any outstanding claims or liabilities that made it judicious to reserve the money instead of paying the debts, then Gaius can recover from Titius both the original debt of 50 *aurei* and the 10 *aurei* that were spent. (D. 3, 5, 13.)

2. Responsibility for Acts.

The class of *negotiorum gestores* is based on a negative rather than a positive idea; on the absence of the authority of the principal rather than the character of the agency. There might accordingly be a most important difference in the acts a *gestor* might be required to do, as well as in the degree of responsibility attached to him. According to circumstances a *gestor* might not be liable for negligence, or he might be answerable even for accident.

A *gestor* was responsible for *dolus* only, and not for negligence or accident (*culpa, casus*), if he acted, so to speak, with reluctance, and in order to prevent a serious evil befalling the principal. Thus, if he interfered to prevent the bankruptcy of the principal. (D. 3, 5, 3, 9.)

But where a *gestor* intervened without urgent necessity, he was bound to show due diligence. Thus, if he undertook the management of money, he was bound to lend the money at interest to solvent persons, although he was not responsible for the loss of the money if they were afterwards, through unforeseen circumstances, unable to repay the loan. (D. 3, 5, 37, 1.)

As a general rule, a *gestor* was not compelled to make good losses resulting from accident (C. 2, 19, 22), unless his interference was uncalled for. (*Culpa est, immiscere se rei ad se non pertinenti*, D. 50, 17, 36.) A *gestor* was liable for loss by accident when he made enterprises foreign to the habits of the principal. Thus if he buys raw and unskilled slaves, and they do damage, he must pay the loss; but if some of the enterprises yield a profit, others a loss, the *gestor* may set off the gain against the loss, and must make good only the balance of loss. (D. 3, 5, 11.)

On the death of the principal, the *gestor* was not obliged to begin any new transactions, but he ought to complete those already entered upon. (D. 3, 5, 21, 2.)

B. Duties of the Principal.

I. He must pay the expenditure incurred by the *gestor* for his benefit. (D. 3, 5, 45, pr.)

Titius acting for the absent Sempronius repaired a ruinous house, and hired medical aid for a sick slave. Titius is entitled to his expenditure, although the house should

afterwards be accidentally burned, or the slave die, and so Sempronius derive no benefit from the expense. This was the opinion of both Labeo and Ulpian. But Proculus started this difficulty: Suppose Sempronius had given up the house as not worth repairing, or as one that he had no use for. In this case Titius would fail, for the expenditure could not be called beneficial. (D. 3, 5, 10, 1.)

A testator desired his freedman to accept a certain sum to build a tomb to his memory. The freedman cannot recover more than that amount from the heir, although he may have spent more. (D. 3, 5, 31, 4.)

II. The principal must pay interest on sums paid on his behalf by the *gestor*, when the payment was necessary. (C. 2, 19, 18.)

Titius lent money to pay a debtor of Gaius. If the non-payment of the debt would have involved the sale of a pledge or a bankruptcy, Gaius must pay interest. This is a fair price to be paid for deliverance from a great evil, and the rate of interest was to be governed by the custom of the country. If, again, Titius had to borrow the money, Gaius must restore the amount of interest paid by Titius, unless he failed to derive any equivalent advantage. (D. 22, 1, 37.)

Investitive Facts.

The relation of *negotiorum gestio* is constituted when the following facts co-exist:

I. One person—the *gestor*—must act for another (*dominus rei gestae*).

II. There must be no mandate.

III. The *gestor* must not have been forbidden to act by the principal (*dominus*).

IV. The *gestor* must act with the intention of binding the principal.

I. The *gestor* must act for another than himself.

If a person acts in another's business, with a view only to his own profit, he is not a true *negotiorum gestor*, because he acts for himself, not for another. Nevertheless, he will be liable to the *actio negotiorum gestorum* without having any claim for expenses, except in so far as his conduct has resulted in benefit to the principal. (D. 3, 5, 6, 3.)

Gaius is *tutor* to Titius, and Sempronius pays a debt of the *pupillus* without the request of Gaius, in order to prevent Gaius suffering for his neglect. Sempronius can recover the money from Gaius. (D. 3, 5, 6, pr.)

One of two joint-owners defends their land against a claim of servitude. He can recover half the expenses from the other joint-owner. (D. 3, 5, 31, 7.)

Gaius demands from Titius payment of a sum alleged to be due to Sempronius. Titius pays Gaius. Sempronius afterwards learns this, and ratifies the payment made to Gaius. Does this enable him to sue Gaius for the money? Julian says he can; because Sempronius having ratified the act of Gaius, can be sued by Titius for the recovery of the money he paid by mistake; and if that ratification makes him responsible, it should also entitle him to demand the money from Gaius. (D. 3, 5, 6, 9; C. 2, 19, 9.)

Julius sues and recovers a sum from the debtor of the deceased Titius, to whom he imagines Gaius is heir. Seius is the true heir. Gaius, also by mistake, ratified the act of Julius. This makes Julius the *negotiorum gestor* of Gaius. The ratification, as regards Julius, puts Gaius in the position of heir. (D. 3, 5, 6, 10.)

Julius, thinking Gaius to be heir, repairs the hereditary mansion. Gaius under the same erroneous belief ratifies the act. Julius cannot sue Gaius, but must sue the real heir, because he alone is benefited by the repairs. (D. 3, 5, 6, 11.)

II. There must be no valid mandate, for the object of introducing the *actio negotiorum gestorum* was to supplement the law of mandate. (D. 17, 1, 6, 1.)

A remedy may thus be obtained where a person has acted as agent in mistake, under the impression that he was authorised; or where the agent is incapable of binding himself by a contract; and generally, when it is equitable, in the absence of express agreement, that a person should be recouped for expenditure made with a view to benefit another.

Gaius, under the mistake that he was requested by Titius, becomes his surety (*fidejussor*). Gaius, if he is compelled to pay, cannot sue on mandate, since Titius never requested him; but he can sue as a *negotiorum gestor*. (D. 3, 5, 5, pr.)

If, in the same case, Gaius thought he was acting for Titius, but really for Sempronius, he has the same remedy against Sempronius. (D. 3, 5, 5, 1.)

A person acts for the joint property of a husband and wife, with the authority of the husband alone. He can sue the husband on mandate and the wife as a *negotiorum gestor*. (C. 2, 19, 14.)

Titius (a freeman), under the erroneous belief that he is a slave of Julius, acts on behalf of Julius. Titius is a *negotiorum gestor*, because with a slave there could be no contract of mandate. (D. 3, 5, 36.)

Sempronius gave to a freedman or friend a mandate to borrow money. The letter was shown to Gaius, who on the faith of it lent money. The creditor, although there has been no mandate, and no contract with Sempronius, can sue him for the amount as a *negotiorum gestor*. (D. 3, 5, 31, pr.)

III. The *gestor* must not have been forbidden to act by the principal. (D. 17, 1, 40.)

IV. The intention of the *gestor* must be to bind the principal; if he acts, without expecting to be reimbursed, from motives of liberality, or simply in the performance of a duty, he is not a *gestor*.

He that out of friendship to the father of *pupilli* petitions for *tutores* to them, or to have *tutores* removed, has no claim for expenses as a *negotiorum gestor* (D. 3, 5, 44), according to a constitution of Severus. (C. 2, 19, 1.)

In like manner, a freedman has no claim against the daughters of his patron for the same service, because it is his duty (*obsequium*) so to act. (C. 2, 19, 5.)

A husband cannot recover from his wife's father what he has spent for her. But if in the expectation of being recouped he has paid the cost of her funeral, he can sue her father, to whom the *dos* had been given back. (C. 2, 19, 13.)

A mother that has supported her children cannot recover the cost of their maintenance, but money spent for the preservation or improvement of their property by her

may be recovered by the *actio negotiorum gestorum*. (C. 2, 19, 11.) Nor can an uncle recover what he has spent in maintaining his niece. (D. 3, 5, 27, 1.) In such cases the presumption was all but overwhelming that the motive was liberality, but where conclusive evidence existed to the contrary, those who were not actually liable in law for the maintenance of others could recover the money they had so expended. (D. 3, 5, 34.)

A father advances money to an emancipated son to enable him to prosecute his studies abroad. Is the sum so advanced to be regarded as a part of the share of his father's property to which the emancipated son is entitled? The answer depends upon the intention with which the money was given. Was it intended as an advancement, or was it simply an instance of paternal liberality or duty? On whichever answer is given depends the result. (D. 10, 2, 50.)

Remedies.

I. By the principal (*dominus rei gestæ*) against the *negotiorum gestor*. (*Actio negotiorum gestorum directa.*)

The object of this action is to make the *gestor* account, and generally to enforce his duties.

II. By the *gestor* against the *dominus*. (*Actio negotiorum gestorum contraria.*)

The *gestor* could set off his expenses if sued in the *actio directa*, but if he did not adopt this mode, he could bring the *actio contraria*. If, however, the question of his claims were raised on an *actio directa*, he could not afterwards sue for them—as he would be met by the plea of *res judicata*. (D. 3, 5, 8, 2.)

STATUS.

I.—Patron and Freedman (*Patronus*, *Libertus*).

The relation of master to slave was one of ownership. When the slave was manumitted, a new relation was established between him and his old master of an interesting character. In slavery, no civil rights subsist between master and slave. A slave cannot do a wrong to his master, nor a master to his slave. The rights of the master, like all rights *in rem*, arise from the duty imposed on all men generally of forbearing to interfere with him in the possession and use of his slave. But the rights of the patron are of a wholly different character. They are rights against the freedman solely. The old master is no longer *owner*, he is *creditor* in respect of the services due by the freedman. These services, when examined, are found to constitute a prolongation of the master's former interest in his slave; so that a manumitted slave, although free as respects men generally, was still bound to his old master by ties of a substantial character. The services due by a freedman were a return to the master for his generosity in raising him from slavery. The obligation extended no further than the children of the freedman; and thus, by a natural and easy process, as

the sense of the benefit conferred began to fade, the resulting duties were withdrawn, and the descendants of a manumitted slave took their place among free-born citizens.

During the Republic there was but one class of freedmen—Roman citizens; but after the *lex Ælia Sentia* (A.D. 4), and the *lex Junia Norbana* (A.D. 19), two new classes were introduced who did not enjoy the rank of citizenship—the *Latini Juniani* and *Dediticii*. These two classes existed during the Empire down to Justinian, who removed their disabilities, and restored the old single class of freedmen—Roman citizens.

Of freedmen there are three kinds—Roman citizens, Latins, and those reckoned among the *dediticii*. (G. 1, 12.)

Freedmen—Roman Citizens.

Definition.

Of freemen some are born free (*ingenui*), others made free (*libertini*). (G. 1, 10.)

Freedmen (*libertini*) are persons that by manumission have been set free from lawful slavery. (J. 1, 5, pr.; G. 1, 11.)

A freeborn man (*ingenuus*) is a man that is free as soon as he is born; and that whether he is brought forth in wedlock by two freeborn parents, or whether his parents are freedmen, or one a freedman and the other free-born. But if a man is born of a free mother while his father is a slave, none the less the child is freeborn. So too is the son of a free mother and a father that is uncertain, because he was conceived by a public woman. (J. 1, 4, pr.)

Now when a child is freeborn, the fact that he has been in slavery, and thereafter been manumitted, never stands in his way. For it has been very often settled that manumission cannot stand in the way of birthright. (J. 1, 4, 1.)

Rights and Duties.

A. Rights of Patron (*Patronus*) = Duties of Freedman (*Libertus*).

I. Reverence (*Obsequium, Reverentia*). A freedman was not allowed to bring an action against his patron without the prior consent of the Prætor. (D. 2, 4, 4, 1.) If the patron had inflicted very grievous injury on his freedman, or whipped him very severely, such consent was readily given (D. 2, 4, 10, 12); but in other cases all redress was peremptorily refused if the result of the action would be to stamp the patron with infamy (*infamia*). Hence the freedman could not sue the patron if he had been guilty of fraud (D. 37, 15, 5, 1), or force. (D. 37, 15, 7, 2; D. 37, 15, 2, pr.) The freedman could not sue

his patron for corrupting his slaves, even although a judgment against the patron would not have made him infamous. Even in the cases where a freedman was allowed to sue his patron, he could not recover more than the patron could afford to pay (*in quantum facere potest*). (D. 37, 15, 7, 1.) If the freedman brought an action without leave obtained, or otherwise acted in disparagement of the respect demanded by the law, he was said to be ungrateful (*ingratus*), and we have already seen (p. 170) what was the punishment for that offence.

The interference of patrons with their freedmen seems to have gone to great lengths, if we may judge from the pretensions that were negatived. It was laid down that a patron had no right to fix his freedman's place of abode (C. 6, 3, 12), or to prohibit him following his profession or occupation (D. 37, 15, 11); but a freedman was not allowed to follow the same business as his patron in the same place, if it were to the prejudice of his patron. (D. 38, 1, 45.)

II. If the patron becomes so feeble and poor as to require periodical supplies of food, his freedman is bound to support him, if he can do so. (D. 25, 3, 9; D. 25, 3, 5, 19.) The patron is not bound absolutely to reciprocate, but if he refused to aid an impoverished freedman he forfeited all his rights to the freedman's services, if any were promised, and all his interest in the freedman's property on his death, if at that time the freedman should have any.

III. The patron had certain rights to his freedman's property on the death of the freedman (*jura in bonis*). These rights will be considered under Inheritance.—(Book III.—Intestate Succession.)

IV. Rights to the services of the freedman. (*Operae libertorum libertatis causa impositae; operae officiales.*) As the duty of reverence was a prolongation of the legal disability of the slave, so the duty of rendering life-long service to the patron was a continuation of the material and valuable part of the master's interest in his slave. There was, however, an important difference in the incidence of those duties. Every manumitted slave owed reverence to the person that manumitted him, for the duty was attached by law to the act of manumission; but only those freedmen could be compelled to serve their patrons who had, in the manner presently to be described, expressly sworn and promised to do so as the price of their freedom.

Generally speaking, the freedman worked for his master a certain portion of every day. (*Operae sunt diurnum officium.*) (D. 38, 1, 1.) If the patron did not find food and clothes for the freedman, he must leave him enough time to procure sustenance for himself. (D. 38, 1, 19; D. 38, 1, 22, 2.) When the amount of the work was not agreed upon at the time of manumission (D. 38, 1, 30, pr.), it was to be determined by the relative age, health, position, and other circumstances, of the parties. (D. 38, 1, 16, 1.) The kind of work was the same as the freedman had been accustomed as a slave to perform, or any trade he might afterwards learn, if it involved no danger to life, and no dishonour. (D. 38, 1, 38, pr.) The work was to be done for the patron alone; and except in special circumstances (*e.g.*, a *pantomimus, archimimus,* or *medicus*, whose services could not be utilised except by making them work for money), the patron was not allowed to let the work of his freedman for hire, or to require him to render his services to any third person. (D. 12, 6, 26, 12; D. 38, 1, 25, 1.) The *lex Ælia Sentia* prohibited patrons from forcing their freedmen to give up to them the wages of their labour.

The obligation of work was contracted by a verbal promise, accompanied by oath. It was usual to make the slave take an oath before manumission, although it had no legal effect, in order to bind his conscience, and as a security that, immediately on his manumission, he would give the necessary legal promise. (D. 40, 12, 44, pr.) As soon as the manumission was effected, the freedman, by making a promise on oath to do work for his patron, effectually bound himself in law. (D. 38, 1, 7, pr.; D. 40, 4, 36.)

The patron could not avail himself of this obligation unless the manumission was gratuitous and voluntary. (C. 6, 3, 7; D. 38, 1, 13, pr.) If the slave bought his liberty, he could not be burdened with the obligation of work. So if the person that manumitted the slave was not the owner of the slave, but a mere trustee for the purpose of manumission, although he acquired the valuable rights of patronage already described, he could not require the freedman to promise him service; and a promise to that effect was void, unless contracted by the freedman freely, and with a knowledge that it was not required of him by the law. (D. 38, 1, 47; D. 38, 2, 29, pr.) An exception was, however, made in favour of a son requested by his father to manumit a slave bequeathed to him; for the object of such a bequest was

to give the son the full rights of patronage. (D. 38, 2, 29, 1; D. 40, 5, 33, pr.)

The obligation must be contracted in good faith, as a mark of respect towards the patron, and not for the purpose of holding the freedman in thraldom. (D. 44, 5, 1, 5.) The Prætor refused to enforce excessive work from the freedman. (*Libertatis onerandae causa.*) (D. 38, 1, 2, pr.) Promises were regarded as void if they were imposed not with any intention of exacting their performance, but to hold them over the head of the freedman as a threat, if he should displease or disobey his patron. (D. 44, 5, 2, 2.)

The obligation to work for the patron might be extinguished, without affecting the other rights of the patron, in the following ways:—1. When a freedwoman attained the age of fifty. (D. 38, 1, 35.) No such age was fixed for freedmen. 2. If the freedman or freedwoman attained such dignity as would render the performance of the work unbecoming, they were released from the obligation. (D. 38, 1, 34.) 3. The marriage of a freedwoman, with the consent of her patron, released her from work during the continuance of the marriage. (C. 6, 3, 8; C. 6, 6, 2; D. 38, 1, 14.) 4. A freedman having two children subject to his paternal power (*patria potestas*), was released by the *lex Julia de maritandis*. (C. 6, 3, 6, 1; D. 38, 1, 37, pr.)

Investitive Facts.

The relation of patron and freedman was created by the manumission of a person lawfully a slave. (J. 1, 5, pr.)

Divestitive Facts.

A. By the Direct Act of the Patron and Freedman.

I. The right of wearing gold rings. (*Jus aureorum annulorum.*)

This privilege was obtained only by petition from the Emperor. (C. 6, 8, 1.) Commodus (D. 40, 10, 3) required the consent of patrons to make the grant valid. At no time, however, did the imperial grant suffice wholly to take away the patron's rights; it did not affect his claim to reverence (D. 2, 4, 10, 3), nor his hopes of succession to his freedman's property. (D. 40, 10, 6.) Justinian (Nov. 78, 1) gave to every freedman the right of wearing gold rings, but without depriving the patron of his rights; and consequently this ceased to be a divestitive fact.

In the earliest times, a consul enjoying a triumph wore an iron ring on his finger. Afterwards, as wealth increased, the Roman ambassadors when on a foreign mission wore gold rings, but only in public; and in the time of Pliny, the right to wear them had not reached lower in the social scale than the equestrian order. Severus gave the privilege to his soldiers, and subsequently, until Justinian, the privilege of wearing gold rings marked off the freeborn from the manumitted class.

II. Grant of the privileges of freeborn citizenship. (*Restitutio Natalium.*)

If we may judge from the name, this petition was at first employed only by those manumitted slaves who, after their escape from slavery, discovered that they were freeborn, and its object was therefore the restoration of birthrights. But it became the appointed means by which the stain of slavery could be wiped out, and the freedman to whom it was granted became as if he had never been a slave. (D. 40, 11, 5, 1.) He was thus put on an equality with freeborn citizens, and all the rights of the patron were taken away. (D. 40, 11, 2.) The restitution of birthrights was obtained by petition from the Emperor, and except in rare cases the consent of the patron and his children was essential to the success of the petition. (D. 40, 11, 4; D. 40, 11, 5.)

B. By Operation of Law.

I. If either the patron or freedman forfeited his liberty or citizenship, the rights of the patron were extinguished.

II. So if the patron or his son without cause accused the freedman of a capital crime, or gave false evidence against him. (D. 38, 2, 14, 5; D. 2, 4, 10, 11.) A capital crime, in the stricter sense of the word, was one punishable with death or loss of citizenship. (D. 50, 16, 103; D. 38, 2, 14, 3; D. 37, 14, 10.)

III. If the patron or his children brought an action claiming the freedman as a slave, and failed, the rights of patronage were forfeited. (D. 38, 2, 14, pr.; D. 38, 2, 16, pr.)

IV. The patron's refusal or neglect to support his freedman when in distress according to the *lex Ælia Sentia*. (D. 38, 2, 33; D. 37, 14, 5, 1.)

V. If the patron made his freedman swear not to marry, he forfeited his rights. (D. 37, 14, 15; D. 2, 4, 8, 2.) The object of this oath was to enable the patron on the death of his freedman to get the whole of his property.

VI. The marriage of a freedman with any female slave or *colona* of the Emperor, with the knowledge of the patron, extinguished his rights. (C. 6, 4, 2.)

Remedies.

Services. An action was given by the Praetor against a freedman who neglected

to perform the work agreed upon. (D. 38, 1, 3, pr.) The measure of damage was the value of the work undone, not the loss sustained by the patron in consequence of the non-performance. (D. 38, 1, 26, 1.)

Freedmen, Latins (*Latini Juniani*).

These were slaves whose manumission did not comply with all the conditions necessary to confer on them the rights of citizenship, and who by the *lex Junia Norbana* were placed on the same footing as the old Latin colonists.

They are called *Latini* because they are treated like Latin colonists: *Juniani* because it was through the *lex Junia* [A.D. 19] they received their freedom, though formerly they were regarded as slaves. (G. 1, 22.)

Their rights and duties are identical with those mentioned as applicable to citizen freedmen; but the Latins were subject to further disabilities.

They are not allowed by the *lex Junia* either to make a will themselves, or to take under another man's will, or to be appointed *tutores* by will. (G. 1, 23.)

But in saying, as we have said, that they cannot take under a will, we must be understood to mean that they can take nothing directly as an inheritance or as legacies. In another form, however, that of a trust, they can take. (G. 1, 24.)

Investitive Facts.

When in a freedman's person these three requirements meet—that he is over thirty years of age, that his master was owner *ex jure Quiritium*, and that he was freed by a lawful and regular manumission (that is by *vindicta*, by entry in the census, or by will), then he becomes a Roman citizen. If, however, any one of these is wanting, he is a Latin. (G. 1, 17.)

Under the *lex Ælia Sentia* a slave under thirty years of age, if set free by will, becomes a Latin,—although the statute itself did not directly make him a Latin. (G. 1, 22, as restored.)

A slave, again, over that age, but either manumitted by one having him *in bonis* only, though in lawful form, or set free before friends, but whose freedom is based on no other ground, becomes a Latin. All these, however, were at an earlier date protected as if free; although they were slaves *ex jure Quiritium* the Praetor protected their freedom. But now persons manumitted in this way are called *Latini Juniani*. (G. 1, 22, as restored.)

Among Roman citizens there are two forms of ownership (*dominium*), *in bonis* and *ex jure Quiritium;* and a slave may belong to a master that owns him by either title or by both. But we say that the slave is in the *potestas* of his master only if the master owns him in *bonis*, and this even although at the same time he belongs *ex jure Quiritium* to a master that is not the same. For he that has the bare *jus Quiritium* in a slave, is not understood to have *potestas*. (G. 1, 54.)

Divestitive Facts.

The divestitive facts of *Latinitas* are investitive facts of citizenship.

1. When a freedman has a son a year old (*anniculi probatio*).

In many ways Latins come to reach Roman citizenship. In fact, that very *lex Ælia Sentia* provides that a man under thirty years of age that has been manumitted and become a Latin may gain the citizenship as follows :— (1.) He must take to wife either a Roman citizen, or a Latin colonist, or a woman of the same condition as himself. (2.) He must have this attested by not less than seven Roman citizens, above the age of puberty, summoned as witnesses. (3.) He must beget a son, and that son must be a year old. (4.) He must then, as allowed and indeed ordained by that statute, go before the Prætor (or in the provinces before the president of the province), and fully prove that he has under the *lex Ælia Sentia* taken to himself a wife, and has by her a son a year old. (5.) The magistrate before whom the case is proved must further declare formally that it is so. Then the Latin himself, and his wife, if she too is of the same condition, and their son, if he also is of the same condition, become Roman citizens, as the statute ordains. The reason we have added in the case of their son, "if he also is of the same condition," is this, that if the Latin's wife is a Roman citizen, then her offspring, under a recent *Senatus Consultum* passed at the instance of the late Emperor Hadrian, is by birth a Roman citizen. (G. 1, 28-30.)

Ulpian ascribes this to the *lex Junia Norbana* instead of the *lex Ælia Sentia*. (Ulp. Frag. 3, 3.)

This right to gain Roman citizenship was under the *lex Ælia Sentia* possessed by freedmen only if manumitted, and thereby made Latins, while still under thirty years of age. But afterwards, a *Senatus Consultum* made when Pegasus and Pusio were consuls allowed the same right to freedmen manumitted and made Latins when over thirty years of age. (G. 1, 31.)

Nay, even if the Latin dies before proving the case of his son, now a year old, the mother can prove the case. By so doing both she and her son will become Roman citizens ; and further, the son, just as if he had been begotten in lawful marriage, comes in as if a posthumous heir and obtains his father's goods. If both father and mother die, the son in person ought to prove the case, as it is his interest to obtain their goods, which will come to him along with the Roman citizenship. Of course, if he is still under puberty, a *tutor* must conduct his case. (G. 1, 32, as restored.)

We shall see whether what we have said of a son a year old can be said or not of a daughter a year old. (G. 1, 32 A, as restored.)

A child was considered to be a year old on the morning of its 365th day. (D. 50, 16, 134.) In reckoning time the law took no account of fractions of a day, and thus in cases of the acquisition of rights, the dawn of the last day was regarded as completing the year. Where rights were lost by lapse of time, a different calculation was adopted ; the rights were held not to be extinguished until the conclusion of the last day. (D. 44, 7, 6.)

2. By a *Senatus Consultum* (probably *Tertullianum*), a Latin woman that had borne three children became a citizen. (Ulp. Frag. 3, 1; Paul, Sent. 4, 9, 8.)

3. Another mode of becoming a Roman citizen was by grant from the Emperor (*Beneficium principale*). (Ulp. Frag. 3, 2.)

4. A Latin became a citizen if his manumission was repeated with the requisite conditions observed (*iteratio*).

If a slave belongs to one master *in bonis*, to another *ex jure Quiritium*, then one of those two masters can begin his freedom, the other renew and complete it. (G. 1, 32 B, as restored.)

If he has gained freedom and the position of a Latin from the master he belonged to *in bonis* only, he ought with his consent to ask it from his master *ex jure Quiritium* also. When a slave belongs to one and the same master both *in bonis* and *ex jure Quiritium*, he may, when manumitted by him, both become a Latin and gain the rights of a citizen (*jus Quiritium*). (G. 1, 35, as restored.)

Again, if the slave became a Latin because he was under thirty when manumitted, he becomes a citizen if on attaining that age his master repeated the manumission by the *vindicta*. (Ulp. Frag. 3, 4.)

5. Further, any Latin gains the rights of a citizen by building a ship to carry ten thousand *modii*, or even by buying one and carrying corn to Rome for six years, either with that ship, or, if it is lost, with another he has got in its place. This is pointed out in an edict by the late Emperor Claudius. (G. 1, 32 C, as restored.)

6. By a *lex Visellia* six years' service in the *vigiles* or night-watch (*militia*) raised a Latin to the citizenship; and the number of years was reduced to three by a subsequent *Senatus Consultum*. (Ulp. Frag. 3, 5.) The *vigiles* were instituted by Augustus as a body of firemen (D. 1, 15, 1), but from the duties of their chief officer (*Praefectus Vigilum*) it may be inferred that they watched robbers and disturbers of the peace as well.

7. Again, an edict by the Emperor Nero provides that if a Latin spends not less than two-thirds of his patrimony in finishing a building in Rome, he shall obtain the rights of a citizen. (G. 1, 33, as restored.)

8. Establishing a mill and bakehouse (*pistrinum*). (Ulp. Frag. 3, 1.)

Or if he grinds daily not less than 100 *modii* of corn. (G. 1, 34, as restored.)

9. By holding the office of magistrate in a Latin colony. (G. 1, 95.)

Freedmen (*Dedititii.*)

The *dedititii* were certain manumitted slaves, who, in consequence of grave misconduct committed in the state of slavery, were subjected to certain perpetual disabilities.

Peregrini dedititii is the name for those aliens that once took up arms and fought against the Roman people, but afterwards gave themselves up when beaten. (G. 1, 14.)

The *lex Ælia Sentia*, accordingly, provides that slaves whose masters have put them in chains as a punishment, or that have been branded, or examined under torture for some wrong-doing and convicted thereof, or that have been given up to fight with the sword or with wild beasts, or that have been thrown into a school for gladiators or into prison, and have afterwards been manumitted either by the same master or by some one else, shall, when freed, be in the same condition as *peregrini dedititii*. (G. 1, 13.)

Slaves therefore so debased, no matter how they are manumitted or at what age, and even although their masters enjoy full rights over them, can never, we shall say, become Roman citizens or traders ; but in any case, as we shall understand it is settled, are to be reckoned among the *dedititii*. (G. 1, 15.)

But if a slave is not so debased, manumission makes him, we shall say, sometimes a Roman citizen, sometimes a Latin. (G. 1, 16.)

Those that are reckoned among the *dedititii* cannot take under a will in any way, any more than a free alien can ; and, according to the general opinion, they cannot themselves make a will. (G. 1, 25.)

Freedom in its worst form, therefore, is the lot of those that are reckoned among the *dedititii*. To them no statute, no *Senatus Consultum*, no imperial constitution, gives any way of approach to Roman citizenship. (G. 1, 26.)

Nay they are even forbidden to stay in the city of Rome, or within the hundredth milestone from the city. If they break this rule, it is ordained that they and their goods shall be sold by the State, upon the express condition that their slavery is not to be in Rome, nor within the hundredth milestone from the city, and that they are never to be manumitted ; and if they are manumitted, it is ordained that they shall become slaves of the Roman people. All these regulations are included in the *lex Ælia Sentia*. (G. 1, 27.)

The status of freedmen was formerly threefold. Of the persons manumitted some gained a greater degree of freedom, as recognised by law, and became Roman citizens ; others a less, and became Latins under the *lex Junia Norbana ;* and others a lower still, and thus came to be reckoned among the *dedititii* under the *lex Ælia Sentia*. But the worst of all conditions, that of the *dedititii*, has long fallen into disuse ; and the name of Latins is not often heard. Our goodness, therefore, that longs to raise everything, and to bring it to a better standing, has in two constitutions amended this, and brought it to its earlier state. For in Rome's early infancy the freedom that was open was one and simple, the same (that is) that the manumitter had, except indeed that the manumitted would be a freedman, the manumitter freeborn. The class of *dedititii*, therefore, we have swept away by a constitution published among our decisions, and in these

at the suggestion of Tribonian, our distinguished Quaestor, we have set at rest the disputes arising under the old law. The *Latini Juniani*, too, we have dealt with, and all the rules observed with regard to them we have corrected in another constitution at the suggestion of the same Quaestor, a constitution that shines out brightly among the imperial enactments. To all freedmen then, with no distinctions as to age when manumitted, or as to the ownership of the manumitter, or as to the mode of manumission, such as were formerly observed, we have given Roman citizenship. Many ways too have been added by which freedom with Roman citizenship, the only kind now known, may be secured to slaves. (J. 1, 5, 3.)

II.—Parent and Child.

Children after emancipation were not entirely cut off from their parents. A relation continued to subsist between them resembling that already described as existing between a manumitted slave and his former master. Children were emancipated by the same form that was employed in the enfranchisement of slaves; namely, manumission by the *vindicta*. The father thus acquired the rights of a patron. But the relation of the father, as patron, to his son, is nearly as artificial as the *potestas* itself; it is in fact an attenuated prolongation of the *potestas*. It brings us no nearer to a natural relation, consisting of duties springing out of the natural relation between parent and child. To a very great extent, however, the artificial relation of patron to an emancipated son coincided with a natural one. The position of legitimate children that had never been under the *potestas* of their father, was almost identical with the position of those that had been under the *potestas* and had been emancipated. Still more, illegitimate children, the offspring of concubinage, were subject to nearly the same duties, and enjoyed nearly the same rights. Lastly, the mother, as well as the father, enjoyed similar parental rights and responsibilities. Thus the narrow relation of patron to an emancipated child was broadened until it was nearly coextensive with that of parent and child.

The following observations apply to (1) emancipated children; (2) children born in lawful wedlock, but never subject to the *potestas* of their father; (3) natural children; but not (after Justinian's time) to the offspring of prohibited, incestuous, or infamous connections. (Nov. 89, 15.)

Rights and Duties.

A. Rights of Parents of both Sexes: Duties of Children.

1. Children owe to their parents reverence (*obsequium, rever-*

entia). This reverence was the same as was exacted from freedmen towards their patrons. (D. 37, 15, 9.)

II. Children having the means were bound to maintain their parents, if necessary. This duty arose only if the father or mother were in want and the children were able to support them. (C. 5, 25, 1.) This duty extended not only to parents, but to all ascendants, both male and female. (D. 25, 3, 5, 2.)

The mother of illegitimate children had a right to maintenance from them. (D. 25, 3, 5, 4.)

If a parent was in extreme distress, even the heirs of his children were bound to perform the duty that would have fallen upon them if they had been alive. (D. 25, 3, 5, 17.)

III. Parents had certain rights of succession to the property of their children. (Book III.—Intestate Succession.)

A father emancipating a son could not exact from him any promise of services (*operae*) as the price of the emancipation. (D. 37, 12, 4.) Nor if the son promised such services on oath was the promise binding. A son owes his father reverence (*pietas*), says the Prætor, not work (*operae*). (D. 37, 15, 10.) In this respect only is there a marked difference from the duties owed by a freedman to his patron.

B. Rights of Children: duties of Parents and other Ascendants of both Sexes.

1. Parents, and, failing them, grandfathers, grandmothers, and other ascendants, are bound to maintain their children. (D. 25, 3, 5, 3.) This obligation existed in the absence of the *potestas*. (D. 25, 3, 5, 1.) It extended to illegitimate children (*vulgo concepti*), the offspring of promiscuous intercourse, but not to the children of prohibited or incestuous connections. (D. 25, 3, 5, 4.)

The obligation was measured by the means of the parents and the needs of the children. Grown-up men could demand maintenance if they were in distress, or were unable to work through bad health. (D. 25, 3, 5, 7.) The father was bound to give not merely food, but all other reasonable expenses (D. 25, 3, 5, 12); not, however, extending to the discharge of debts incurred by his necessitous children. (D. 25, 3, 5, 16.) The obligation was regarded as very solemn, and the neglect to provide for young children is placed by Paul in the same moral category with infanticide. (D. 25, 3, 4.)

II. Fathers, having means, were required by the *lex Julia et Papia Poppaea* to give dowries to their daughters; and the

law seems to have been extended to the provinces by a constitution of Severus and Antoninus. This obligation was imposed on fathers even when their daughters were not under their *potestas*, but mothers were never obliged to give dowries. (D. 23, 2, 19 ; C. 5, 12, 14.)

III. The rights of children to the property of deceased parents will be discussed elsewhere. (Book III.—Intestate Succession.)

III.—Husband and Wife.

Definition.

"Marriage," says Modestinus, "is a union of a male and female, giving both a common lot throughout life; a union of all their rights, both divine and human." (D. 23, 2, 1.)

In contemplation of law, the *manus* and marriage, although in the earlier times generally if not invariably conjoined, were considered to be distinct. Thus by means of the interruption of the *usus* for three nights, the wife could retain her position as wife without subordinating herself to her husband as his daughter.

Lawful marriage is a mutual contract between Roman citizens, who come together in accordance with the precepts of the statutes. (J. 1, 10, pr.)

Marriage, or matrimony, is the union of a man and a woman, involving unbroken harmony in the habits of life. (J. 1, 9, 1.)

The definition of Justinian is the best, because it attempts the least. The words of Modestinus, *divini juris*, refer to the right of a wife, at least *in manu*, to share the sacred rites (*sacra privata*) of her husband's family. Marriage (*justae nuptiae*) may be defined as that particular union of the sexes that gave the father *potestas* over the children born to him by his wife. Marriage may be compared with other relations.

Concubinage (*concubinatus*) was a relation of the sexes, resembling in many particulars legal marriage, but differing from it in failing to give the *potestas* over the children born of the concubine (*concubina*).

Contubernium was the union of slaves. When a male and female slave were allowed to cohabit—for by the Roman law they could not marry—the relation between them, although it had no legal sanction, was not wholly ignored. The children born of such a union were regarded as related in blood (*cognati*), and this relation prevented them marrying if they afterwards became free. (D. 23, 2, 14, 2.)

Stuprum was any connection between a man and a free woman (not a slave) otherwise than in marriage or concubinage, and provided the woman was not married. (D. 48, 5, 34, pr.)

Polygamy was not allowed either in marriage or concubinage. (C. 5, 26, 1 ; C. 5, 5, 2 ; C. 9, 9, 18.)

Rights and Duties.

According to the ancient law of Rome, marriage had two principal effects. It gave the husband at once large powers

over his wife; and if he had children, it gave him still larger powers over them. The husband's rights in respect of his wife were summed up in the word *manus;* his rights over his children, in the word *potestas.* To the latest period of Roman history, marriage continued to bestow on the husband the *potestas* over his children; but even before the Empire, precautions were taken to prevent the husband acquiring the *manus* over his wife. Gaius informs us that in his time the *manus* rarely existed. What took the place of the *manus?* One of the principal rights of the husband was to his wife's property; in that respect the *manus* yielded to the *dos.* But the other rights involved in *manus* perished wholly. The *manus* passed away without leaving behind it any relation like that subsisting between patron and freedman, or parent and child.

It would be a mistake, however, to suppose that the Romans were destitute of fixed principles as to the conduct that husbands and wives ought to observe towards each other. The wife, for instance, took the rank of her husband. (C. 10, 39, 9.) But the rights and duties of a wife, as of a husband, rested simply on a moral basis; they were vindicated by the social sanction, not by the civil law. Perhaps the best criterion of the nature of marital duty is the liability of the husband for the maintenance of his wife. There is perhaps no text that expressly states that the husband was not bound to support his wife; but an inference may confidently be drawn from the decisions relating to the liability of the husband for the funeral expenses of his deceased wife. If the wife had a dowry, that was the fund in the first instance to be charged with the funeral expenses. (C. 2, 19, 13.) If there were no dowry, the wife's father was next liable; or if he were dead his heirs; and only if all these failed was the husband bound to pay for his wife's funeral. (D. 11, 7, 22; D. 11, 7, 28.) Again, it is clear that if a wife had a dowry, her husband would be compelled to support her out of it. (D. 24, 3, 22, 8.) But in the absence of a dowry, the wife seems to have had no claim to maintenance against her husband.

The absence of legal duties between husband and wife becomes easily intelligible when the remarkable freedom of divorce among the Romans is kept in view. It was an ancient and deeply-rooted principle of the Roman law that marriages should be free; that no one should be compelled to continue in the bondage of marriage against their will (*libera matrimonia esse*

antiquitus placuit). (C. 8, 39, 2.) This was a provision against conjugal misconduct that took the place of civil actions. No one need submit to wrong from a relation that could be terminated at pleasure. Thus it is that our best information regarding the conduct in a husband or wife that was deemed improper, is to be gathered from the lawful grounds of divorce as enumerated in successive imperial constitutions.

Investitive Facts.

Marriage was completed by the consent of the husband and wife, and of the persons, if any, under whose *potestas* they were, together with the delivery of the wife to the husband. (D. 23, 2, 2.)

I. Of the consent of the husband and wife.

A father could not force his son (D. 23, 2, 21 ; C. 5, 4, 14) or daughter into marriage, nor could a patron even compel his freedwoman to marry him, unless, perhaps, he had manumitted her on purpose. (D. 23, 2, 28.) If, however, a son, yielding to his father's threats or severities, married against his will, this "undue influence" was not considered to vitiate the consent. (D. 23, 2, 22.)

II. Of the consent of the *paterfamilias*.

Lawful marriage is a mutual contract between Roman citizens who come together in accordance with the precepts of the Statutes. The males must be over puberty, and the women marriageable. The males may be either fathers or sons of a household, provided only that if they are sons they must have the consent as well of the ascendants in whose *potestas* they are. This is so needful, as both the principles of the law and natural reason urge, that the parents' order ought to come first. Hence the question has been raised whether a madman's daughter or son can marry. As to the son's case there was a difference of opinion. We have therefore put forth a decision allowing a madman's son, just like his daughter, power, even though the father does not come in, to unite in marriage in the manner given in our constitution. (J. 1, 10, pr.)

The consent of the head of the family was essential to the validity of the marriage of anyone under his power, irrespective of age. In the case of sons, this privilege may be explained on the principle that, without a man's consent, new persons ought not to be brought into his family, and that as the children of his son would be under his power, he ought to have at least a prohibitory voice. But this reasoning does not apply to a *filiafamilias*, because the children of a daughter fell under her husband's *potestas*, not her father's. The true explanation must be sought in the absolute and uncontrolled dominion originally possessed by the Roman *paterfamilias;* and the right of a voice in his children's marriages, stoutly maintained even under the jurisprudence of Justinian, may be regarded as a relic of the old paternal despotism. There was no exemption. Even that favourite of legislation—the soldier—could not, while subject to the *potestas*, escape this peculiarly vexatious incident of it.

EXCEPTIONS.—1. When the father is insane. Theophilus explains why, in this instance, the rule did not apply that silence gives consent (*qui scit nec contradicit*, C. 5, 4, 5.) A person can give a tacit, only if he can give an express, consent; but a madman was incapable of consenting either way. By the ancient law the daughter of a lunatic (*mente captus*) or a madman (*furiosus*) could marry. Marcus Aurelius gave this privilege to the sons in confirmed cases (*mente capti*), and Justinian extended it to the sons of those suffering from acute insanity (*furiosi*). The marriage settlement was to be fixed by the curators or cognates of the lunatic, with the sanction of the Prefect of the city, or, in the Provinces, of the President of the Province. (C. 1, 4, 28.)

2. If the *paterfamilias* were taken captive, and remained with the enemy three years, those under his power were allowed to marry. (D. 23, 2, 9, 1.)

3. If he were absent from home, his children could marry after three years since he was last heard of. (D. 23, 2, 10.) Julian goes further, and says, if the marriage was with a person in such a position of life that the consent of the *paterfamilias* would be given as a matter of course, neither son nor daughter need wait the expiration of the three years. (D. 23, 2, 11.)

Against fathers that refused their consent with the object of preventing their children marrying the *lex Julia et Papia Poppaea* first provided a remedy. The Proconsuls and Presidents of Provinces were empowered to compel the father to consent and make a settlement. Special laws were enacted to compel heretic, Jewish, or Samaritan fathers to endow their orthodox children, and give them in marriage to the orthodox. (C. 1, 5, 13; C. 1, 5, 19.) The father was treated as sinning against the *lex Julia*, not merely by an active refusal of his consent, but by neglecting to provide suitable spouses for his children. (D. 23, 2, 19.)

Grandchildren under the power of their grandfather, if males, required the consent of their father also; but girls did not. (D. 23, 2, 16, 1.) The reason was, that on the death of the grandfather, the father acquired the *potestas* over his children, and if his consent were unnecessary, he would find his children's children under his *potestas*, and entitled to a share in his property against his will. It was a general rule that no one could become heir to a man against his will. (J. 1, 11, 7.)

As the consent flowed from the *potestas*, it followed that children emancipated from the *potestas* could marry without the consent of their parents. (D. 23, 2, 25.)

The consent of the mother was not required. So a woman could marry without the consent of her *tutor*. (D. 23, 2, 20.) But widows under twenty-five, who had been emancipated, could not marry a second time without their father's consent. (C. 5, 4, 18.)

III. Delivery of the wife to the husband.

It is an old and vexed question among civilians whether consent alone, if clearly expressed, sufficed to constitute marriage; or whether, over and above, some rite, or merely delivery of the wife to the husband, was requisite? Generally the question could not have arisen, because when the marriage was contracted in the presence of the husband and wife, delivery was implied. In a few cases, however, the question emerged. Thus, a gift was made to a woman by her husband on the marriage-day. Was it valid? This depended upon the further question, whether it was made before she was married; because

if made afterwards, it was void in consequence of the rule forbidding gifts between husband and wife. The question thus propounded seems to involve the point on which a decision is desiderated; namely, at what particular moment the marriage was complete. The answer given is, that if the woman receives the gift in her own home, it is a gift before marriage, and therefore valid; but if she receives it after being led into her husband's house, it is a gift after marriage, and could therefore be withdrawn. (C. 5, 3, 6.) This enables us to understand a rule stated by Pomponius. If marriage depended on consent and nothing else, such consent might equally be given when the parties were absent as when present. This is recognised in all contracts formed by consent alone. But according to Pomponius, a man could by letter or message enter into marriage, provided the woman was taken to his house (*in domum ejus deductione*, hence *ducere in matrimonium*); while a woman could not in her absence be thus married to a man. (D. 23, 2, 5.) Those passages, in spite of some apparently to the contrary (C. 5, 4, 21; D. 24, 1, 66, 1), appear conclusive as to the necessity of delivery of the wife to the husband as an essential constituent of the investitive fact of marriage.

Some authors endeavour to make out an analogy with the contracts *re;* marriage, in their view, is not a consensual, but a real, contract. But the true meaning of the rule seems difficult to miss. In the old law, marriage was made by *mancipatio*, or by delivering the wife into the possession of the husband. Unless the husband had possession of his wife for a year, he could not have the *manus;* and if she were not delivered to him, he could not have possession. In later times, the possession of the wife for a year did not subject her to the *manus*, and there was no reason why delivery of the wife should continue to be required in order to constitute marriage. But there is no difficulty in understanding that the custom of delivering the wife should continue when there was no longer any reason for it; for to the latest times a woman could not be a witness to a will, simply because anciently she was not a member of the *Comitia*, in which alone wills could be made.

Restraints on the Investitive Facts.

Conubium is defined by Ulpian (Ulp. Frag. 5, 3) as the capacity of marrying (*conubium est uxoris jure ducendae facultas*). When, therefore, as between two given persons there is no impediment to their marriage, they are said to possess *conubium*.

The impediments, presently to be enumerated, are each of them fatal to the legality of marriage. When the parties were related in blood, or in certain cases by adoption, they were subject also to punishment; and in every case, however arbi-

trary the prohibition, it made the marriage absolutely void. The impediments are, in judicial language, *diriment*, and not merely *prohibitive*.

Therefore, if in defiance of what we have said, persons come together [in infamous and incestuous marriage], there is understood to be no husband, no wife [no children], no marriage, no matrimony, no dowry. The offspring, therefore, of such a union are not in the father's *potestas*, but in that respect are on the same footing as children the mother has conceived as a public woman. Now these, too, are understood to have no father, seeing it is uncertain who he is ; and hence they are usually called bastards (*spurii*), either from a Greek word, as if conceived σποράδην, or as being *sine patre filii* (sons without a father). It follows, therefore, that even on the dissolution of such a union there is no room for exacting a dowry. Moreover, they that unite in forbidden marriage suffer other penalties as well, that are contained in the sacred constitutions. (J. 1, 10, 12 ; G. 1, 64.)

A. Absolute Disqualification : persons that cannot marry.

I. With slaves there can be no marriage. (G. 1, 58, as restored.)

II. Boys under fourteen years (*impuberes*) and girls under twelve (*non viripotentes*) could not marry. If, however, a girl married under age remained with her husband until she was twelve, she became his legal wife. (D. 23, 2, 4.)

III. Persons already married cannot marry. A person whose husband or wife had been five years in captivity, could marry again without dissolving the first marriage. (D. 24, 2, 6.)

IV. A woman criminally accused of adultery could not marry unless she was acquitted, or the prosecution was abandoned. If condemned, she was forbidden again to marry. (D. 23, 2, 26 ; D. 23, 2, 34, 1.)

V. A female slave manumitted by her master for the purpose of marrying her, cannot marry anyone but him unless he gives her up. If she refuses him, she cannot marry another even with his consent. (D. 23, 2, 51, pr.)

B. Persons allowed to Marry, but forbidden to Intermarry.

I. Cognates (*cognati*), persons connected by blood.

Cognates are divided into three classes :—

1. Ascendants (*ascendentes*) ; one's parents, one's grandparents, great-grandparents, etc.
2. Descendants (*descendentes*) ; one's children, one's grandchildren, one's great-grandchildren, etc.
3. Collaterals (*cognati ex transverso gradu* or *a latere*) embrace any of the descendants of any ascendant. Thus, my aunt is a collateral cognate, because she is a descendant (daughter) of my ascendant (grandfather). Her children are my cognates (cousins), being also descendants of my grandfather. So my nephews are collaterals ; they are descendants (grandchildren) of my ascendant (father).

1. No ascendant, however far removed, can marry any descendant, however far removed.

It is not every woman, therefore, that we may lawfully take to wife : from marriage with some we must refrain. Between persons standing to one another as ascendant and descendant marriage cannot be contracted [and between them there is no *conubium*] ; as, for instance, between father and daughter, grandfather and granddaughter, mother and son, grandmother and grandson, and so on indefinitely. If such persons unite, the marriage they contract is said to be nefarious and incestuous. (J. 1, 10, 1 ; G. 1, 58-59.)

2. Collaterals within the third degree cannot intermarry.

Between persons collaterally related there is a like rule to be observed, but it is not so far reaching. A brother and sister certainly are forbidden to marry, whether they are the offspring of the same father and the same mother, or have only one of these two in common. (J. 1, 10, 2 ; G. 1, 60-61.)

EXCEPTION.—A brother's daughter we may lawfully take to wife. This came into use for the first time when the late Emperor Claudius took Agrippina, his brother's daughter, to wife. But not a sister's daughter. So the imperial constitutions point out. Again, we may not take to wife an aunt, whether a father's sister or a mother's sister. (G. 1, 62.)

This solitary exception was repealed by Constantine. (C. Th. 3, 12, 1.)

3. Collaterals beyond the third degree could intermarry.

EXCEPTION.—A brother or sister's daughter we may not lawfully take to wife ; nor even a granddaughter, although in the fourth degree. For where we may not lawfully take to wife the daughter, the granddaughter too is not allowed. (J. 1, 10, 3.)

The exception included the great-granddaughter of a sister, or the sister of a great-grandfather. (D. 23, 2, 17, 2 ; D. 23, 2, 39, pr.) Such persons, although beyond the third or even fourth degree, were within the meaning of the prohibition against marriage with ascendants or descendants. They were said to be in the place of parents. Ulpian tells us (Ulp. Frag. 5, 6) that the prohibition in old times extended to the fourth degree, thus preventing the intermarriage of first cousins ; but although restraints on this marriage were at various times attempted, they were finally overruled by Arcadius and Honorius. (C. 5, 4, 19.)

Two brothers' or sisters' children, or a brother's and a sister's, can intermarry. (J. 1, 10, 4.)

It is certain that relationships formed in slavery are a bar to marriage, and that even although the father and daughter or brother and sister may have been manumitted. (J. 1, 10, 10.)

II. Agnates (*agnati*). Agnation is the fictitious tie of blood produced through the existence of the *patria potestas*. Two persons are agnates in respect of each other, when they are so related that if the person through whom they are connected were alive together with them, they would be under his *potestas*. Agnation is the artificial tie through the *potestas ;* cognation the natural tie through birth.

Agnates are kinsmen (*cognati*) related through males, kinsmen as it were on the father's side. A brother, for instance, born of the same father, is an

agnate ; and so is that brother's son or his son's son, and so again are a father's brother and that uncle's son or son's son. But kinsmen related through females are not agnates, but only kinsmen (*cognati*) by the *Jus Naturale*. [Between an uncle and his sister's son, therefore, there is no agnation, but only kinship.] Your father's sister's son, therefore [or mother's sister's son], is not your agnate, but only a kinsman ; and you in turn stand to him in the same legal relation ; for the offspring follow the father's family, not the mother's. (J. 1, 15, 1 ; G. 1, 156.)

The legal relation (*jus*) of an agnate is usually destroyed by *capitis deminutio ;* for agnation is the name of a legal relation. But the legal relation of kinship is not changed by every form of *capitis deminutio ;* for the principles of the *jus civile* can destroy the relations due to the *jus civile*, but not natural relations. (J. 1, 15, 3 ; G. 1, 158.)

But though it has been said that the legal relation of kinship remains even after *capitis deminutio*, yet this is only so if it is the *capitis deminutio minima* that comes in ; for then the kinship remains. But if a man incurs *capitis deminutio maxima*, the legal relation of kinship as well as of agnation is at an end. If, for instance, some kinsman is enslaved, he ceases to be a kinsman, and not even if he is manumitted does he regain his kinship. Nay, even if a man is transported to an island, his kinship is dissolved. (J. 1, 16, 6.)

Agnation imitates cognation, and has the same difference of degrees and kinds—ascendants, descendants, collaterals, etc.

1. No ascendant, however remote, can marry any agnatic descendant, even although the artificial tie of agnation is removed by emancipation.

So entirely is this the case, that although it is by adoption that they have come to stand to one another as ascendant and descendant, yet they cannot intermarry. Nay, more ; even after the adoption is dissolved, the same rule of law remains. If, therefore, you once come to have by adoption a daughter or a granddaughter, you will not be able to take her to wife, even although you emancipate her. (J. 1, 10, 1 ; G. 1, 59.)

2. Agnatic collaterals cannot intermarry where cognatic collaterals cannot, unless the tie of agnation is broken, in which case the restriction is removed. (D. 23, 2, 55, 1.)

If a woman comes to be your sister by adoption, as long as the adoption lasts there can undoubtedly be no marriage between you and her. But if the adoption is dissolved by her emancipation, you will be able to take her to wife ; or if you yourself are emancipated, there is no bar to the marriage. It is agreed, therefore, that if a man wishes to adopt his son-in-law, he ought first to emancipate his daughter ; and if he wishes to adopt his daughter-in-law, he ought first to emancipate his son. (J. 1, 10, 2 ; G. 1, 61.)

EXCEPTION.—His father's sister, again, although by adoption, a man may not lawfully take to wife ; nor his mother's sister ; for they are held to stand in the place of ascendants. On the same principle it is true that a man is forbidden to take to wife a great-aunt, whether on the father's side or the mother's. (J. 1, 10, 5.)

If a woman, your father has adopted, has a daughter, it seems you are not debarred from taking her to wife ; for she is no relation to you either by the *jus civile* or by the *jus naturale*. (J. 1, 10, 3.)

But (D. 23, 2, 55, 1) marriage with the mother of an adoptive father is forbidden, unless the son is emancipated.

III. Relatives by affinity (*affines*). *Affines* are persons connected by marriage or by concubinage (C. 5, 4, 4), or by *contubernium*. (D. 23, 2, 14, 3.)

There were no degrees of affinity. (D. 38, 10, 4, 5.)

Again, a woman that has once been our mother-in-law or daughter-in-law, or stepdaughter or stepmother, we cannot take lawfully to wife. "Once been" we say, because if the marriage that brought us such a connection (*affinitas*) still exists, there is another reason why there can be no marriage between us ; namely this, that the same woman cannot marry two men, nor the same man have two wives. (G. 1, 63.)

From respect for his connections by marriage (*adfinitas*) there are certain women one must refrain from marrying. A stepdaughter or a daughter-in-law, for instance, a man may not take to wife, because both stand in the place of a daughter. This, of course, must be understood to mean that the woman has been a stepdaughter or a daughter-in-law. For if she is still your daughter-in-law, still (that is) married to your son, there is another reason why you will not be able to take her to wife, since the same woman cannot be married to two men. Again, if she is still your stepdaughter, if (that is) her mother is still married to you, you will not be able to take her to wife, because you are not allowed to have two wives at the same time. (J. 1, 10, 6.)

A mother-in-law too, and a stepmother, one is forbidden to take to wife, because they stand in the place of a mother. This too comes in only after the connection is dissolved. For otherwise, if she is still your stepmother, still married (that is) to your father, you are debarred from marrying her by the common rule of law that the same woman cannot be married to two men. Again, if she is still your mother-in-law, if (that is) her daughter is still married to you, the marriage is barred, because you cannot have two wives. (J. 1, 10, 7.)

A husband's son by another wife, and a wife's daughter by another husband, or *vice versa*, can lawfully contract a marriage, although they may have a brother or a sister born of the marriage contracted afterwards. (J. 1. 10, 8.)

A stepfather (*vitricus*) and stepdaughter (*privigna*) cannot intermarry :
nor a stepmother (*noverca*) and stepson (*privignus*) :
nor a father-in-law (*socer*) and daughter-in-law (*nurus*) :
nor a mother-in-law (*socrus*) and son-in-law (*gener*).

A man cannot marry his brother's widow or deceased wife's sister. This prohibition was introduced first by Constantine, and repeated by Valentinian, Theodosius, and Arcadius. (C. Th. 1, 2 ; C. 5, 5, 5.)

There are other persons too that for various reasons are forbidden to enter into the marriage-contract. They are enumerated, by our permission, in the books of the Digest or Pandects gathered from the old law. (J. 1, 10, 11.)

IV. Quasi-relationship.

If your wife is divorced, and afterwards gives birth to a daughter by some one else, this daughter is not your stepdaughter. But yet, Julian says, one ought to abstain from marriages of this kind. (J. 1, 10, 9.)

A son could not marry the widow of his adopted father, even if he had been emancipated, because she is in place of a stepmother (*in loco novercae*). (D. 23, 2, 14, pr.) So a man could not marry the widow of an adopted son, because she is a sort of stepdaughter to him, even after emancipation. (D. 23, 2, 14, 1.)

Your son's betrothed is not your daughter-in-law, nor is your betrothed his stepmother. Yet in the eye of law they act more rightly that refrain from marriages of this kind. (J. 1, 10, 9.)

V. The existence of a fiduciary relation in two cases operated as a limited barrier to marriage.

1. Certain high officials were forbidden to marry any woman domiciled in the province of their administration. The prohibition extended to their sons. (D. 23, 2, 57, pr.; D. 23, 2, 38, pr.; D. 23, 2, 63; D. 50, 16, 190.) The officials were the President (*Praeses Provinciae*), the Prefect of the cohorts (*Praefectus cohortis*), the Prefect of the cavalry (*Praefectus equitum*), and the Tribune (*Tribunus*). The disqualification ceased as soon as their term of office expired. (C. 5, 4, 6.)

2. *Tutores*, *Curatores*, or their sons, were not permitted to marry a *pupilla* until she was twenty-six years of age. This prohibition was introduced by a *Senatus Consultum* apparently of the time of Marcus and Commodus. (D. 23, 2, 67, 3.) To permit such a marriage offered a temptation to the *tutor* to hush up all questions of maladministration by marriage, and accordingly the prohibition was kept up as long as by the law a woman could challenge the accounts. The prohibition was removed if the girl were betrothed to the *tutor* by her father, or given to him in his last will. (D. 23, 2, 66; D. 23, 2, 36.)

VI. Conviction for crime.

1. A man convicted of adultery with a married woman cannot marry her although she has been neither accused nor condemned. (D. 34, 9, 13.)

2. One that has committed rape on a woman, can never afterwards marry her. If her parents consent, they are punished with banishment. The reason was that the property of the offender became forfeited to the woman, and by marriage he could get it back again. (Nov. 143; Nov. 150.)

VII. Religion.

Jews and Christians could not intermarry. If they did so, their connection was illegal, and they were guilty of the crime of adultery (*crimen adulterii*). This law was introduced before the Christian empire was a century old, in A.D. 388. (C. 1, 9, 3.)

VIII. The relation of patron and freedman.

1. A patron might marry his freedwoman (*liberta*), but it was considered to evince a higher regard for decency if he assigned her the humbler position of concubine. *Honestius sit patrono libertam concubinam quam matremfamilias habere.* (D. 25, 7, 1. pr.; C. 5, 4, 15.)

2. A female patron could not marry her freedman (*libertus*). Nor could a freedman marry the daughter, granddaughter, or wife of a patron (*patronus*). (C. 5, 4, 3.)

IX. Restrictions on Senators.

From a reference in Livy (39, 19) it would seem that a freeborn man could not marry a freedwoman. But owing, it is said, to a scarcity of freeborn women, marriage was allowed between *ingenui* (except Senators) and *libertinae*, by the *lex Julia et Papia Poppaea*. (D. 23, 2, 23.) This enactment subjected certain marriages to penalties, but does not appear to have made them null. (D. 23, 2, 16, pr.) It forbade a freeborn person to marry a prostitute (*qui palam quaestum fecit*) (D. 23, 2, 43, 1); a procuress (*lena*) (D. 23, 2, 43, 6; D. 23, 2, 43, 7); a woman condemned in a public trial, *i.e.*, one that could be brought by any informer (*damnata publico judicio*) (D. 23, 2, 43, 10); a woman caught in adultery, though not condemned (D. 23, 2, 43, 12); or a comic actress (Ulp. Frag. 13, 2). But the restrictions of the *lex Julia* on the marriages of Senators were made fatal to these marriages, by a *Senatus Consultum* passed in the reign of Marcus and Commodus. (D. 23, 2, 16, pr.) The joint effect of the *lex Julia* and that *Senatus Consultum* was as follows :—

1. A Senator, his son, his son's son, and his son's grandson, could not marry a freedwoman. A Senator's son's daughter, or granddaughter, or great-granddaughter, could not marry a freedman. (D. 23, 2, 44, pr.)

2. The same persons could not marry a comic actress, nor one whose father or mother had acted in comedy. (D. 23, 2, 44, pr.)

Constantine extended this prohibition to the *Praefecti*, who were just above the Knights and below the Senators, and to the *duumviri* in municipalities; and, on the other hand, to all persons of the lowest order (*humiles abjectaive personae*), as the daughters of a procurer or gladiator or tavern-keeper. (C. 5, 27, 1.) This enactment of Constantine was repealed by Justinian, who allowed the highest personages to marry freedmen or others of low rank, provided a dowry was fixed and the marriage settlement was made in writing (*instrumenta dotalia*). (Nov. 117, 6.)

X. Latins and foreigners (*Latini, Peregrini*) could not marry Roman citizens. (Ulp. Frag. 5, 4.)

Hence some veterans are usually allowed by the imperial constitutions *conubium* with the first Latin or alien woman that they marry after their discharge. The offspring of such a marriage are Roman citizens, and come under the *potestas* of their ascendants. (G. 1, 57.)

It is perfectly certain that a Roman citizen and the alien woman that he weds, if only he has *conubium* with her, can, as we have said above, contract a lawful marriage. Their offspring then will be a Roman citizen, and in the father's *potestas*. (G. 1, 76.)

If, again, a female Roman citizen marries an alien, and there is *conubium* between them, by the law of the alien people the offspring is an alien and his father's lawful son just as if he had begotten him by an alien wife. Now, however, by a *Senatus Consultum* passed at the instance of the late Emperor Hadrian, even though there is no *conubium* between the Roman citizen and her alien husband, the offspring is his father's lawful son. (G. 1, 77.)

XI. By the XII Tables, marriages between Patricians and Plebeians were prohibited, but only for a short time; for in B.C. 445 the prohibition was removed on the rogation of the tribune C. Canuleius. (Livy, 4, 6.)

Divestitive Facts.

A. Voluntary, by the Acts of the Parties.

A Roman marriage was at no time indissoluble; but it was

permanent, and continued for life, if neither party wished sooner to dissolve it. Divorce was always a private act; it required the sanction of no court of law; and although the unjustifiable exercise of the right of dissolving a marriage was at different times visited with more or less punishment, yet the right was never denied.

Divortium was the dissolution of a marriage at the instance of either or both parties. (D. 50, 16, 191.)

Repudium was strictly the dissolution of an agreement of betrothal (*sponsalia*). (D. 50, 16, 101, 1.)

Sometimes *divortium* is taken as the name for dissolution of marriage, and *repudium* for the written bill of divorce (*repudio misso*). (C. 5, 17, 8.)

I. A marriage could be dissolved by the *paterfamilias* of the wife. When the wife passed into the *manus* of her husband, she was thereby released from the *potestas* of her father; but when she married without falling under the *manus*, she remained in the *potestas* of her father. In the exercise of his *potestas*, the father could take his daughter from her husband against the wishes of both. This abuse was limited by a constitution of Antoninus Pius, who prohibited a father from disturbing a harmonious union. Marcus Aurelius added, "Unless for very weighty reasons" (*magna et justa causa interveniente*). (C. 5, 17, 5.)

A *paterfamilias* could not, of course, take away his daughter from her husband if she were emancipated. (C. 5, 17, 5.)

II. Divorce by mutual consent (*divortium bona gratia*).

During the whole period from the foundation of Rome to Justinian, it appears that divorce might take place by mutual consent without any check from the law whatever. If husband and wife agreed to separate, the State never interfered. But Justinian prohibited this kind of divorce except in three cases: (1) when the husband was impotent; (2) when either husband or wife desired to enter a monastery; and (3) when either of them was in captivity for a certain length of time. Those that dissolved a marriage by pretending to undertake a vow of chastity, but did not do so, forfeited the property they brought to the marriage in favour of their children. (Nov. 117, 10-12.)

But at a later period Justinian enacted that persons dissolving a marriage by mutual consent should forfeit all their property and be confined for life in a monastery, which was to receive a third of the forfeited property, the remaining two-thirds going to the children of the marriage. This severity,

so much at variance with the Roman spirit, indicates the growing power of the clergy (*ut non Dei judicium contemnatur*). (Nov. 134, 11.)

The nephew and successor of Justinian repealed his uncle's prohibitions, and restored divorces *bona gratia*. (Nov. 140, 1.)

III. Divorce by the husband alone, or the wife alone, without the consent of the other.

This topic may be considered under two heads :—

(A.) The Form of Divorce. (B.) Restraints on Divorce.

(A.) The Form of Divorce.

Before the *lex Julia de adulteriis* no special form was observed ; it was enough that the husband told the wife or the wife the husband that the marriage was at an end. (D. 38, 11, 1.) The husband generally took the keys from his wife, put her out of his house, gave her back her dowry, and so dissolved the marriage. The act might be done in the wife's absence. Cicero divorced his wife Terentia by letter.

But the *lex Julia de adulteriis* required a written bill of divorce (*libellus repudii*) to be given in the presence of seven Roman citizens above the age of puberty as witnesses. (D. 24, 2, 9.) The written record of the marriage (*nuptiales tabulae*) was destroyed, and the divorce publicly registered. The form of words employed in the repudiation was *tuas res tibi habito*, or *tuas res tibi agito*. (D. 24, 2, 2, 1.)

The repudiation must be a deliberate intention to break up the marriage (*animo perpetuam constituendi dissensionem*). (D. 24, 2, 3.) It was valid, although wholly without excuse, so that it was unnecessary even to acquaint the other party with the change in their condition. It was held that if a wife made a bill of divorce in the presence of the requisite witnesses, the marriage was dissolved without delivery of the bill to the husband, and even without his knowledge of it. (C. 5, 17, 6.) Still it was considered proper to deliver the bill of divorce to the other party. (D. 24, 2, 2, 3.) The effect of this rule was, that a madman (*furiosus*) could be divorced, his consent being unnecessary; also the *paterfamilias* of a lunatic wife could divorce her husband. (D. 24, 2, 4 ; D. 24, 3, 22, 9.)

(B.) Restraints on Divorce.

Romulus is said to have forbidden the repudiation of wives unless they were guilty of adultery or drinking wine, on pain of forfeiture of all the offender's property, one-half to go to the wife, the other to Ceres. But the laws of the XII Tables seem

to have recognised freedom of divorce, although it is said no one took advantage of the liberty for 500 years, until Sp. Carvilius put away his wife for barrenness, by order of the Censor. The only check on divorce, during the greater part of the Republic, was the Censors, who probably exercised their authority when the husband made an unjustifiable use of his power, as they did in the case of L. Antonius, whose expulsion from the Senate they procured on account of his repudiating a girl he had married. A wife *in manu* could not divorce her husband; but if he divorced her, she could require him to release her from the *manus*. Wives not *in manu* had the same power of repudiating their husbands that their husbands had of repudiating them.

1. Restraints introduced by the *lex Julia et Papia Poppaea.*

If the wife were guilty of adultery, her husband in divorcing her was allowed to retain a sixth part of her dowry (*dos*); if she had committed a less serious fault, the husband could retain one-eighth. (Ulp. Frag. 6, 12; C. 5, 12, 24.)

If the husband were guilty of adultery, the wife could demand immediate restitution of her dowry; or if it was repayable at once (as lands), then the annual proceeds of it for three years. If the fault were less serious, he must restore the dowry in six months instead of a year. (Ulp. Frag. 6, 13.)

Those penalties ceased if both sides were in fault (*paria enim delicta mutua pensatione dissolvuntur*). (D. 24, 3, 39.) So if the husband, after the divorce, again betrothed himself to his former wife (D. 24, 3, 38), or brought a further accusation against her and abandoned it (D. 48, 5, 11, 3), the penalties were remitted.

2. Legislation of Constantine, A.D. 331. (C. Th. 3, 16, 1.)

The *lex Julia and Papia Poppaea* deprived the person that made a divorce without cause of the benefits given him when the divorce was justifiable. Constantine began the legislation against capricious repudiations, and specified the causes for which alone one party could divorce the other without incurring penalties.

1°. Causes for which a woman could repudiate her husband without blame.

(1) If he were guilty of murder; or (2) prepared poisons; or (3) violated tombs.

If, for any other reason—as, *e.g.*, his being a drunkard (*ebriosus*) or gambler (*aleator*), or given to the company of loose women (*mulierculariis*)—a wife divorced her husband, she forfeited her dowry, and was punishable with deportation.

2°. Causes for which a husband could divorce his wife without blame.

(1) If she were an adulteress; or (2) preparer of poisons; or (3) a procuress.

If for any other reason than one of the three specified, a husband divorced his wife, he forfeited all interest in his wife's dowry; and she, if he married again, could take the second wife's dowry as well.

3. Legislation of Honorius and Theodosius, A.D. 421. (C. Th. 3, 16, 2.)

These emperors, ignoring apparently the constitution of Constantine, impose restrictions in a somewhat different way.

1°. Divorce of a husband by a wife.

(1.) If for grave reasons, or crime committed by the husband, the wife could retain

her dowry and the gifts made to her by the husband on the betrothal, and could marry again after five years.

(2.) If only for breaches of morality or moderate faults, the wife forfeited her dowry and all interest in the money brought by the husband to the marriage, and was incapable of marrying again.

(3.) If no grounds were proved to exist for the divorce, the wife forfeited her dowry and betrothal presents, might be deported, and was incapable of marrying again, or of receiving pardon from the Emperor.

2°. Divorce of a wife by a husband.

(1.) If for a serious crime, the husband retained the wife's dowry, and could at once marry again.

(2.) If for immorality, but not crime, the husband gained none of the property brought by his wife into the marriage, but could at once marry again.

(3.) If for mere dislike, the husband forfeited the property he brought into the marriage (*donatio ante nuptias*), and was incapable of re-marrying.

The constitutions of Constantine and Honorius and Theodosius, although they were not retained in Justinian's code, are here inserted, to complete the history of legislative restraint on divorce. Whether owing to their stringency or severity, or to some other cause, those constitutions seem to have fallen into utter neglect, and succeeding legislation of a milder type ignores them.

4. Legislation of Theodosius and Valentinian, A.D. 449. (C. 5, 17, 8, 2.)

1°. A wife could divorce her husband without blame if he were convicted of any of the following offences :—

(1) Treason ; (2) Adultery ; (3) Homicide ; (4) Poisoning ; (5) Forgery, etc. ; (6) Violating sepulchres ; (7) Stealing from a church ; (8) Robbery, or assisting or harbouring robbers ; (9) Cattle-stealing ; (10) Attempting his wife's life by poison, the sword, etc. ; (11) Introducing immoral women to his house ; (12) Beating or whipping his wife.

If for any other than one of those offences a wife divorced her husband, she forfeited her dowry, and could not marry again for five years.

2°. A husband could divorce his wife for any of the above-mentioned reasons for which she could divorce him, except the eleventh, and also for the following offences committed by the wife :—(1.) Going to dine with men, not her relations, without the knowledge or against the wishes of her husband. (2.) Going from home at night against his wishes, without reasonable cause. (3.) Frequenting the circus, theatres, or amphitheatre, after being forbidden by her husband. To these were added by Justinian (A.D. 528), (4.) Procuring abortion. (5.) Frequenting baths with men. (C. 5, 17, 11, 2.)

If for any other than one of those offences a husband divorced his wife, he forfeited all interest in his wife's dowry, and also his own contribution to the marriage settlement (*donatio ante nuptias*).

5. In Nov. 117, Justinian repealed the former constitutions, and resettled the grounds of divorce.

1°. Divorce of a husband by a wife. Valid grounds. (Nov. 117, 9.)

(1.) The husband's engaging in, or being privy to, any plots against the Empire. (2.) Attempting his wife's life, or not disclosing to her any plots against it. (3.) Attempting to induce his wife to commit adultery. (4.) Accusing his wife of adultery, and failing to substantiate the charge. In this case the husband was, moreover, liable to especially severe fines. (5.) Taking a woman to live in the same house with his wife, or persisting in frequenting any other house in the same

town with any woman, after being warned more than once by his wife or her parents, or other persons of respectability.

If for any of those reasons a wife divorced her husband, she recovered her dowry, and also the husband's portion (*donatio ante nuptias*) for life, with the reversion of it to her children ; if she had no children, it became her absolute property.

If for any other reason a wife divorced her husband, the provisions of the constitution of Theodosius and Valentinian applied.

2°. Divorce of a wife by a husband. (Nov. 117, 8.)

(1.) If the wife knows of any plots against the Empire, and does not disclose them to her husband. (2.) Adultery by the wife. Severe penalties were added in this case. (3.) Attempting her husband's life, or concealing any plots against it. (4.) Frequenting banquets or baths with men, against the orders of her husband. (5.) Remaining from home against the wishes of her husband, unless with her own parents, or unless her husband drives her out. (6.) Going to the circus, theatre, or amphitheatre, without the knowledge or after the express prohibition of her husband.

If for any of those reasons a husband divorces his wife, he can retain her dowry altogether if there are no children ; and for his life if there are, the dowry going on his death to them.

If for any other reason a husband divorces his wife, he is liable under the constitution of Theodosius and Valentinian.

It seems strange that, with so much legislation, it should have escaped the Roman Emperors that there was a very short and easy road to the goal they were toiling after through such a wilderness of penalties. The simple plan would have been to make a divorce *void* unless it were with the consent of both parties, or for one of the reasons enumerated with so much particularity in the Code and Novels. In one case only does this plan seem to have been adopted. Justinian, following in the steps of Marcus Aurelius and Diocletian, made the consent of the husband's or wife's father or mother indispensable to the validity of the divorce, when the father or mother had advanced the dowry (*dos*), and it would be forfeited by an unreasonable divorce. If, however, the divorce would not injure the parents, their consent was not required. (Nov. 22, 19.)

Provisions in regard to the Children of those Divorced.

1. The earliest legal provision for the settlement of children after the divorce of their parents seems to be a constitution of Diocletian and Maximian. (C. 5, 24, 1.) It states that there was no law compelling the judge (*judex*) in such a case to give the male children to the father, and the female children to the mother ; the judge could act according to his discretion.

2. Justinian enacted that the divorce of parents should in no way impair the legal rights of their children, or affect their right to inherit from their father, or to require aliment from him.

If the father were guilty of an offence justifying his wife in

divorcing him, and she remained unmarried, the children were to be given into her custody, and maintained at the cost of the father; but if the mother were guilty, the father had the right of custody. If he were poor, and unable to support them, and the mother was rich, she was obliged to take them and maintain them. (Nov. 117, 7.)

B. Involuntary Divestitive Facts.

I. Death of the husband or wife. (D. 24, 2, 1.)

II. Loss of liberty by either husband or wife. (D. 49, 15, 12, 4.) But after five years since the captive was last known to be alive, his wife could marry again without divorcing her captive husband.

Mere loss of citizenship (*aquae et ignis interdictio*) did not dissolve the marriage, unless the wife or husband desired to give up the marriage (*si non mutat uxoris affectionem*). (C. 5, 17, 1.)

CONCUBINATUS.

Under the name of *Concubinatus* there existed during the Empire an institution that bore a close resemblance to marriage. It was a monogamous relation; a man could not have two concubines, or a wife and a concubine, at the same time. (Paul, Sent. 2, 10, 1; C. 5, 26, 1.) It was not less permanent than marriage, for marriage could be dissolved by either party at pleasure. It was regarded, however, as a lower kind of union, especially on the side of the woman. A married woman had a higher position (*dignitas*) (D. 32, 49, 4), implying on the part of her husband a warmer degree of affection (*dilectus*). (Paul, Sent. 2, 20, 1.) The offspring of such a union were not under the *potestas* of their father, and that circumstance constitutes a broad difference between concubinage and marriage. Under the Christian Emperors, the offspring could, however, be brought under the *potestas* by a subsequent marriage of the parents. (*Legitimatio per subsequens matrimonium.*)

In some respects concubinage was a freer institution. Thus, although persons forbidden by the law of nature to intermarry could not live in concubinage (D. 23, 2, 56; D. 25, 7, 1, 3), yet those whose marriage was forbidden only by the *jus civile* could enter into concubinage. (D. 25, 7, 5.) Freeborn men could have freedwomen as concubines at a time when they were forbidden to marry them. (D. 25, 7, 3, pr.) Again, it was considered more respectable for a *patronus* to have his *liberta* as a

concubine than as a wife. So a president of a province could take a native of the province as a concubine, but not as a wife. In this instance, the object was to prevent rapacious presidents getting possession of women's property as dowry by marrying them. (D. 25, 7, 5.)

BETROTHAL (*SPONSALIA*).

Servius Sulpicius Rufus gives an account of the manner in which betrothal took place in Latium. He that intended to marry a woman, stipulated with the person that was to give her in marriage that he would do so, and on his part promised (*spondebat*) to marry her. The girl thus promised was called *sponsa*, the man that promised to marry her *sponsus*. If there was a failure on either side, an action lay (*actio ex sponsu*), and the judge, if there was no good reason against the marriage of the parties, condemned the promise-breaker in damages according to the value of the match to the person disappointed. This was the law in Latium until the right of citizenship was conferred on it by the *lex Julia*. This sort of betrothal appears not to have been confined to Latium, but to have been anciently observed also in Rome.

In the Digest we find nothing of the form of stipulation except the name (*sponsalia, sponsus, sponsa*).[1]

To a certain extent betrothal put the betrothed in very much the same position as if they were married; but the single duty of the *sponsus* and the *sponsa* was within a reasonable time to proceed to carry out the marriage.

The reciprocal promises of any man and woman, and of those, if any, under whose *potestas* they were, made the contract of betrothal without any further ceremony, without writing or witnesses. (D. 23, 1, 4, pr.)

The consent of the betrothed persons was necessary, but they were presumed to consent if they did not actively oppose their *paterfamilias*. (D. 23, 1, 13; D. 23, 1, 12, pr.)

A daughter, however, was not allowed to oppose her father, unless the person to whom he asked to betroth her was of immoral character or low position. (D. 23, 1, 12, 1.)

---

[1] *Sponsalia* is the proposal and reciprocal promise of a future marriage. (*Sponsalia sunt mentio et repromissio nuptiarum futurarum.*) (D. 23, 1, 1.)

The name is derived from *spondeo*, because anciently betrothals were made by stipulation. (D. 23, 1, 2.)

Not only the consent of the *paterfamilias* of each of the betrothed was necessary, but of the *tutor* and mother of one that was *sui juris*. (C. 5, 4, 1.)

The contract was terminated by the death or renunciation of either *sponsus* or *sponsa*. (C. 5, 1, 1.) The form was, "I will not avail myself of your bargain" (*conditione tua non utor*). (D. 24, 2, 2, 2.)

By the *lex Julia et Papia Poppaea*, if the marriage did not take place within two years, unless for special reasons, the contract of betrothal was at an end. The reasons were ill-health of the *sponsus* or *sponsa*, the death of parents, or necessary and distant journeys. (D. 23, 1, 17 ; C. 5, 1, 2.)

In Latium we find the *actio ex sponsu* giving damages in proportion to the value of the marriage to the party disappointed. But in Rome there seems to have been no action for the naked promise of a future marriage. The same object was, however, accomplished in another way. Earnest (*arrhae*) of a substantial kind was usually given at the time of making the betrothal, and was forfeited if the other side failed, without good grounds, to carry out the promise.

Arrhae Sponsalitiae consisted of a present by the *sponsus* to his *sponsa* or her father, or by the *sponsa* to the *sponsus*, made on condition that if the marriage was for a good reason broken off it should be returned; if without a good reason, forfeited to the innocent party. (C. 5, 1, 3.) If the marriage were broken off through the fault of the *sponsa*, she was bound to restore the betrothal gift, along with a penalty of fourfold its value. (C. Th. 3. 5, 6.) This was reduced to a penalty of the value of the gift, by Leo and Anthemius. (C. 5, 1, 5, 1 ; C. 1, 4, 16.) But if there were grounds for breaking off the match, as impotency, diversity of religious sect, looseness of conversation, or extravagance, this penalty was not enforced. Justinian gave the same permission to persons desiring to enter on a life of religion ; each party being required to return the betrothal present. (C. 1, 3, 56.)

IV.—*TUTELA IMPUBERUM.*

We learn from Gaius that there was much dispute among the Roman jurists as to the proper classification of the different species of *tutelae*.

From this it is plain how many forms of *tutela* there are. But if we are

to ask into how many kinds these forms are to be drawn out, the discussion will be a long one; for on that point the old writers were very doubtful. The subject is one that has been fully handled by us, and with great care, both in our work on the interpretation of the Edict and in the books we made as a commentary on Quintus Mucius. It is therefore enough, meanwhile, to remark merely that some have said there are five kinds, as did Quintus Mucius; others three, as did Servius Sulpicius; others two, as Labeo; while others have believed that there are as many kinds as there are forms. (G. 1, 188.)

The question here raised is very unimportant, as it relates only to the arrangement of the investitive facts. The office of *tutor* was the same, in whatsoever manner he was appointed, and it is improper to speak of different *species* of *tutelae*, which are, in fact, nothing more than different ways of appointing *tutores*.

Let us pass now to another division. Of the persons not *in potestate* [*in manu* or *in mancipio*] some are either *in tutela* or under a curator; others are bound by neither of those legal ties. Let us look, therefore, to those *in tutela*, or under a curator; for thus we shall understand about the other persons that are bound by neither tie. And first let us look narrowly at those *in tutela*. (J. 1, 13, pr.; G. 1, 142-143.)

Definition.

Tutela is, as Servius defined it, a right and power over a free person (*in capite libero*), given and allowed by the *jus civile* in order to protect him while by reason of his age he is unable to defend himself.[1] *Tutores*, again, are those that have that force and power, and take their name from the fact. They are called *tutores*, therefore, as being protectors (*tuitores*) and defenders, just as *aeditui* are so called because they protect sacred buildings (*aedes*). (J. 1, 13, 1.)

Tutores, too, who are liable to the remedy for *tutela*, are understood to be bound not strictly *ex contractu*,—for there can be no business contract between *tutor* and *pupillus*. Undoubtedly, too, they are not liable *ex maleficio*. They seem, therefore, to be liable *quasi ex contractu*. Further, in this there are actions open to both parties. Not only has the *pupillus* an *actio tutelae* against the *tutor*, but the *tutor* also has an *actio contraria tutelae* against the *pupillus* if he has spent anything on his property or become bound for him, or if he has bound his own property as security to his creditor. (J. 3, 27, 2.)

Children under puberty are in *tutela* by the law of every State. For it is agreeable to natural reason, that a person not of full age should be guided by the *tutela* of some one else. There is, indeed, almost no State in which parents are not allowed to give their children under puberty a *tutor* by will; although, as we have said above, Roman citizens alone have their children in their *potestas*. (G. 1, 189.)

That children under the age of puberty should be in *tutela*, is fitting by the *jus naturale*, so that he that is not of full age should be guided by another's *tutela*. (J. 1, 20, 6.)

---

[1] *Est autem tutela, ut Servius definivit, jus ac potestas in capite libero ad tuendum eum, qui propter aetatem se defendere nequit, jure civili data ac permissa.* (J. 1, 13, 1.)

There appears at first sight a contradiction between J. 1, 13, 1, and J. 1, 20, 6; G. 1, 189, the first passage ascribing *tutela* to *jus civile* and the second to *jus naturale*. *Tutela*, as an institution of Roman law, has characteristics peculiar to Rome; but guardianship of minors, in some form or other, is a necessary institution in every system of law. The conflict brings out the unreality and worthlessness of the much vaunted distinction between *jus civile* on the one hand, and *jus gentium* and *jus naturale* on the other.

The definition of Servius omits two elements that ought to be included. It does not mention the fact that a *tutela* was a public office or duty (*publicum munus, jus publicum*) (D. 26, 7, 5, 7), which the person duly appointed could not refuse to undertake; nor that it was an unpaid office. Although *tutores* could not charge for their services (D. 26, 7, 33, 3), still they could accept a reward from the person that appointed them. When a testator's freedman was appointed *tutor* in consequence of his intimate knowledge of the property of the *pupillus*, the other *tutores* might give him an allowance for his support (*alimenta*), or salary, when without this assistance it would be impossible for him to attend to the business of the *pupillus*. (D. 27, 3, 1, 7.)

A *tutela* is the public and unpaid duty imposed by the civil law on one or more persons of managing the affairs and supplementing the legal deficiencies (*et negotia gerunt et auctoritatem interponunt*, Ulp. Frag. 12, 25) of a person *sui juris*, under the age of puberty. Puberty is twelve years for girls and fourteen for boys.

It is opposed to a curatorship (*cura, curatio*) in respect both of the powers of the *tutor* and of the persons for whose benefit it is made. A *cura* is either not for persons under the age of puberty, or if so, not generally, but only for some particular purpose or object (*non personae sed rei vel causae datur.*)

A *tutor* when appointed is believed to be appointed to look after the entire patrimony. (J. 1. 25, 17.)

It is contrasted with *potestas* in this respect, that whereas the powers of the *paterfamilias* are of the nature of ownership, the powers of the *tutor* are given him in trust for the exclusive benefit of the *pupillus*, and he is not allowed to reap any personal advantage from their exercise. (*Lucrum facere ex tutela non debet*). (D. 26, 7, 58, pr.)

In the earliest form of *tutela*, that of the next agnates (*agnati*), the *tutores* succeeded for their own benefit. The *tutela* was given to them because they got the property of the *pupillus* in the event of his death. (D. 26, 4, 1, pr.) The heir was the *tutor*.[1] But there seems no trace of anything like guardianship in chivalry, where the guardian took all the profits, merely allowing his ward a maintenance. At all events, in the Digest, the rule admits no exception, that a *tutela* is for the benefit of the *pupillus*, not of the *tutor*.

Rights and Duties.

First Case (One *Tutor*)

A. Duties of *Tutor*.

I. It is the duty of the *tutor* to give his consent to all such legal acts of the *pupillus* as without such consent are insufficient

[1] *Quo tutela redit, eo hereditas pervenit, nisi cum foeminae heredes intercedunt.* (D. 50, 17, 73, pr.)

to bind the *pupillus* (*interponere auctoritatem*); provided it is for the interest of the *pupillus* so to bind himself. (D. 26, 7, 10.)

Auctoritas is derived from *augeo*, I increase; and it means that the *tutor* fills up what is wanting in the legal capacity of his *pupillus*.

The duty of the *tutor* may be considered under the following heads:—(1) the legal incapacities of the *pupillus;* (2) how far the *tutor* could make up the defects; (3) in what way the *tutor* must give his consent; and (4) the liability of the *tutor* if he improperly gave or refused his consent.

1. The legal incapacities of the *pupillus*.

The authority of the *tutor* is in some cases necessary for the *pupillus*, in some it is not. For it has been held that he may better his condition even without that authority; but he cannot make it worse without the authority of his *tutor*. Hence in those cases that give rise to obligations on both sides —sale for instance, letting on hire, mandate, or deposit—if the authority of the *tutor* does not come in, then those that contract with the *pupillus* are themselves bound, but he is not in turn bound to them. If he stipulates that anything shall be given him, the authority of the *tutor* is not needed; but if he promises anything to some one else, it is needed. (J. 1, 21, pr.)

The *pupillus* could not manumit a slave without the consent of his *tutor*, as well as the approval of the council required by the *lex Ælia Sentia* (D. 40, 2, 24), nor pay a debt that he owed, because that was a sort of alienation of his property. (D. 26, 8, 9, 2.)

If, therefore, a *pupillus* gives anyone money on loan without authority from his *tutor*, he contracts no obligation, because he does not make the money the property of the receiver. The actual coins, therefore, wherever they may be, he can reclaim by *vindicatio* [by stating (that is) in the *intentio* that they are his *ex jure Quiritium*]. If the coins lent have been spent by the receiver in good faith, they can be recovered by a *condictio;* if in bad faith, by an *actio ad exhibendum* [just as if he still possessed them. But it is questioned whether he can demand the coins given on loan from the receiver, if he in turn has alienated them in good faith to a third party; since he seems by the very fact of alienation to have been enriched]. (J. 2, 8, 2; G. 2, 82, as restored.)

But, on the contrary, anything can be rightly given to the *pupillus* (male or female) without authority from the *tutor*. If, therefore, a debtor pays the *pupillus*, the authority of the *tutor* is needed to set him free. [For though the money is made the property of the *pupillus*, yet the *pupillus* cannot dissolve any obligation without the authority of his *tutor;* because he is allowed to alienate nothing without that authority.] All this is settled on grounds of the plainest reason in a constitution addressed to the advocates of Cæsarea at the suggestion of the very eminent Tribonian Quaestor of our sacred palace. The arrangements thus published are as follows:—It shall be lawful for the debtor of a *pupillus* to pay the *tutor* or curator, provided he is first allowed to do so by the opinion of a judge, publicly given free of all

cost. If this course is followed, and if both the judge declares his assent and the debtor pays, the very fullest security attends such a payment. If, however, the payment is made in some other fashion than the one arranged by us, the *pupillus* may still be repelled by the *exceptio doli mali* if he demands the same sum of money while he either has the money safe or has been enriched thereby. But if he has either spent it wrongly or lost it by theft, the *exceptio doli mali* will do the debtor no good; for he will none the less be condemned because he paid the money recklessly, and not in accordance with our arrangements. (J. 2, 8, 2; G. 2, 84.)

On the contrary, again, a *pupillus* (male or female) cannot make a payment without authority from the *tutor*. For what he pays does not become the receiver's property, because he is allowed to alienate nothing without the authority of the *tutor*. (J. 2, 8, 2; G. 2, 84.)

EXCEPTIONS.—(1.) Although a *pupillus* could neither buy nor sell without the consent of his *tutor* so as to give a good title to the purchaser, yet he was responsible to the extent to which he had gained by the transaction (*in quantum locupletior factus est*). (D. 26, 8, 5, 1; D. 44, 4, 4, 4.) He could not keep what he had bought and refuse payment, or demand back what he had sold without giving up the money paid for it. (D. 44, 1, 4.)

In like manner, although a *pupillus* could not make a valid discharge to his creditor, yet if the latter had, in ignorance of the incapacity of the *pupillus*, accepted payment and used the money, the debt was fully extinguished. (D. 26, 8, 9, 2.)

Persons under puberty are not liable to an *actio commodati*, because no *pupillus* can enter into this contract without the authority of his *tutor*. So entirely is this the case, that even if, after reaching the age of puberty, he admits fraud or negligence, he is not liable to this action; because it could not stand at the first. (D. 13, 6, 1, 2.) But if the *pupillus* has made profits, an *actio commodati utilis* ought to be given, according to the rescript of Antoninus Pius. (D. 13, 6, 3, pr.)

It was questioned whether an *actio depositi* could be given against a *pupillus* with whom something had been deposited without authority from the *tutor*. The correct opinion was, that if the deposit was made with a person old enough to be capable of fraud, or if he were guilty of fraud, then an action could be brought; for, of course, so far as he has made profits (*quantum locupletior factus est*), an action is given against him, even though no fraud has come in. (D. 16, 3, 1, 15.)

(2.) In certain cases, even for his own benefit, a *pupillus* could not act without the consent of his *tutor*. (D. 26, 8, 9, 3; D. 26, 8, 11.)

He cannot enter on an inheritance, nor ask *bonorum possessio*, nor take an inheritance under a trust (*ex fideicommisso*), except by authority from the *tutor*; and this though he might gain by so doing, and could in no case lose. (J. 1, 21, 1.)

If the child was over seven years of age, he himself, with the sanction of the *tutor* entered on the inheritance, or sought the *bonorum possessio*; if he was under that age,

the *tutor* was authorised, by a constitution of Theodosius and Valentinian, (A.D. 426), to enter on a *hereditas* or petition for a *possessio bonorum* in the name of the pupil as his agent. (C. 6, 18, 3; C. 6, 18, 4.)

2. To what extent did the authority of the *tutor* remove the incapacity of the *pupillus* to bind himself?

The turning point was when children had completed their seventh year. After that age they had *intellectus*, and were capable of taking an intelligent part in the formalities of the law; but they did not possess *judicium;* they were not able to judge whether it was for their interest to undertake any obligation. Generally speaking, as in the case of inheritance above cited, a child after seven years of age made the stipulation or acted in any other legal transaction, the *tutor* supplying the element of *judicium* in which he was wanting. But under that age he could not act, and whatever could be done for him must be done by the *tutor* alone. (But see D. 27, 8, 1, 15.) The *tutor*, in such cases, was an agent, and, as we have seen, the civil law with great reluctance admitted the representation of one free person by another. Ulpian tells us that in his day the representation was allowed in actions or suits (D. 26, 7, 1, 2); but the final step to enforce judgment (*actio judicati*) was taken directly for or against the *pupillus*. (D. 26, 7, 2, pr.)

There is some difficulty in determining the exact application of the terms used with reference to the line drawn at seven years of age. Theophilus tells us (Theoph. Inst. 3, 19, 9) that three stages must be reckoned. (1) Infancy (*infantes*) in the literal sense, when the children cannot speak; (2) *infantiae proximi* (next to infancy) are those that can speak, but have not passed their seventh year. These were considered to have no understanding (*intellectus*). (3) *Pubertati proximi* (next to puberty) are children from the beginning of their eighth year until they have passed the age of puberty. Elsewhere the age of infancy (*qui fari non possunt*) is spoken of as extending to the end of the seventh year. (D. 26, 7, 1, 2; C. 6, 30, 18, pr.) In this case, what is meant by *infantiae proximus* and *pubertati proximus?* One view is that a male child is *infantiae proximus* up to ten and a-half years, and a female child up to nine and a-half years. This result is attained by dividing the time equally between seven and the age of puberty. Another view is that a child was *infantiae proximus* for one year after *infantia*, and *pubertati proximus* for one year before puberty; the intervening space having no distinctive name. Between these views our information does not warrant us in arriving at any decision.

Exception.—The consent of the *tutor* does not give validity to the act of the *pupillus*, if the effect is to benefit the *tutor*.[1]

Formerly, when the *legis actiones* were in use, there was another case in which a *tutor* was appointed—when, namely, such a proceeding was to be

[1] *Regula est juris civilis: in rem suam auctorem tutorem fieri non posse.* (D. 26, 8, 1, pr.)

taken between a *tutor* and the woman or *pupillus* under him. For no *tutor* could give an authority in what affected himself; another, therefore, was appointed to authorise the action to be carried through. This latter was called a prætorian *tutor*, because the urban Prætor appointed him. Now since the *legis actiones* have been taken away, some think this kind of *tutor* is needless; but one is still usually given in any statutory proceedings (*legitimo judicio*). (G. 1, 184.)

If judicial proceedings are to be taken between a *tutor* and *pupillus*, since a *tutor* cannot give his authority in what affects himself, there is appointed in his room, not a prætorian *tutor* as formerly, but a curator. He comes in to carry through the proceedings, and when they have been carried through he ceases to be curator. (J. 1, 21, 3.)

The rule is equally strict when the benefit does not accrue to the *tutor* himself, but to his *paterfamilias* or *filiusfamilias*. (D. 26, 8, 7, 2.) But a *tutor* may buy from his *pupillus*: (1) when the property is sold by a creditor (D. 26, 8, 5, 5); and (2) when the sale is of a portion of the property that the *tutor* does not manage, with the consent of the managing *tutor*. (D. 26, 8, 6.)

3. How the authority (*auctoritas*) of the *tutor* must be given.

A *tutor* ought to give his authority at once while the business is going on, and in person, if he thinks it for the good of the *pupillus*. An authority put in afterwards or by letter is void. (J. 1, 21, 2.)

It must also be unconditional (D. 26, 8, 8) and free. If the *tutor* refused his assent, he could not be compelled to give way, but was of course liable in damages if his refusal was unreasonable and prejudicial to the *pupillus*. (D. 26, 8, 17.)

His signature to a written instrument was not necessary, although a *tutor* should sign all writings to remove doubt. (D. 26, 8, 20.) The consent was given orally, in most cases, by interrogation. The *tutor* was asked whether he consented (*an auctor huic rei esset*); but although no formal question was put, if he in fact consented, the transaction was valid. (D. 26, 8, 3.)

4. Consequences to the *tutor* of improperly giving or withholding his authority.

The *tutor*, in giving or withholding his authority to the acts of his *pupillus*, was bound to keep in view solely the advantage of the *pupillus*, and to study his interests with all the care of a prudent man. (D. 26, 7, 33, pr.)

A. (a *pupillus*), with the consent of B. (his *tutor*), bought land of C., whose property was then forfeited by a judicial sentence. A. was evicted. If B. knew that C.'s property was forfeited, he must make good the loss to A.; but if he did not know, then he was not responsible. (D. 26, 7, 57, 1.)

So if the *pupillus*, with the consent of his *tutor*, makes a free gift of any of his property to persons to whom he is under no customary obligation to make such gifts, the *tutor* must pay back the value of the gifts. (D. 27, 3, 1, 2.)

II. It is the duty of the *tutor* to manage the property of his *pupillus*. (D. 26, 7, 1, pr.) The management of the property

included numerous duties, the principal of which are here enumerated.

1. Before meddling in any way with the property, the *tutor* was bound to make a complete inventory. (C. 5, 51, 13.) If he entered on the management of the estate without first making an inventory, his conduct was held to be fraudulent, unless he had a very strong excuse. (D. 26, 7, 7, pr.)

2. To sell perishable things. (D. 26, 7, 7, 1.) A *Senatus Consultum*, of the time of Severus, prohibited the alienation of lands by *tutores* unless an express power was given by the will of the father of the *pupillus*, or they first obtained a decree of sale from the Prætor, which was not granted except to discharge debts that could not otherwise be paid. (D. 27, 9, 1, 2.) Constantine extended the prohibition to all property except old clothes and superfluous articles. (C. 5, 72, 4.)

3. To deposit all moneys of the *pupillus* in safety. Up to the time of Justinian it was the duty of the *tutor* either to put out the money at interest, or to buy lands with it (C. 5, 37, 24); but Justinian permitted *tutores* to hoard the money, unless it was required for the maintenance of the *pupillus*.

4. Within six months after his appointment the *tutor* ought to have collected all the debts due to the *pupillus*, or at least to have sued the debtors. The *tutor* was allowed two months after any subsequent debt accrued to recover it. (D. 26, 7, 7, 11.) If the *tutor* neglected to gather in the debts within the time allowed him, he was liable for all loss sustained in consequence of his remissness. (D. 26, 7, 15.) If the *tutor* accepted from a solvent debtor less than was due, he was himself bound to pay the difference to the *pupillus*, the debtor also remaining liable for the balance. (D. 26, 7, 46, 7.)

5. To pay the debts of the *pupillus*, including those due to himself. (D. 26, 7, 9, 5.) He could not make presents of the wealth of his *pupillus* (D. 26, 7, 22); but he could make such gifts as were considered to be due from the rank of his *pupillus*. Such were the customary presents to parents and relatives; maintenance to slaves and freedmen of the *pupillus* (D. 26, 7, 12, 3); maintenance and education to a poor sister of the *pupillus* (D. 27, 2, 4); or support to a needy mother (D. 27, 3, 1, 4); but not a bridal present to her on her second marriage (D. 27, 3, 1, 5), nor a dowry to a half-sister. (D. 26, 7, 12, 3.)

6. It was the duty of the *tutor* to bring in his own name, if the *pupillus* were not above seven years of age, all such actions

as the interest of the *pupillus* required ; and in the name of his *pupillus* after that age. (D. 26, 7, 1, 2.) It was also his duty to defend all actions that ought to be defended. (D. 26, 7, 30; C. 5, 37, 6.)

7. Generally, in administering the property of his *pupillus*, a *tutor* must do everything that a prudent man would do, and do nothing that such a one would not do. (D. 26, 7, 33.) If, in consequence of the deliberate disregard of his duty by the *tutor* (*dolus*), or by a want of due diligence (*culpa lata aut levis*), the *pupillus* suffered any loss, or failed to gain any advantage that could, with diligence, have been obtained for him, the *tutor* must make good the loss. (C. 5, 51, 7.)

By the neglect of a *tutor* the rent of an emphyteusis is not paid, and the *pupillus* in consequence forfeits his interest ; the *tutor* must make good the loss. (C. 5, 37, 23.)

A *tutor*, to oblige a friend, sells too cheap or buys too dear ; he must make up the difference between the price paid and the true value. (D. 26, 7, 7, 2.)

A *tutor* employs the money of his *pupillus* in trade in his own name ; he is guilty of a breach of trust, and must pay back what he took with interest, but he was not bound to give up the profits he made (*pupillo usuram, non compendium, praestandam*). (D. 26, 7, 47, 6.) But if he traded in the name of the *pupillus*, he must account for the profits. (D. 26, 7, 58, pr.)

Property belonging to a *pupillus* is stolen by robbers, or lost (partially or wholly) through the failure of the banker to whom it was entrusted, when his credit was good, by the *tutor ;* the loss, not being occasioned by any fault of the *tutor*, falls on the *pupillus* entirely. (D. 26, 7, 50 ; C. 5, 38, 4 ; D. 27, 4, 3, 7.)

Grain that ought to be placed in barns or sold is left to rot. The *tutor* must make good the loss on account of his neglect. (C. 5, 38, 3.)

The responsibility of the *tutor* could not be taken away by an express clause in the will nominating him (*eosque aneclogistos esse volo*) ; for the *tutela* was a public office, the duties of which could not be modified by private arrangements.[1] (D. 26, 7, 5, 7.)

8. When his *pupillus* arrived at the age of puberty, the *tutor* ought to inform him, and urge him to seek a curator to manage his property during his minority (*i.e.* until twenty-five). If the *tutor* did not inform his pupil, but continued himself to manage his affairs after the *tutela* had properly come to an end, he remained liable for his acts and negligence as *tutor*. (D. 26, 7, 5, 5.)

9. When the *pupillus* arrived at the age of puberty, the *tutor* was bound to complete and present his accounts, and if he

[1] (*Nemo enim jus publicum remittere potest hujusmodi cautionibus nec mutare formam antiquitus constitutam.*)

failed, the slaves who managed the business must render accounts, and, if these were not satisfactory, they might be put to the torture for the discovery of the truth. (D. 27, 3, 1, 3.)

When a *tutor* manages the business of a *pupillus* (male or female), he has, after the *pupillus* comes to the age of puberty, to give an account of his management. The proceeding is called *actio tutelae*. (J. 1, 20, 7; G. 1, 191.)

10. If the accounts show a balance against the *tutor*, he ought at once to pay it over to the *pupillus;* if he delays, he must pay interest. Time was, however, allowed to call in money that the *tutor*, in the course of his duty, had put out at interest. (D. 26, 7, 8.)

III. The *tutor* was bound to make his *pupillus* a proper allowance for his support (D. 26, 7, 12, 3); but not out of his own property if his *pupillus* had none. (D. 27, 2, 3, 6.) If the amount of the allowance were not fixed by the instrument appointing the *tutor*, it was settled by the Prætor on the application of the *tutor*, or, if he neglected to apply, of the *pupillus*. (C. 5, 50, 1.) It was not imperative on the *tutor* to apply to the Prætor, for if he acted *bona fide* in order to prevent the affairs of the *pupillus* becoming known, and fixed an allowance on his own responsibility, he was not considered to fail in his duty. (C. 5, 50, 2.)

IV. It was the duty of the *tutor* to see that provision was made for the custody and education of his *pupillus*, but not himself to undertake the task. Usually, when a *tutor* was appointed by the father of his *pupillus*, provision was at the same time made in the will for the custody and education of the son. The person named in the will obtained the custody of the child unless the relatives made objections. (D. 27, 2, 1, 1.) If objections were offered, the Prætor examined them, and made a decree. (D. 27, 2, 5.) If no one were named by will, the proper person to have the custody of the child was its mother, if she remained a widow. If the *tutor* or the relatives of the child objected to the mother having the custody, the dispute was settled by the Prætor, who had regard to the position and character of the mother. (C. 5, 49, 1.) Occasionally he found it necessary to compel a freedman to undertake the charge of a *pupillus*. (D. 27, 2, 1, 2.)

B. Duties of *Pupillus*.

1. To repay the *tutor* all that the latter properly expended

on his behalf (D. 27, 2, 2, pr.), as the expense of travelling on necessary business of the *tutela*. (D. 27, 3, 1, 9.)

The *pupillus* was not released from this obligation although all his property was exhausted, if the expenditure ought to have been incurred. (D. 27, 4, 3, pr.)

2. To release the *tutor*, and indemnify him for all the obligations undertaken by him on his behalf. It was not necessary for the *tutor* to wait until he had actually performed the obligation. (D. 27, 4, 6.)

SECOND CASE (WHEN MORE THAN ONE TUTOR) (*CONTUTORES*).

I. The authority of the *tutor*.

1. When there were several *tutores*, was the consent of all necessary to create an obligation for the *pupillus?* Originally, the consent of every *tutor* was necessary, except in the case of *tutores* appointed by testament, or after *inquisitio*, any one of whom could authorise the *pupillus* to bind himself. Justinian made the consent of any *tutor* (whatever the mode of his appointment) sufficient, except for the purpose of putting an end to the *tutela;* as by the arrogation of the *pupillus*. (C. 5, 59, 5.)

Where the administration of the property was divided among the *tutores*, each could give his consent to acts of the *pupillus* relating to the portion of the estate under his special care, but could give no validity to the acts of his *pupillus* in respect of the property administered by other *tutores*. (D. 26, 8, 4; C. 5, 59, 5.) In one case this rule was departed from. Any *tutor* could authorise an acceptance of an inheritance by a *pupillus*, even if he had no share in managing the property of the *pupillus*. (D. 29, 2, 49.)

2. The consent of one *tutor* was sufficient to enable a *contutor* to buy, sell, or otherwise deal with the *pupillus*. Thus, when there were several *tutores* no inconvenience was felt from the rule that a *tutor* could not make a contract with his *pupillus*, for another of the *tutores* could grant the requisite authority, being, of course, responsible to the *pupillus* for the propriety of the step. (D. 26, 8, 5, pr.)

II. *Administration.*—*Contutores* might jointly administer the property of the *pupillus*, or they might apply for a division, so that each should have a separate portion to administer. The inconveniences of a joint-management are so obvious and numerous, that it was a matter of particular care with the

Prætor to encourage a division of the property with undivided responsibility of each *tutor* for his own department. (D. 26, 7, 3, 6.)

1. When the administration is undivided, or divided by private agreement among the *tutores* without the intervention of the Prætor, the responsibility remains joint, and each *tutor* is liable for all loss sustained by the misconduct of any of his colleagues. The *pupillus* may sue any one of his *tutores* for the whole of any loss (*in solidum*), but must give up to him his rights of action against the other *tutores*. (C. 5, 52, 2.)

2. When the administration was divided by the Prætor, or by the testament by which the *tutores* were appointed, it was usual to assign to each of the *tutores* a portion of the property, or the administration might be confided to some, to the exclusion of the other *tutores*. Those excluded were called *honorarii tutores*.

1°. Responsibility of *honorarii tutores*.—They have a right, and are bound to inspect the accounts of the acting *tutores*, and to see that all moneys are properly invested or placed in safe custody. If the acting *tutores* do not show their accounts, they may be removed from office at the instance of the *honorarii tutores*. Should the latter neglect to examine the accounts of their *contutores*, and any defalcation occurs, they are bound to make good the loss if the defaulting *tutor* is unable to pay. (D. 26, 7, 3, 2.) On this footing old stewards—freedmen—were often placed after their patron's death. On account of their knowledge of the property, they were made *honorarii tutores*, although not entrusted with any share in the actual administration. (D. 26, 2, 32, 1.)

2°. Responsibility of acting *tutores*.—Each *tutor* was confined to the property entrusted to him, and could not interfere with the portion administered by a *contutor* (C. 5, 40, 2; D. 26, 7, 4), and each was responsible only for his own share. (C. 5, 38, 2.) But each *tutor* was bound, if he knew anything to justify the removal of a *contutor*, to have him removed; and if he failed to do so, was responsible, like a *tutor honorarius*, for whatever loss might result. (D. 26, 7, 14; C. 5, 52, 2.)

3. Modes of dividing the property.

But if, under a will or on an inquiry, two or more are appointed, then one *tutor* or curator can offer security against loss to the *pupillus* or young man, and so be preferred to the other, and be sole manager;—unless, indeed, that other offers security, comes before the former, and so is sole manager

himself. But the one cannot of himself demand security from the other: he can only make an offer of it, and so give the other his choice either to accept security or to give it. But if neither offers security, then if the testator entered any one's name as manager, he ought to manage; or if no one's name was entered, then the one chosen by the majority, as the Prætor's edict provides. If, however, the *tutores* differ as to the choice of a manager or managers, then the Prætor ought to step in. And where there are several appointed on inquiry the same course is to be approved, that the majority, namely, should choose the person that is to administer. (J. 1, 24, 1.)

1°. When the father of the *pupillus* had in his will designated certain of the *tutores* for administration, or prescribed any division, the Prætor gave effect to his will, unless for specially powerful reasons. (D. 26, 7, 3, 1.)

2°. If the father had not expressed any preference, the *tutores* ought to meet, and decide by a majority of votes which of them should have the active administration. (D. 26, 7, 3, 7; D. 26, 4, 5, 2.) If they cannot agree, the Prætor may either leave them with the joint administration (D. 26, 7, 3, 8), or himself select one. (D. 26, 7, 3, 7.) If the property lay in different places, a geographical distribution was adopted; but sometimes a newly acquired property was given to one *tutor*, the others seeing to the old property.

3°. If the *tutores* are appointed to their office by a mode that does not subject them to the necessity of giving security on entering on their duties, and one of them offers security to get the administration, he will be made sole manager. If, however, the others compete with him, and offer security also, then either all will retain the administration together (D. 26, 2, 17, pr.), or he that is the safest, and has the best securities, will be preferred. (D. 26, 2, 18.)

Investitive Facts.

A. The modes of appointing *Tutores*.

I. *Tutela Testamentaria.*—By the last will, or by *codicilli* confirmed by the last will of the deceased *paterfamilias* of the *pupillus*. (D. 26, 2, 3; D. 50, 17, 73, 1.) This mode of appointing *tutores* was authorised by the XII Tables.[1] *Tutores* appointed in this way are called *testamentarii tutores*, although the name of *dativi* is given to them both by Gaius and Ulpian. (G. 1, 154.) It is best, however, with Justinian, to confine the name *dativi* to those appointed by magistrates.

1. When the will is valid, the *tutor* nominated requires no confirmation by the Prætor.

Ascendants are allowed, therefore, to appoint *tutores* by will for the children in their *potestas;* for males (called *pupilli*) under puberty, for females even over that age as well as under it. For the ancients wished women, even of full age, to be in *tutela*, because of the levity of their disposition. (G. 1, 144.)

[1] Ulp. Frag. 11, 14. *Testamento nominatim tutores dati confirmantur lege XII Tabularum his verbis: uti legassit super pecunia tutelave suae rei, ita jus esto. Qui tutores dativi appellantur.*

Ascendants are allowed, therefore, to appoint *tutores* by will for the children under puberty in their *potestas;* and this in every case, for boys or girls alike. (J. 1, 13, 3.)

To grandsons, however, and granddaughters, ascendants can appoint *tutores* by will, only if after their death the grandchildren will not fall back into the father's *potestas.* If, therefore, your son is, at the time of your death, in your *potestas*, your grandsons by him cannot have a *tutor* appointed by your will, although they were in your *potestas;* and this because on your death they will fall back into their own father's *potestas.* (J. 1, 13, 3; G. 1, 146.)

Since in many other cases posthumous children are reckoned as children actually born, so in this case too it is held that to them also *tutores* can be appointed by will. But with this limitation, that they must be such that if born in the ascendants' lifetime they would become *sui heredes* and in their *potestas.* [Such, indeed, we can appoint as heirs; but posthumous outsiders we are not allowed to appoint as heirs.] (J. 1, 13, 4; G. 1, 147.)

If a man appoints *tutores* to his daughters or sons, the appointment seems to hold for a posthumous daughter or son also; because the name son or daughter includes a posthumous son or daughter. But what if there are grandsons? Does the name of sons make the appointment of *tutores* an appointment for them also? We must say that it does, if the testator used the word descendants (*liberi*); but if he used the word sons (*filii*), they will not be included; for sons is one name, grandsons another. Clearly, however, if he appointed *tutores* for "the posthumous," not only sons, but all other descendants as well, will be included. (J. 1, 14, 5.)

For a fixed time, or from a fixed time, or conditionally, or before appointing an heir, a *tutor* can undoubtedly be appointed. (J. 1, 14, 3.)

But for a particular business or case a *tutor* cannot be appointed; because it is for a person, not for a business or a case, that he is appointed. (J. 1, 14, 4.)

2. In certain cases, where some of the conditions above mentioned were absent, and the testamentary appointment was invalid, the Prætor intervened, and gave the *tutela* to the persons so nominated in preference to all others. (D. 26, 3, 1, 1.) The confirmation of the Prætor was given either as a matter of course, or upon inquiry as to the fitness of the persons appointed. The instances mentioned will sufficiently illustrate the reasons upon which the Prætor acted.

(1.) An invalid appointment of a *tutor* is confirmed as of course, without any inquiry (*sine inquisitione*), in the following cases:—

1°. When the appointment is made by a father for a legitimate child, the Prætor confirmed it as of course (D. 26, 3, 1, 2), unless there was good reason to believe that the father had changed his mind as to the fitness of the *tutor*, or was ignorant of circumstances that would have changed it. (D. 26, 3, 8; D. 26, 2, 4, 1.)

But if a father by will appoints a *tutor* to an emancipated son, the appoint-

ment must be confirmed by the opinion of the president in any case, that is without inquiry. (J. 1, 13, 5.)

The confirmation of the Prætor was also necessary, when the appointment of a *tutor*, although made to a son under the *potestas*, was not by will, or by *codicilli* confirmed by will. (C. 5, 59, 2.)

2°. A mother, if she made her child her heir, could give it a *tutor* by will. In this case no inquiry as to the fitness of the *tutor* was made. (C. 5, 28, 4.)

3°. A father, appointing a natural child his heir, can give him a *tutor* by will. (C. 5, 29, 4.)

4°. A patron, or any other person appointing anyone under the age of puberty his heir, can appoint a *tutor* to the heir. But in order to supersede the usual inquiry, the youth to whom the *tutor* is appointed must have no other property (D. 26, 3, 4), because it would give too much power to a man to appoint a *tutor* to a rich child, merely by making him heir to a trifling part of his property.

(2.) An invalid appointment of a *tutor* is confirmed, but only after inquiry (*ex inquisitione*) by the Prætor, in the following cases:—

1°. When a mother appoints a *tutor* to her child by will, but does not make the child her heir. (D. 26, 3, 2, pr.)

2°. When a patron appoints a *tutor* to his freedman without making him his heir. (D. 26, 2, 28, 2.)

3°. When a father or mother appoints a *tutor* to a natural child (*liber naturalis*) without leaving it anything. (D. 26, 3, 7, pr.)

II. *Legitima Tutela.*—*Legitimi tutores* succeeded to the office under the provisions of some statute, and particularly by the provisions of the XII Tables. (Ulp. Frag. 11, 3; D. 26, 4, 5, pr.) They succeeded only if there were no testamentary *tutores*. If the *pupillus* died, the *legitimus tutor* was entitled to his inheritance; and it was said, let them that enjoy the inheritance bear the burden of the *tutela* (*ubi emolumentum successionis, ibi et onus tutelae*). (J. 1, 17, pr.)

The *legitimi tutores* succeeded to the *tutela* if the *paterfamilias* of the *pupillus* died without making a will; or made a will, but did not nominate a *tutor;* or nominated a *tutor* in his will, but the person designated died before the testator. (D. 26, 4, 6.)

The statute, in calling the agnates of an intestate to undertake the *tutela*, is meant to apply not only to the case of a man that could have appointed *tutores*, yet has made no will at all, but also to the case where a man dies intestate so far as the *tutela* is concerned. This then is understood to happen when the *tutor* appointed dies in the lifetime of the testator. (J. 1, 15, 2.)

These were the only cases where the *legitimi tutores* were called upon; under any other circumstances, a *tutor*, if required, was appointed by the magistrates. Thus if two *tutores* were named in a will, and one of them died, the appointment of a

substitute fell to the proper magistrate ; but if both died before they accepted office, the *legitimi tutores* were required to act. (D. 26, 2, 11, 4.)

1. *Agnati* as *tutores.*

Where no *tutor* has been appointed by will, under the statute of the XII Tables, the agnates are *tutores*, and are called statutory (*legitimi*). (J. 1, 15, pr.; G. 1, 155.)

Agnates are all those related to a deceased person in such a manner that if he were alive they would be together under his *potestas.* They ceased to hold the *tutela* if they ceased to be agnates, and they ceased to be agnates if they suffered any *capitis deminutio.* (See as to Agnates, p. 685.)

Although the *tutela* belongs to the agnates, it does not belong to all at once, but to those only that are in the nearest degree ; or if they are of the same degree, to all. (J. 1, 16, 7 ; G. 1, 164.)

Titius dies, leaving Maevius a son under the age of puberty ; Julius, brother of Titius, aged twenty-seven ; and Sempronius, a grandson, through another son. Sempronius is twenty-six years of age. In this case, since both Julius and Sempronius are in the third degree removed from Maevius, they will be *contutores* to him. (D. 26, 4, 8.)

The next agnate, if a woman, is passed over. (D. 26, 4, 10, pr.)

If before the *pupillus* arrived at the age of puberty his nearest agnatic *tutor* died, the next agnate or agnates were bound to act as *tutores.*

X. dies, leaving A., a son, aged four ; B., X.'s brother, aged thirty-five ; D., son of B., aged seventeen ; and C., a grandson through another son, aged twenty-six. As in the case just stated, B. and C. will be *tutores* to A. Nine years pass, and B. dies, leaving his son D., now more than twenty-five. At the same time C. gives himself in arrogation. As B. is dead, and C. no longer an agnate, if there are no other agnates than D. equally near to A., D. will be the sole *tutor* of A. (D. 26, 4, 3, 9.)

2. *Cognati* as *tutores.* By the XII Tables, cognates, who were not also agnates, could not succeed as *legitimi tutores.* (C. 5, 30, 1.) Thus, a father's brother would be the *tutor* of his nephew, not a mother's brother. Such continued to be the law until A.D. 498, in which year Anastasius inserted the thin end of the wedge that was to be more firmly driven home by Justinian. He enacted that a brother, although emancipated, and therefore not an agnate, should be *tutor* to his brothers and sisters, and their children, in preference to the nearest agnate. (C. 5, 30, 4.) Justinian took away the supremacy of the agnatic relation, and gave the *tutela* to the nearest of kin, whether agnates or cognates. (Nov. 118, 4-5.)

3. *The Patron and Patron's Children.*—A freedman had no agnates except his descendants, if he had contracted a legal marriage (*justae nuptiae*) ; and they, of course, could not, in the nature of things, be his *tutores.* The place of agnates was

occupied by the master who had released him from slavery, and the master's children.

Under the same statute of the XII Tables, the *tutela* of freedmen and freedwomen belongs to the patrons and their descendants. This *tutela* is called statutory (*legitima*). The statute, indeed, does not provide for this by name; but by interpretation this has been received just as if it had been brought in by the express words of the statute. For from the very fact that the statute ordained that the inheritances of freedmen and freedwomen that died intestate should belong to the patrons and their descendants, the ancients believed that it intended the *tutela* also to belong to them. This is confirmed by the consideration that the statute has ordained that the agnates it calls to the inheritance shall act also as *tutores;* and by the general rule that where the gains from succession are, there also ought to be the burden of *tutela*. "The general rule," we have said; because if a woman manumits a person under puberty, she herself is called to the inheritance, although some one else is *tutor*. (J. 1, 17, pr.; G. 1, 165, as restored.)

A slave is freed when two years old by his joint-masters. The masters both die. One leaves a son A., the other a grandson B. (a son's son). Does the *tutela* go to A. and B. jointly, each representing the interest of the respective patrons, or does A., as being a degree nearer, exclude B.? A. was sole *tutor*, and if he died, then B. took the office. (D. 26, 4, 3, 7.)

4. The *tutela* of a parent over his emancipated children.

The *potestas* over children resembled the ownership (*dominium*) of slaves. In like manner, the position of an emancipated child resembled that of a manumitted slave. The resemblance extended to the appointment of *tutores*, and a father emancipating a child under puberty, became his *tutor* in virtue of being his *patronus*.

Modelled on the *tutela* of patrons, there is another received form; and it also is called statutory. If a man emancipates a son or daughter, a grandson or granddaughter by a son, and so on, while under the age of puberty, he will be their statutory *tutor*. (J. 1, 18, pr.)

An ascendant also is regarded as standing in the place of a patron, if he has had reconveyed to him a daughter, granddaughter, or great granddaughter formerly in *mancipio*, and by manumitting her has obtained over her a statutory *tutela*. His descendants, however, are reckoned to stand in the place of a *tutor fiduciarius;* whereas a patron's descendants gain the same *tutela* that their fathers had. (G. 1, 175.)

The FIDUCIARY TUTOR (*tutor fiduciarius*), according to Gaius, was the person that figured in the emancipation. If instead of re-mancipating the son to his father, after the third sale, the *pater fiduciarius* manumitted the son, he became, as we have seen, the patron, and therefore *tutor* to the son. (See p. 213.)

Modelled on the *tutela* of patrons, there is again another received kind called *fiduciaria tutela*, and especially so called, over emancipated persons

It is open to us, because we have manumitted a free person conveyed to us by *mancipatio*, either by an ascendant or a *coemptionator*. (G. 1, 166.)

EXCEPTION.—The *tutela* of Latins (male or female), under the age of puberty, belongs not, like their goods, to those that manumitted them, but to those that, before manumission, were their owners *ex jure Quiritium*. If, therefore, a female slave is yours *ex jure Quiritium*, and mine *in bonis*, and is manumitted by me alone, and not by you as well, she can become a Latin, and her goods belong to me; but the *tutela* over her is open to you. So the *lex Junia* provides. If, therefore, she is made a Latin by a man to whom she belonged both *in bonis* and *ex jure Quiritium*, both her goods and the *tutela* over her belong to the same person. (G. 1, 167.)

But in the Institutes of Justinian, "*fiduciary tutor*" has a different meaning; it applies to the children of a parent who has emancipated a child, after the analogy of the patron's children.

There is again another kind called *tutela fiduciaria*. If an ascendant manumits a son or daughter, grandson or granddaughter, and so on, while under the age of puberty, he obtains a statutory *tutela* over them. If now he dies, and there are male descendants alive, they become *fiduciarii tutores* of their sons, or brother or sister, and the rest. (J. 1, 19, pr.)

But when a Patron that is statutory *tutor* dies, his children, too, are statutory *tutores*. The reason is, that a son of the deceased, if not emancipated by his father while alive, would, after his death, become *sui juris*, and would not fall back into the *potestas* of his brothers, nor therefore into their *tutela*. But if the freedman had remained a slave, he would have been in exactly the same legal position in regard to his master's descendants after the master's death. They are called to the *tutela*, however, only if they are of full age. This is a general rule laid down by our constitution, to be observed in every case of *tutela* or of curatorship. (J. 1, 19, pr.)

III. *Tutela Dativa.*—If no *tutor* were appointed by will to a *pupillus*, and if he had no agnates that could act as *tutores*, power was given to certain magistrates to appoint a *tutor*. The *tutor* given by a magistrate was called by Justinian *dativus*.

1. The appointment of a *tutor* fell to a magistrate in various cases.

1°. If there was no other *tutor* (*testamentarius* or *legitimus*). (J. 1, 22, pr.)

2°. If a testamentary *tutor*, after accepting office, was excused, or removed for misconduct, the *legitimi tutores* did not succeed, but the magistrate having got the case into his hands, appointed a new *tutor* himself. (D. 26, 2, 11, 1.)

Further, the Senate resolved that if the *tutor* of a *pupillus* (male or female) is removed from his office on suspicion, or excused on some lawful ground, another *tutor* shall be appointed in his place. In this case the former *tutor* loses his office. (G. 1, 182.)

3°. In like manner, so long as there is a possibility that a testamentary *tutor* may act, the *legitimi tutores* are excluded, and meanwhile a temporary *tutor* is appointed by the magistrate.

If a *tutor* had been appointed by will conditionally or from a fixed day, as long as the condition or the day was in suspense, a *tutor* could be appointed under the same statutes. Again, if one was appointed unconditionally, as long as no heir under the will appeared, so long a *tutor* might be demanded under the same statutes. He ceased to be *tutor* if the condition was fulfilled, or the day came, or the heir appeared. (J. 1, 20, 1 ; G. 1, 186.)

4°. If a *tutor* was taken by the enemy, a statutory substitute might be demanded under these statutes. He ceased to be *tutor* if the one that was taken returned to the State ; for the latter on returning recovered his office by the *jus postliminii*. (J. 1, 20, 2 ; G. 1, 187.)

5°. In the absence of the *tutor*, or if the *tutor* cannot on account of his own personal interest give his authority, another *tutor* may be appointed by a magistrate for a single object—as, *e.g.*, to authorise the *pupillus* to accept an inheritance. (D. 26, 5, 9.)

2. The appointment of *tutores* was not part of the ordinary jurisdiction even of the higher magistrates ; it belonged only to those upon whom it was specially conferred by some enactment. (D. 26, 1, 6, 2.)

If anyone had no *tutor* at all, he was given one—in the city of Rome by the urban Prætor and a majority of the tribunes of the commons under the *lex Atilia;* in the provinces by the presidents of the provinces under the *lex Julia et Titia*. (J. 1, 20, pr.; G. 1, 185).

All these usages are observed alike both in Rome and in the provinces. At Rome the Prætor appoints the *tutor;* in the provinces, if the case happens there, the president of the province. (G. 1, 183, as restored.)

But *tutores* ceased to be appointed for *pupilli* under these statutes, after first the Consuls, and then under the constitutions the Prætors, began to appoint *tutores* for *pupilli* of both sexes after inquiry. For the statutes written above made no provision for exacting security from the *tutores* that the property of the *pupilli* should be safe, nor for forcing *tutores* to discharge the duties of the office. But the law now in use is this, that at Rome the prefect of the city, or the Prætor in the exercise of his jurisdiction, and in the provinces, the presidents after inquiry, or the magistrates, by order of the presidents, if the resources of the *pupillus* are not great, are to appoint the *tutores*. (J. 1, 20, 3-4.)

But we have by our constitution cut short all difficulties of this sort in regard to persons, and without waiting for the presidents' orders have arranged thus :—If the resources of the *pupillus* or adult amount to five hundred *solidi*, then the defenders of the cities *(defensores civitatum)* (together with the chief religious personage of the same city, or before other city officials), or the magistrates or the judge at Alexandria, are to appoint *tutores* or curators ; and they in turn are to give the statutory security according to the standard laid down in the same constitution—namely this, that it shall be at the receivers' risk. (J. 1, 20, 5.)

The president of a province could not appoint as *tutor* anyone whose domicile was out of his province. (D. 26, 5, 1, 2.) The municipal magistrates (D. 26, 5, 3) and the *decuriones*, if there were no other persons authorised, could appoint *tutores*. (D. 26, 5, 19.) The *Lex Atilia* dates from before B.C. 186. The *Lex Julia et Titia* B.C. 31.

3. Upon some persons an obligation was imposed to apply for the appointment of a *tutor* to a *pupillus*.

1°. Women were bound to apply to the proper magistrate for *tutores* to their children, whether legitimate or natural, and also to their grandchildren. (C. 5, 31, 11; D. 38, 17, 2, 28.) The penalty imposed on a mother who neglected or refused to fulfil this duty, was the loss of her share in the child's inheritance. (D. 26, 6, 2, 1.)

2°. Freedmen were equally bound to apply for a *tutor* to the children of their patron. If they neglected to do so, they were considered wanting in their duty of reverence (*obsequium*), and were therefore ungrateful (*ingrati*). (C. 5, 31, 2.)

No others were bound to see that a *pupillus* was provided with a *tutor*, but any relative of the *pupillus* or any friend of his family could with propriety make the application. (D. 26, 6, 2, pr.; C. 5, 31, 5.) A creditor of the *pupillus* was not in the first instance allowed to ask for a *tutor* to enable him to carry on his suit, but he ought to ask the relatives or other friends of the *pupillus* to find a *tutor;* and if they did not, he might then petition the president for the appointment of a *tutor*. (D. 26, 6, 2, 3.)

B. The Security (*Satisdatio*) required from *Tutores*.

A *tutor* in certain cases was forbidden to act until he provided sureties for the faithful discharge of his duties. Any acts done by him before giving security were null and void (C. 5, 42, 1), unless the acts were absolutely necessary, and admitted of no delay. (C. 5, 42, 5.) All *tutores* were not obliged to give security.

1. *Testamentarii tutores* were not required to give security.

That the property of persons (male or female) that are *pupilli*, or under curators, may not be wasted or lessened by the *tutores* or curators, the Prætor takes care that both *tutores* and curators shall give security on that score. This is not, however, without exceptions. *Tutores* appointed by will are not compelled to give security, because their honour and diligence have been approved by the testator himself. Again, *tutores* or curators appointed after inquiry [by the Prætor or president of the province], are [often] not burdened with giving security; because only fit persons are chosen. (J. 1, 24, pr.; G. 1, 199-200.)

Tutores and curators ought to give security in the same way as procurators, according to the words of the Edict. But sometimes they are let off from giving security. (G. 4, 99.)

2. *Legitimi tutores* were required to give security. But the patron and patron's children were not compelled to give security for their freedman *pupillus*, if they were in a good position, and the *pupillus* had little property; but if the patron was not of great respectability (*vulgaris et minus honesta*), he was not exempted from the necessity of giving security imposed on all other *legitimi tutores*. (D. 26, 4, 5, 1.) The patron must also give security if, out of hostility to his freedman, he had refused, until compelled, to manumit the freedman, *ex causa fideicommissi*. (D. 26, 5, 13, 1; D. 27 8, 1, 5.) If he did not give security, he was not allowed to act as *tutor*.

3. *Tutores dativi.*—When a *tutor* was appointed by the higher magistrates, after inquiry (*ex inquisitione*), sufficient confidence was reposed in their judgment to dispense with security. The Prætor and president of a province could not exact security. When they wished security to be given, they sent the case down to the inferior magistrates, with an order to appoint the *tutores* named, on their giving security. The inferior magistrates in appointing *tutores* always required security, and if they neglected to insist on security, they were responsible to the *pupillus* for whatever loss might follow. (D. 26, 3, 5.)

The security required was the verbal promise (*fidejussio*) of persons other than the *tutores*, to make good any loss sustained by the *pupillus* (*rem salvam fore pupillo*) through the misconduct of the *tutor*. (D. 27, 8, 1, 15.)

The promise ought to be made in answer to the interrogation of the *pupillus*, if he could speak and was present, even if he was under seven, and did not understand the meaning of the words (D. 46, 6, 6); if he was not present, or could not speak, his slave ought to put the question. The master could sue on the promise to the slave precisely as if it had been made to himself. If the *pupillus* had no slave, a difficulty arose, because one free person could not be an agent for another free person. It was only the very individual that put the question or gave the answer, that could sue or be sued on the promise. In this difficulty, a slave belonging to the State was at first employed (*servus publicus*), and as such a person might be regarded as the slave of each citizen, he was made the conduit pipe for the *pupillus*, and an action (*utilis actio*) was granted against the surety. When once the ice was broken, the scruple about the representation of one free person by another gradually melted away, and in later times any person named by the Prætor for the purpose, or even the magistrate himself, could bind the surety on behalf of the *pupillus*. (D. 27, 8, 1, 15.)

Nominatores are those that applied to a magistrate for the appointment of a particular person as *tutor*. They made themselves responsible as sureties. (D. 27, 7, 2; D. 27, 8, 1, pr.)

Affirmatores are those that have testified (*ex inquisitione*) that the *tutor* was a fit person to hold the office. They also were regarded as sureties. (D. 27, 7, 4, 3.)

RESTRAINTS ON INVESTITIVE FACTS. *Excusationes tutorum.*

I. Who could not be *tutores*.

1 Slaves. (C. 5, 34, 7.)

Even a slave of one's own can be rightly appointed *tutor*, and set free by will. But we must know that even if he is not set free, but appointed *tutor*, he is held to have received directly a tacit gift of freedom, and thus can rightly act as *tutor*. Clearly, however, if it is from a mistaken notion that he is free that he is appointed *tutor*, our dictum would be different. Moreover, an appointment of another man's slave as *tutor* by will, if unconditional, is void. But if the appointment runs thus, "when he becomes free," it is valid. An appointment, however, of one's own slave in that way is void. (J. 1, 14, 1.)

Ulpian says (D. 26, 2, 10, 4) that even if the clause "when he is free" is not inserted, it is to be implied.

2. Aliens (*peregrini*) and (*Latini Juniani*), by the *lex Junia (Norbana)*; (Ulp. Frag. 11, 16); but Latins could be *pupilli* (p. 713).

3. A madman (*furiosus*), or a man under twenty-five (*minor*), if appointed *tutor* by will, comes into office on coming to his senses, or on attaining the full age of twenty-five. (J. 1, 14, 2.)

4. The deaf and dumb could not give that oral consent required in the *auctoritas*, and therefore could not be *tutores*. (D. 26, 1, 17.)

5. Persons under twenty-five (*minores viginti quinque annis*) could not be *tutores*, but subjection to the *potestas* was no disqualification. (D. 27, 1, 10, 7.)

Not only a *paterfamilias* but a *filiusfamilias* also may be appointed *tutor*. (J. 1, 14, pr.)

Persons under twenty-five were formerly excused. But our constitution now so entirely forbids them even to aspire to become *tutor* or curator, that there is no need of excuse. That constitution provides, also, that neither a *pupillus* nor a young man (under twenty-five) shall be called on to act as statutory *tutor*. For it was an anomaly that persons known to need others' aid in administering their own affairs, and guided by others over them, should enter on the *tutela* or curatorship of some one else. (J. 1, 25, 13.)

6. The same rule is to be observed in the case of a soldier, so that not even though he wishes it can he be admitted to the office of a *tutor*. (J. 1, 25, 14.)

7. Again, no lawsuit that a *tutor* or curator has with the *pupillus* or young man, is an excuse that he can offer, unless, indeed, the whole of his goods or the inheritance is in dispute. (J. 1, 25, 4.)

This must be taken to be repealed by Nov. 72, 1, which exempted, however, the mother of the *pupillus*.

8. Monks and Bishops. (Nov. 123, 6.)

9. Those that push themselves forward to be appointed, an give bribes for that purpose. (D. 26, 5, 21, 6.)

10. Only those could be *tutores* in a will with whom the testator had the *testamenti factio*. (See Book III., *Testamentum*.)

11. *Women.*—The *tutela* is called *virile munus*, or *munus masculorum*, an office exclusively within the sphere of men. (C. 5, 35, 1 ; D. 26, 1, 18.) The office of *tutor* was considered to belong, in a sense, to the *jus publicum*. But before the end of the fourth century A.D., a practice grew up of petitioning the Emperor, when there was no testamentary or statutory *tutor*, to appoint the mother *tutor* to her children. She was obliged to take an oath not to marry again. From Papinian we learn that a Prætor could fall into the mistake of supposing it to be obligatory to confirm a mother as *tutor*, if she had been appointed in her husband's will. Justinian, after several enactments (C. 5, 35, 3 ; Nov. 89, 14 ; Nov. 94, 2), finally decided that the exclusion of women from the office of *tutor* should be retained, except in the case of mothers to their children, or grandmothers to their grandchildren. These were to be preferred to all collaterals next after the testamentary *tutores*, if they were willing to abstain from a re-marriage, and to renounce the benefit of the *Senatus Consultum Velleianum*, which disabled women from binding themselves for other persons. (Nov. 118, 5.)

II. Exemptions (*Excusationes*).

The office of *tutor* was obligatory on all persons duly appointed. If, after having begun to act, a *tutor* withdrew without a legal ground of release (*excusatio*), he could be removed from the office with infamy (D. 26, 7, 5, 2), while continuing responsible for all loss sustained by the *pupillus* in consequence of his withdrawal. The grounds of exemption were very numerous, and must have formed an important branch of legal study, but they are now of little interest.

If it is by false allegations that a man has got himself excused from the office of *tutor*, he is not freed from the burden of the office. (J. 1, 25, 20.)

(I.) Complete exemption from the *tutela*.

1. Inequality of rank.

1°. Freeborn men (*ingenui*) were not compelled to be *tutores* to freedmen (*libertini*). (D. 26, 5, 27, 1 ; D. 27, 1, 44, 1.)

2°. A senator was exempted from serving as *tutor* except to the children of Senators. (D. 27, 1, 15, 3.)

2. Again, if enmity has moved a father to appoint any one *tutor* by will, this itself furnishes him an excuse. (J. 1, 25, 9.)

We must not admit the excuse of a man that makes use of this fact only, that he was unknown to the father of the *pupilli*. This is decided by a rescript of the late imperial brothers (Antoninus and Verus). Enmity, however, actively shown between a man and the father of the *pupilli* or young men,

if deadly and never reconciled, excuses a man usually from the office. And again, anyone whose status has been disputed by the father of the *pupilli* is excused from acting as *tutor*. (J. 1, 25, 10-12.)

3. Inability of the *tutor* to act.

1°. Again, the fact that a man is burdened with three unsought *tutelae* or curatorships, furnishes relief for the time, as long as he is in actual management. The *tutela* of several *pupilli*, however, or the curatorship of goods that are the same, as in the case of brothers, is to be counted as one. (J. 1, 25, 5.)

For the purpose of this exemption an honorary *tutela* does not count as a burden (D. 26, 2, 26, 1), nor a *tutela* in which there is no property to administer. (D. 27, 1, 31, 3.)

2°. Poverty, too, must be allowed as an excuse, if a man can show that he is unequal to the burden laid upon him. This is decided both by a rescript of the late imperial brothers and by one issued by the late Emperor Marcus alone. (J. 1, 25, 6.)

3°. Ill-health, again, that makes a man unable to attend even to his own affairs, is an admitted ground of excuse. (J. 1, 25, 7.)

4°. In like manner, also, a man that cannot read must be excused, as the late Emperor Pius decided by rescript; although even persons ignorant of reading are fit enough to manage business. (J. 1, 25, 8.)

5°. A man over seventy, again, can excuse himself from acting as *tutor* or curator. (J. 1, 25, 13.)

6°. Perpetual exile: in case of temporary exile, a curator is appointed instead. (D. 27, 1, 29, pr.)

7°. If the property were situated in a different province from that in which the *tutor* nominated had his domicile, he could claim exemption. (D. 27, 1, 46, 2; D. 27, 1, 10, 4.)

4. Privilege.

1°. *Tutores* or curators are excused on various grounds. They are often excused because of their children, whether in their *potestas* or emancipated. For if a man has three children still alive at Rome, or in Italy four, or in the provinces five, he can excuse himself from acting as *tutor* or curator, just as he can from other duties, since both of these are public duties. Adopted children, however, do not count; but even if given in adoption, count to the father to whom they were born. Grandsons, again, if by a son, count, for they may come into the father's place; but if by a daughter, they do not count. It is only children still alive, too, that count as an excuse from serving as *tutor* or curator; the deceased do not count. But if they have been lost in war, it has been questioned whether or not they count; and it is agreed that those alone count that are lost in the battle-field. For they that have fallen for the Commonwealth, are held to live for ever in their renown. (J. 1, 25, pr.)

2°. Again, at Rome, grammarians, rhetoricians, and doctors, and those that, in their own fatherland, follow the same professions, and are within the number, are relieved from acting as *tutores* or curators. (J. 1, 25, 15.)

To this list sophists (*sophistae*, D. 27, 1, 6, 1), *philosophi*, and *oratores* have to be added. (D. 27, 1, 6, 5) ; also the clergy. (C. 1, 3, 52, 1.)

According to an epistle of Antoninus Pius, the number of professional men exempted in the smaller cities was five doctors (*medici*), three sophists, and three grammarians ; in the middling-sized cities, seven doctors, four sophists, and four grammarians ; in the largest, ten doctors, five rhetors (or sophists), and five grammarians. (D. 27, 1. 6, 2.) The number of philosophers was not fixed, because a philosopher was a rarity. (D. 27, 1, 6, 7.) But the restriction as to the number, or the exercise of the profession in one's country, was not scrupulously adhered to. Anyone properly instructed, and in the actual practice of his profession, seems to have been able to procure exemption. (D. 27, 1, 6, 10.)

3°. Jurisconsults, called to the council of the Emperor, are exempt. (D. 27, 1, 30 pr.)

4°. Military veterans. Twenty years' service in the army exempted soldiers, except from the *tutela* of sons of old soldiers. (D. 27, 1, 8, 2.) Service in the urban or prætorian cohorts appears, irrespective of its length, to have given exemption. (D. 27, 1, 8, 9.) But service in the *Vigiles* exempted only for one year. (D. 27, 1, 8, 4.)

5°. The members of certain corporations were exempt from serving as *tutores*, except to children of their colleagues, whose property was situated not beyond 100 miles from Rome. (D. 27, 1, 41, 3 ; D, 27, 1, 42.) The corporations enjoying this privilege were the builders (*fabri*) (D. 27, 1, 17, 2) ; the corn-measurers (*mensores frumentarii*) (D. 27, 1, 26) ; the bakers (*pistores*) (D. 27, 1, 46, pr.) Those persons that attached themselves immovably to land for the custody of a castle or fort (*inquilini castrorum*), were not obliged to be *tutores*, except to the children of those in their own condition attached to the same castle. (D. 27, 1, 17, 7.)

6°. A freedman, managing the property of his patron, when a Senator, was exempt from the office of *tutor ;* but only one freedman was allowed this exemption. (C. 5, 62, 13.)

(II.) Partial exemption.

1°. If the illness or insanity of a *tutor* is temporary, a curator is to be appointed until he recover. (D. 27, 1, 10, 8 ; D. 27, 1, 12, pr.)

2°. The late Emperor Marcus, in his half-yearly ordinances (*semestria*), published a rescript, that an administrator of the imperial treasury so long as he is in office can be excused from acting as *tutor* or curator. (J. 1, 25, 1.)

3. Again, persons away on State service are excused from acting. Nay, even if they were *tutores* or curators before going away on State service, they are excused from their offices as long as they are away on State service, and meanwhile a curator is appointed in their place. But if they come back, they must take up the burden of office again ; and they have not a year's relief, as Papinian wrote in his fifth book of answers ; for this interval those only have that are called to a *tutela* for the first time. (J. 1, 25, 2.)

4°. Magistrates during the continuance of their office. (D. 27, 1, 17, 5.)

Persons in power can excuse themselves, according to a rescript of the late Emperor Marcus ; but a *tutela* already begun they cannot abandon. (J. 1, 25, 3.)

Those excuses could be urged unless the nominated *tutor* had expressly or by his conduct renounced the benefit of them. (D. 27, 1, 15, 1 ; C. 5, 63, 2.)

So, conversely, there is no excuse for those that have promised the father of the *pupilli* that they will administer the *tutela*. (J. 1, 25, 9.)

Freedmen could not avail themselves of any excuse, as against the children of their patrons (C. 5, 62, 5), unless they were unable, through infirmity of body or mind, to undertake the office (D. 27, 1, 45, 4), or had obtained their freedom by purchase. (D. 27, 1, 14, 3.)

Divestitive Facts.

A. Discharge of *Tutor* by Magistrate.

I. A *tutor* in office might obtain a discharge by proving a valid excuse. Every excuse that was sufficient to exempt a person from undertaking the duties of *tutor* did not release him after he had once entered. (D. 27, 1, 12, 1.)

II. A *tutor* could be removed from office for incompetence or misconduct (*ob ignaviam vel negligentiam vel dolum*) (*crimen suspecti tutoris*). (D. 26, 10, 4, 4.)

Those cease to be *tutores* that are removed from office on suspicion, or that excuse themselves on some lawful ground, and lay down the burden of the office according to the rules we shall put forth further on. (J. 1, 22, 6.)

All *tutores*, however appointed, were liable to be dismissed. (D. 26, 10, 9; D. 26, 10, 1, 5.)

We have shown who may inquire into the case of a suspected *tutor;* let us now see who may fall under suspicion. All *tutores* may, whether appointed by will, or of any other kind. Even a statutory *tutor*, therefore, can be accused. What then if he is a patron? Still we must say the same, provided always we bear in mind that his reputation (*fama*) must be spared even although he is removed on suspicion. (J. 1, 26, 2.)

A *tutor* could be removed in the following cases:—

1°. If he was obliged to give security, and began to administer without doing so, he was compelled to produce his sureties on pain of removal. (C. 5, 42, 2.)

2°. If after interfering with the administration he refused to go on, he could be removed. (D. 26, 7, 5, 2.)

3°. If he neglected or refused to give the *pupillus* maintenance out of the property of the *pupillus*, he could be removed.

If a *tutor* does not appear, when an action is brought, to have a maintenance decreed for his *pupillus*, a letter of the late Emperors Severus and Antoninus provides that his *pupillus* shall be put into possession of his goods. Those goods that will be injured by delay are to be sold off. Therefore he that does not furnish maintenance can be removed as if on suspicion. But if he does appear, and alleges that no maintenance can be decreed because the estate is too poor, and if this statement is a lie, it is decided that he is to be remitted to the prefect of the city for punishment, just as he is remitted that has given money in order to buy the office of *tutor*. (J. 1, 26, 9-10.)

This severity was not employed, if the *tutor* was not in fault. If a *tutor* went away without authorising any maintenance, his relatives were summoned before the

Prætor, who, after hearing what they had to say, either removed the *tutor* from office if his negligence was inexcusable, or if he had been suddenly called away on important business without having time to attend even to his own affairs, and there was a probability of his return, appointed a curator to give the *pupillus* maintenance. (D. 27, 2, 6).

4°. A tutor was removable if in the administration he acted with a deliberate disregard of the interest of the *pupillus* (*dolus*), or with such gross negligence as is scarcely to be distinguished from wilful misconduct (*culpa lata*). (D. 26, 10, 7, 1.)

A suspected *tutor* is one that does not discharge his duty honourably, even although he is solvent; so Julian too declared in a rescript. Even before he begins to discharge any duty, he may be removed as if on suspicion; so Julian also wrote, and his view is the settled one. (J. 1, 26, 5.)

A *tutor* sells, without a decree of the Prætor, property inalienable without such decree; the sale is void, but the *tutor* is not removed, unless his intention is fraudulent. (D. 26, 10, 3, 13).

A *tutor* foolishly or with evil intention makes his *pupillus* abstain from a solvent inheritance. He is removable. (D. 26, 10, 3, 17).

Lastly, we must know that fraudulent administrators of a *tutela* or curatorship must be removed from office, even although they offer security. For to give security does not change the malevolent design of a *tutor;* it only gives him all the longer facilities for attacking the property. (J. 1, 26, 12.)

5°. For general incompetence (D. 26, 10, 4, 4) or carelessness a *tutor* could be removed. (*Segnities, ignavia, rusticitas, inertia, simplicitas, ineptia.*) (D. 26, 10, 3, 18.)

We regard a man as suspected whose character is such as to bring suspicion upon him. But a *tutor* or curator that, although poor, is faithful and diligent, is not to be removed as if suspected. (J. 1, 26, 13.)

6°. If the *tutor* has become hostile to the *pupillus*, he may be removed, or generally for any other reason deemed by the magistrate sufficient. (D. 26, 10, 3, 12.)

A *tutor* has been appointed by a magistrate in ignorance that he had been forbidden to act as *tutor* by the mother of the *pupillus* in her testament. He is to be removed without discredit (*sine damno existimationis*). (C. 5, 47, 1.)

B. Termination of the *Tutela* by Events.

1. Males, as soon as they come to the age of puberty, are freed from *tutela*. Puberty, Sabinus and Cassius and the other teachers of our school think, is reached when a man shows it by the state of his body; when (that is) he can beget a child. In the case of those that cannot come to maturity—the impotent, for example—that age, they say, is to be looked to at which men reach puberty (if they ever reach it at all). But the authorities of the opposing school think puberty is to be estimated by years; that is, he is of the age of puberty that has completed his fourteenth year. (G. 1, 196.)

Pupilli (male or female) as soon as they reach the age of puberty are freed from the *tutela*. But puberty the ancients wished to be reckoned in the case of males not only by years but by the state of the body. Our majesty, however, wisely thought it worthy of the chastity of our times, that since it seemed immodest even to the ancients in the case of females to inspect the state of the body, this protection should now be extended to the case of males also. We have, therefore, by the hallowed constitution published by us, ordained that puberty in males is to begin at once on the completion of the fourteenth year. The rule the ancients wisely laid down with regard to females, that after the completion of their twelfth year they should be believed capable of marriage, we have left as they ordained. (J. 1, 22, pr.)

2. In like manner the *tutela* is ended by the death of either *tutor* or *pupillus*. (J. 1, 22, 3.)

3. By change of *status* (*capitis deminutio*).

1°. By the *capitis deminutio* of the *tutor* too, since by it his freedom or citizenship is lost, the *tutela* comes entirely to an end. (J. 1, 22, 4.)

2°. But by his *minima capitis deminutio*, as when he gives himself to be adopted, statutory *tutela* alone is at an end, but no other form. (J. 1, 22, 4.)

And not only the two greater forms of *capitis deminutio* destroy the right of agnates to act as *tutores*, but even the lowest (*minima*). If, therefore, a father emancipates one of his two children, after his death neither can be *tutor* to the other by right as an agnate. (G. 1, 163.)

3°. The *capitis deminutio* of the *pupillus* (male or female), however, even although *minima*, takes away *tutela* in every form. (J. 1, 22, 4.)

Again, the *tutela* is put an end to if the *pupillus*, while still under puberty, is adopted by *arrogatio*, or transported: or again, if he is reduced into slavery for ingratitude by his patron, or is taken by the enemy. (J. 1, 22, 1.)

4°. If the *tutor* is appointed by will till the fulfilment of a fixed condition, then equally it happens that he will cease to be *tutor* when the condition is fulfilled. (J. 1, 22, 2.)

Further, *tutores* appointed by will for a fixed time, at the end of that time lay down their office. (J. 1, 22, 5.)

Remedies.

A.—In respect of Rights and Duties.

I. Duties of *Tutor* to *Pupillus*.

1. *Actio tutelae directa*.—This is the action by which, after the *tutor* has ceased to hold office, he or his heirs can be made to pay damages to the *pupillus* or his heirs, for loss sustained in consequence of any unlawful act or omission in the performance of his duty. (D. 27, 3, 4, pr.; D. 27, 3, 1, 16.)

When the *tutor* is under the *potestas*, the action may be brought by the *pupillus* against his *paterfamilias*, if he has consented to his son's acting, or himself interfered in the administration. (D. 26, 1, 7; D. 27, 3, 6; D. 27, 3, 4, 1.)

Except in five cases, a *tutor* was not compelled to pay interest beyond the ordinary rate prevailing in the place where the *tutela* was performed (*pupillares usurae*). Such interest was payable if the *tutor* neglected to get in a debt or sue a debtor within the

time allowed him, and generally for all moneys that he owed the pupil. (D. 26, 7, 7, 10.) But in five cases interest was allowed at 12 per cent. per annum (*legitimae usurae*): when the *tutor* takes the money of his *pupillus* for his own use (C. 5, 56, 1; D. 26, 7, 7, 4): when he has been required by the testator or by the Prætor to invest the money of the *pupillus* in the purchase of land, and has not done so; when the *tutor* falsely denies that the property of the *pupillus* can afford him a maintenance; when he falsely denies that he has any property belonging to the *pupillus*, and thereby the *pupillus* is compelled to borrow at 12 per cent.; and when he has received 12 per cent. from the debtors of the *pupillus*. (D. 26, 7, 7, 7-10.)

2. *Actio utilis tutelae directa.*

A *tutor* that abstained from the administration altogether seems at first to have avoided all risk of paying damages. The *actio tutelae* could be invoked only when the *tutor* had actually interfered. If he was once amenable to the *actio tutelae*, his omissions were estimated equally with his acts; but if he took the precaution not to act at all, he could not be called to account for mere omission to perform his duty. This defect was remedied by the above-mentioned *utilis actio*. (D. 46, 6, 4, 3.)

3. *Actio de rationibus distrahendis.*

This action could be brought by the *pupillus* or his heirs against a *tutor* after the *tutela* was at an end, to recover a penalty of twice the value of any property that the *tutor* had taken from the *pupillus* and converted to his own use. (D. 27, 3, 2, pr.; D. 27, 3, 1, 24.) It was an action given by the XII Tables.[1] Either the *actio tutelae* or the *actio de rationibus distrahendis* may be brought for a criminal appropriation of the property of the *pupillus*, but not both. (D. 27, 3, 1, 21.)

4. Those special actions did not prevent the *pupillus* bringing against his *tutor* the ordinary actions for damages, even during his continuance in office. Such were the *actio furti, actio damni injuriae, condictio furtiva*, etc. (D. 27, 3, 9, 7.)

II. Responsibility of the heirs of a *tutor.*

When an action has been brought against a *tutor*, and before the proceedings are concluded the *tutor* dies, the action may be carried on against his heirs, and the full amount recovered that could have been obtained from the *tutor* himself. If the *tutor* died before an action was begun against him, his heirs could be sued in his stead. In this case, however, their responsibility was not quite so great.

1. While the heir was bound to pay all the debts due by the *tutor* to his *pupillus*, he could never be compelled to pay more than the ordinary interest (*pupillares usurae*), and even that only in the discretion of the judge. (D. 27, 7, 4, 2.)

2. The *tutor* was compelled to produce the inventories and all writings relating to the property, and if he did not, must pay damages according to the amount stated by the *pupillus* on oath. (D. 27, 7, 8, 1.) But his heir was not subjected to this rigorous treatment unless he had the papers in his possession, and refused to produce them. (C. 5, 53, 4.)

3. The *tutor* was bound to show ordinary diligence and care, but his heir was responsible only for such acts or omissions as amounted to fraud (*dolus*), or gross negligence undistinguishable from it (*culpa lata*). Entire abstinence from the administration was regarded as *culpa lata*. (D. 26, 7, 39, 6; C. 5, 54, 2; C. 5, 54, 1.)

The *actio de rationibus distrahendis* did not lie against the heirs, because it was a penal action, and no action for penalties could be brought against the heir. (D. 27, 3, 1, 23.)

III. The sureties of *Tutores. Fidejussores, Nominatores, Affirmatores.*

1. *Actio ex Stipulatu* or *Condictio incerti.*

As the security given by the sureties of *tutores* was the stipulation, the remedy

---

[1] *Si tutor dolo malo gerat, vituperato; quandoque finita tutela escit furtum duplione luito.*

was by the usual action for breach of a stipulation. This action could be brought where the *actio tutelae directa* could (D. 46, 6, 1) and did not lie, where there was no ground for the *actio tutelae*. (D. 46, 6, 4, 6.) The surety could also urge every defence that was competent to the *tutor*. (D. 27, 7, 5.) The *pupillus* was not bound to sue the *tutor* or his heirs before proceeding against the surety; the surety was treated not as an accessory but as a co-principal, bound jointly (*in solidum*) with the *tutor*. (C. 5, 57, 1.) If there was more than one surety, the *pupillus* was not compelled to divide his action amongst them, but could sue whichever he pleased on making over his rights of action against the co-sureties. (D. 46, 6, 12.)

IV. The municipal magistrates that appointed the *tutor* and their heirs.

1. *Utilis actio tutelae directa.*

This action was given by a *Senatus Consultum* of the time of Trajan. (C. 5, 75, 5.) It was subsidiary, *i.e.*, could be brought only after the actions against the *tutor*, his heirs and sureties, had failed to satisfy the claims of the *pupillus*. (D. 27, 8, 1, 1.) It lay, if the magistrate had, after being asked, neglected to appoint a *tutor* (D. 27, 8, 1, 6), or had appointed an improper person, or had been satisfied with insufficient security. The heirs of the magistrate were bound only if his negligence amounted to *culpa lata*. (D. 27, 8, 6; C. 5, 75, 2.)

It is to be observed that not only are *tutores* or curators liable for their management to the *pupilli*, and the young men and the other persons; but also against those that receive the security a subsidiary action lies, which brings them their last safeguard. This action is given against those that have neglected to take security at all from *tutores* or curators, or have suffered improper security to be taken. In accordance with the opinions of the *jurisprudentes*, as well as under the imperial constitutions, it may be brought further against their heirs also. (J. 1, 24, 2.)

In those constitutions, too, it is set forth that if *tutores* or curators do not give security, they may be compelled to by taking pledges from them. (J. 1, 24, 3.)

But neither the prefect of the city nor the Prætor, nor the president of a province, nor anyone else that has a right to appoint *tutores*, shall be liable to this action; but those only that usually exact the giving of security. (J. 1, 24, 4.)

The *pupillus* had no preferential claim on the property of the magistrate, but ranked along with the other creditors. (D. 27, 8, 1, 14.)

Burden of Proof.—There was a curious anomaly in this action, adopted as an additional safeguard to the *pupillus*. The *pupillus* was not bound to prove that the sureties were insolvent when they were accepted; but the magistrate, to exculpate himself, must prove that they were solvent. (D. 27, 8, 1, 13.)

V. Duties of *Pupillus* to *Tutor*.

(1.) *Actio tutelae contraria.*

Like the *actio tutelae directa*, this action could be brought only when the *tutor* had ceased to hold his office. (D. 27, 4, 4.) It was given to the *tutor* and his heirs against the *pupillus* and his heirs, to recover the expenses he had incurred on behalf of the *pupillus*, and to be indemnified against any outstanding obligations. (D. 27, 4, 3, 9; D. 27, 4, 5.)

B. In Respect of Investitive Facts.

I. Specific performance of the *tutela*. The Prætor, in the exercise of his extraordinary jurisdiction, could compel the *tutor* to act. (D. 26, 7, 1, pr.)

II. When a man wishes to excuse himself, and has more excuses than one, but has failed to establish some of them, he is not forbidden to use others,

if he does so within the times appointed. Those that wish to excuse themselves do not appeal; but within the fifty days next after they know of their appointment, they ought to excuse themselves, no matter of what kind they are—no matter, that is, in what fashion however they have been appointed. This is the time allowed if they live within one hundred miles of the place where they were appointed *tutores*. But if they live more than one hundred miles away, they must reckon exactly a day for every twenty miles, and thirty days besides. And yet, as Scaevola said, the time should be counted so as never to give less than fifty days. (J. 1, 25, 16.)

The proper judge to apply to was he that appointed or confirmed the *tutor*. Testamentary or *legitimi tutores* applied to the president of the province. (C. 5, 62, 18.)

The *tutor* must apply in person, but may deliver a written statement of the grounds on which he claims exemption. (D. 27, 1, 13, 10; D. 27, 1, 25.) If the friends of the *pupillus* did not contest the claim within fifty days (D. 27, 1, 38), the judge gave a decree granting the exemption. (C. 5, 62, 3.)

c. In Respect of Divestitive Facts.

I. Those released for proper grounds of exemption followed the procedure just explained.

II. Removal of *tutor*. *Crimen suspecti tutoris.*

It is to be observed that the charge against a *tutor* on suspicion comes down from the statute of the XII Tables. (J. 1, 26, pr.)

1°. The object of this accusation was simply to remove the *tutor* from office, and, therefore,

If a *tutor* or curator is brought to trial on suspicion, and afterwards dies, the trial on suspicion is at an end. (J. 1, 26, 8.)

The right of removing *tutores* tried on suspicion has been given in Rome to the Prætor, and in the provinces to their presidents, and to the proconsul's *legatus*. (J. 1, 26, 1.)

2°. Next we must see who can accuse *tutores* on suspicion. Now it is to be observed that this action is quasi-public; that is, it is open to all. Nay, even women too are admitted, under a rescript of the late Emperors Severus and Antoninus; but those only that are led to come forward for this duty by the strong ties of natural affection (*pietatis necessitudine*)—a mother, for instance. But a nurse too, and a grandmother, and even a sister may. And even some other woman the Prætor admits as an accuser, if he sees that her disposition is warmly affectionate, and that without overstepping the modesty of her sex, but led on by her affection, she cannot endure the wrong done to the *pupillus*. (J. 1, 26, 3.)

Persons under puberty cannot accuse their *tutores* on suspicion. (J. 1, 26, 4.)

A *contutor* was bound to bring the action against a *tutor* guilty of mismanagement in the property assigned to him on division. (D. 26, 10, 3, pr.) Freedmen of *pupilli* were considered to do a grateful act in asking the removal of the *tutores* tha were wasting the property of their pupil-patrons. (D. 26, 10, 3, 1.)

But the magistrate had the power of removing a *tutor*, although no accusations were brought against him; as, for example, if in the course of other proceedings it appeared that the *tutor* was guilty of malversation, or was incompetent. (D. 26, 10, 3, 4.)

3°. If anyone is accused on suspicion, until the trial is ended he is forbidden to act as manager, as Papinianus held. (J. 1, 26, 7.)

4°. A *tutor* removed after trial on suspicion is rendered infamous if removed for fraud, but not equally so if removed for neglect. (J. 1, 26, 6.)

A *tutor* was not infamous if removed for incompetence; or if not removed, but saddled with a curator. (D. 26, 10, 3, 18.)

Criminal Proceedings.

A freedman, too, that is proved to have acted fraudulently while *tutor* to his patron's sons or grandsons, is remitted to the prefect of the city to be punished. (J. 1, 26, 11.)

Those that had neglected to make an inventory, or to buy lands, when they had money, as occasion offered, and were unable to make good the loss, were subject to imprisonment. (D. 26, 7, 49; D. 26, 10, 3, 16.) It was a criminal offence to pay money to procure an appointment as *tutor*, or to take money to procure the appointment of another, or fraudulently to understate the property of the *pupillus*, or fraudulently to alienate any portion of it. (D. 26, 1, 9.)

V.—*TUTELA MULIERUM.*

Definition.

But for keeping women of full age under a *tutor*, almost no reason of any worth can be urged. For the common belief that from the levity of their disposition they are often deceived, and may, therefore, in fairness, be guided by the authority of *tutores*, seems plausible rather than true. (G. 1, 190.)

Among aliens, women are not in *tutela* as they are among us. They are, however, often after a fashion; as, for instance, in Bithynia, where a statute ordains that a woman's contracts must be authorised by her husband, or by a son over the age of puberty. (G. 1, 193.)

According to the old law, a woman never had legal independence. If she was not under the *potestas*, she was under *manus* or *tutela*. Between the *potestas*, *tutela*, and *manus*, women were never legally their own masters. We learn from Cicero that the ingenuity of the jurisconsults had been successful in devising means of escape from the *tutela*, although their conduct in evading or frittering away the old institution that symbolised the supremacy of the male sex, did not meet his approval. In the reign of Claudius, the *tutela* of a woman's agnates was taken away, but it seems from Leo (C. 5, 30, 3) that Constantine revived the agnate's *tutela* along with that of a cognate brother of the full blood. In the time of Justinian, the *tutela* of women was on the same basis as that of men; it was confined to those under the age of puberty.

Rights and Duties.

A. Duties of *Tutor.*

I. *Auctoritas.*—A woman, like a child, was incapable of entering into certain legal transactions without the authority of her *tutor.*

A woman, after the age of puberty, was relieved from some of the incapacities that attached to her as a *pupilla.* She could alienate *res nec mancipi* (but not *res mancipi*), without the authority of her *tutor.*

But, on the other hand, *res mancipi* as well as *nec mancipi* can be transferred to women and *pupilli* without the authority of their *tutor.* For they are allowed to better their condition even without the authority of their *tutor.* (G. 2, 83.)

To a woman, even without the authority of her *tutor*, a payment may rightly be made, for he that pays is freed from his obligation. The reason is that a *res nec mancipi* a woman can part with, as we lately said, even without the authority of her *tutor.* But the condition of this is actual receipt of the money. For if she does not receive it, but says she has, and wishes to free the debtor by crediting him with payment without the authority of her *tutor*, she cannot. (G. 2, 85.)

If, therefore, a woman ever gives anyone money in loan without the authority of her *tutor*, as she makes it belong to the receiver—for money is a *res nec mancipi*—she contracts an obligation. (G. 2, 81.)

A woman must have a tutor in settling the dowry (*dos*) on her marriage, or even after her marriage, if she wished to increase or vary the settlement. When, in Justinian's time, the perpetual *tutela* was obsolete, a curator was named for the purpose. (D. 26, 5, 7.) Ulpian adds, that the authority of a *tutor* was necessary to enable a woman to bind herself by contract, to take part in the old civil procedure (*legis actio, legitimum judicium*)—(for the meaning of these terms see Book IV.), or in any legal transaction belonging to the *jus civile;* or to permit her freedwomen to live *in contubernio* with a slave. (Ulp. Frag. 11, 27.)

Women of full age manage their own business for themselves, and it is only in certain cases, for form's sake, that the *tutor* interposes his authority. Often indeed the Prætor compels him to give his authority even against his will. (G. 1, 190.)

Exception.—The statutory *tutela* enjoyed by patrons and parents has a certain force. For they are not compelled to authorise the making of a will, or the alienation of *res mancipi*, or the taking up of obligations, unless indeed in the latter two cases some weighty reason comes in. All these rules are established for their own sakes, because to them the inheritances of the woman belong at death. Thus they are not shut out from the inheritance, nor does it come to them impoverished by the alienation of the more valuable property, or wilfully burdened with debt. (G. 1, 192.)

II. In the time of Gaius and Ulpian, the *tutor* had no power whatever to interfere with the management of the woman's property. All his powers were summed up in the *auctoritas.* (Ulp. Frag. 11, 25.)

Investitive Facts.

I. By Testament (*Testamentarii tutores*). Not only a *paterfamilias*, but a husband whose wife was *in manu*, could appoint a *tutor* to a woman. A practice grew up, before the time of Cicero, of leaving the name of the *tutor* blank in the will, and allowing the woman to fill it up. It was this that incurred his sarcastic observation, that whereas the laws, out of regard to woman's incapacity to manage her affairs, had subjected her to the control of *tutores*, the perverse ingenuity of the jurisconsults had subjected the *tutores* to the choice of the woman. (Cic. pro. Murena, 27.)

To a wife *in manu* just as to a daughter, and to a daughter-in-law in a son's *manus* just as to a granddaughter, a *tutor* can be given. In strict propriety a *tutor* ought to be given thus :—"Lucius Titius as *tutor* to my children I give and leave by will" (*do lego*), or "I give." But if it is written thus :—"To my children" or "to my wife" "let Titius be *tutor*," he is properly appointed. To a wife *in manu* it is agreed the choice of a *tutor* may be allowed ; or, in other words, it may lawfully be left to her to choose for herself as *tutor* whom she will. The form is this :—"To Titia my wife I give the choice of a *tutor*;" in this case the wife may lawfully choose one either for her affairs generally, or for one or two affairs only. The power of choice may be either full or restricted. Full power is usually given, as we have just said above. Restricted power is usually given thus :—"To Titia my wife I give the choice of a *tutor* once only," or "twice only." Now these two powers of choice differ greatly. A wife that has full power may choose a *tutor* once, or twice, or thrice, or oftener ; but a wife that has restricted power can choose no more than once, if a choice is given her but once ; and no more than twice, if a choice is given her but twice. *Tutores* given in the will by name are called *dativi*; those taken by choice *optivi*. (G. 1, 148-154.)

II. *Legitimi tutores.*

1. Agnates.

In old times indeed, as far as the statute of the XII Tables went, women too had their agnates for *tutores*. But afterwards the *lex Claudia* was passed, which took away *tutela* so far as respects women. A male under puberty has therefore for *tutor* his brother over the age of puberty, or his father's brother ; but women are no longer compelled to have such a *tutor*. (G. 1, 157.)

2. The patron and patron's children to freedwomen (*libertae*). This case is the same as already mentioned, p. 712.

III. *Dativi tutores.*

1. A magistrate could appoint a *tutor* to a woman,—(1) If there was no other *tutor* (Ulp. Frag. 11, 18); (2) When the woman has to sue or be sued by *legis actio* (Ulp. Frag. 11, 24.)

Besides, a *Senatus Consultum* allows women to ask for another *tutor* in the room of one that is away; and thereupon the former *tutor* ceases to be *tutor*, no matter how long he is to be away. (G. 1, 173.)

EXCEPTION.—But to this there is an exception. For when a *patronus* is away, no freedwoman of his may ask for a *tutor* in his room. (G. 1, 174.)

To meet certain cases, however, the Senate has allowed a freedwoman to ask for a *tutor* in the room of her *patronus* when away, in order, for instance, to enter on an inheritance. The same resolution has been come to by the Senate when the son of the *patronus* is only a *pupillus*. For even by the *lex Julia de maritandis ordinibus* (on marriages), a person in the statutory *tutela* of a *pupillus* is allowed, in order to settle a dowry, to ask a *tutor* from the urban Prætor. No doubt the son of a *patronus*, although under puberty, can yet be made a freedwoman's *tutor*. But he cannot authorise anything, because he himself is allowed to do nothing without authority from his *tutor*. Again, if a woman is in statutory wardship of a madman or a dumb man, she is allowed by a *Senatus Consultum* to ask for a *tutor* in order to settle a dowry. In all these cases, however, it is evident that the *tutela* still remains with the *patronus* and his son. (G. 1, 176-181.)

There are several ways in which a freedwoman can have a *tutor* of another kind. If, for instance, she is manumitted by a woman, then under the *lex Atilia* (or in a province under the *lex Julia et Titia*) she ought to ask a *tutor*. For since patronesses are themselves under *tutores*, they cannot be *tutores*. Again, if a freedwoman is manumitted by a male, and with his authority makes a *coemptio*, and therefore is reconveyed and manumitted, she ceases to have for *tutor* her patron, and begins to have instead him by whom she has been manumitted; and he is called her *tutor fiduciarius*. Again, if a patron or his son gives himself in adoption, she ought to ask for a *tutor* to herself under the *lex Atilia* or *Titia*. In like manner also, under the same statutes, a freedwoman ought to ask for a *tutor*, if her patron dies and leaves no male child in his household. (G. 1, 195-195 c.)

2. As in the case of *pupilli*, the Prætor and major part of the Plebeian Tribunes at Rome, and in the provinces the president by the *lex Atilia* and the *lex Julia and Titia*, but no other magistrate, could appoint *tutores* to women.

IV. *Cessicius tutor.*

Agnates that are statutory *tutores*, and manumitters, are allowed to transfer the *tutela* of women by an *in jure cessio* (surrender in court). But the *tutela* of males they are not allowed to transfer; for it is held not to be burdensome, because it ends at the age of puberty. The man to whom the *tutela* is transferred is called *cessicius tutor*. If he dies or suffers *capitis deminutio*, the *tutela* returns to the *tutor* that transferred it. Or if he that transferred it dies or suffers *capitis deminutio*, then it leaves the *tutor cessicius*, and reverts to the man that stood second as *tutor*—next, that is, after him that transferred it. (G. 1, 168-170.)

But as far as agnates are concerned, no question is now raised in regard to the transfer of *tutela*. For all *tutela* of women by agnates was removed by the *lex Claudia*. Now, some have thought that *tutores fiduciarii* have no right to transfer their office, since they of their own accord undertook

the burden. But although this is the received opinion, yet in the case of a parent that has conveyed his daughter, granddaughter, or great-grand-daughter to another, on the express condition that she shall be reconveyed to him, and has manumitted her when reconveyed, one ought not to say the same. For he is to be regarded as a statutory *tutor;* and ought, therefore, to be privileged no less than patrons. (G. 1, 171-172.)

Divestitive Facts.

I. Change of *Tutor.*

A woman too can make a *coemptio* not only with her husband but with an outsider. A *coemptio* is said, therefore, to be made either *matrimonii causa* or *fiduciae causa.* For a woman that makes a *coemptio* with her husband in order to stand to him in a daughter's place, is said to make a *coemptio matrimonii causa.* But she that in any other case makes a *coemptio* with her husband, or with an outsider, to escape *tutela*, for instance, is said to make a *coemptio fiduciae causa.* The process is this :—If a woman wishes to set aside the *tutores* she has in order to obtain another, with their authority she makes a *coemptio.* Next she is reconveyed by the *coemptionator* to the man she herself wishes. He then manumits her by *vindicta*, and forthwith becomes her *tutor—tutor fiduciarius* he is called, as will appear lower down. (G. 1, 114-115.)

Another use to which the *coemptio fiduciae causa* was put, according to Cicero, was the extinction of sacred rites. (Cic. Pro Murena, 12.) What the nature of the liability was, and how it was got rid of by coemptio with an old man, Cicero does not explain. It is interesting as a proof that in some way not stated by Gaius or any of the older authorities, the pontifical college was able to enforce those religious obligations that were at one time incident to inheritance in the Roman law, as they still are in India at the present day.

II. From *tutela* freeborn women can claim to be freed when they have three children (*trium liberorum jure*) ; freedwomen, in the statutory *tutela* of a patron or his children, when they have four. And all other women too that have *tutores* of another kind, *Atiliani* or *fiduciarii* for instance, can claim to be free when they have three children. (G. 1, 194.)

If, therefore, a man appoints by will a *tutor* to his son and daughter, and both come to years of puberty, then the son ceases to have a *tutor*, but the daughter none the less continues in *tutela.* For it is only under the *lex Julia et Papia Poppaea* that women can claim to be freed from tutela when they have children. (G. 1, 145.)

III. What we are saying does not apply to the vestal virgins. For our ancestors willed that they too should be free, to honour their priestly office. The statute of the XII Tables, therefore, provided accordingly. (G. 1, 145.)

Remedies.

It seems from Gaius that a *tutor* who, to the manifest injury of a woman, refused to give his consent, could be compelled to perform his duty by the Prætor.

Hence a woman is given no remedy against a *tutor* for what he does as *tutor.* But when *tutores* manage the affairs of a *pupillus* (male or female), they must give account to him after puberty, or be liable to the *actio tutelae.* (G. 1, 191.)

VI.—*CURA, CURATIO.*

Definition.

A curator is appointed to a person past the age of puberty to manage his affairs, when from any cause he has become unfit to manage them himself. The following were the chief cases:—

I. Minors.

Males above the age of puberty, and marriageable females, receive curators till they complete their twenty-fifth year. For although they are above the age of puberty, they are still of such an age as to be unable to manage safely their own affairs. [Even among alien people too they are protected, as we pointed out above.] (J. 1, 23, pr.; G. 1, 197.)

But against their will young men do not receive curators, except for a lawsuit—for a curator can be given for some special case. (J. 1, 23, 2.)

II. Madmen (*Furiosi*).

Madmen, too, and spendthrifts, although over twenty-five, are yet in the curatorship of their agnates, under the statute of the XII Tables. (J. 1, 23, 3.)

The words of the XII Tables were:—"If a man is mad, or a spendthrift, and has no guardian, let his agnates and men of his *gens* have power over him and his money."[1]

If a person not under the *potestas* were mad, but had not reached twenty-five years of age, a curator was to be appointed to him, not as being insane, but as a minor. (D. 26, 1, 3, 1.)

III. Lunatics, too, the deaf, the dumb, the incurably diseased, must have curators given them, for they cannot direct their own affairs. (J. 1. 23, 4.)

This did not apply to the blind, who, being able to speak, could appoint a procurator. (Paul, Sent. 4, 12, 9.)

IV. Spendthrifts (*prodigi*). A curator was appointed to one who, in consequence of wasting his property, was interdicted by the Prætor from the management of it. The effect of such an interdict was to disable the spendthrift from alienating or encumbering his property. (Paul, Sent. 3, 4, 7.)[2] Women could be declared spendthrifts. (Paul, Sent. 3, 4, 6.)

V. Sometimes, too, a *pupillus* receives a curator, as when (to take a case) the statutory *tutor* is not a fit person; for to him that has a *tutor* no *tutor* can be given. Again, if a *tutor* given by will, or by the Prætor or president of a province, is not fit to manage the business, though guilty of no fraud, a

---

[1] *Si furiosus escit, adgnatum gentiliumque in eo pecuniaque ejus potestas esto. . . . . Ast ei custos nec escit. . . . .*

[2] *Quando tua bona paterna avitaque nequitia tua disperdis, liberosque tuos ad egestatem perducis, ob eam rem tibi ex re commercioque interdico.*

curator is usually associated with him. Further, curators are usually given in the room of *tutores* that are excused from their office, not permanently, but only for a time. (J. 1, 23, 5.)

But if a *tutor* is hindered by ill health or other necessary cause from being able to manage the business of his *pupillus*, and the *pupillus* either is not on the spot or is an infant, then the *tutor* may choose anyone he pleases to act at his risk, and the Prætor or president of the province will appoint him by a decree. (J. 1, 23, 6.)

In other cases, persons who were simple custodians were sometimes called curators. Thus the person to whose custody an inheritance was entrusted, pending the deliberation of the heirs as to whether they would accept it (D. 27, 10, 3), or the birth of an heir (D. 27, 10, 8), was called a curator, although his only duty was to keep the property in safety. (D. 26, 7, 48.)

Rights and Duties.

A. Duties of Curator.

The duties of the curator are substantially the same as those of a *tutor*.

I. Consent of curator (*Consensus curatoris*).

The incapacity of a person after the age of puberty was materially different from that of a *pupillus;* his acts were not void, but voidable. The chief object in the intervention of the curator was to see that the minor was not overreached.

II. A curator had the same powers of administration as a *tutor*.

In regard to actions brought against a minor or other person under a curator, the rule was as follows:—If the minor was present he might be sued with the consent of his curator, or the curator alone could be sued; but if the minor was absent, the curator alone could be sued. (D. 26, 7, 1, 3.)

III. In the case of the insane, the curator, in addition to the administration of the property, had the custody of the person. (D. 27, 10, 7, pr.)

IV. A curator must provide maintenance, and, if necessary, education to a minor. (D. 27, 2, 3, 5.)

B. Duties of a Minor, etc., to Curator are the same as the duties of a *pupillus* to a *tutor*. (D. 27, 4, 1, 2.)

Investitive Facts.

A. Modes of appointing Curators.

I. Now a curator is not given by will; but if given, is confirmed by decree of the Prætor or president of the province. (J. 1, 23, 1.)

This privilege dates as far back at least as a rescript of Marcus Aurelius. (D. 27,

10, 16, pr.) Justinian confirmed this power, and gave liberty to any parent to appoint a curator to an insane child, whether instituting the child as heir or disinheriting him. (C. 1, 4, 27.)

II. *Legitimi Curatores.*—By the law of the XII Tables, the nearest agnates were *tutores* to spendthrifts (*prodigi*) and the insane (*furiosi*). Anastasius included among agnates (for this purpose as well as inheritance) emancipated brothers. (C. 5, 70, 5; Ulp. Frag. 12, 2.)

III. Curators appointed by magistrates (*dativi curatores*).

The *lex Plaetoria* seems to have fixed majority at twenty-five, and permitted minors to apply to the Prætor, who, on proof of their incapacity to manage their affairs, would give them a curator. This enactment also provided for the appointment of *tutores* to spendthrifts and the insane. Marcus Antoninus seems to have made the appointment of curators to minors obligatory, whenever they desired any.

1. If there were no curator provided by will or legal succession, a curator was appointed by a magistrate. (D. 27, 10, 3.)

2. Curators are given by the same magistrates that give *tutores*. (J. 1, 23, 1.)

At Rome it is usually the Prefect of the city or the Prætor, in the provinces the presidents, that after inquiry give curators. (J. 1, 23, 3; G. 1, 198.)

On the same grounds, in the provinces too, the presidents are to appoint curators. (G. 1, 198.)

A son was to be preferred to any stranger as curator of an insane father or mother. (D. 26, 5, 12, 1; D. 27, 10, 4; D. 27, 10, 1, 1.)

3. A mother was bound to apply for a curator to an insane child (*furiosus*), but not to a minor. (D. 26, 6, 2, 1; C. 5, 31, 6.)

No one could apply for a curator to a minor but the minor himself (D. 26, 6, 1, 5), except when the minor is sued, and neglects or refuses to ask for a curator. In this case a curator may be appointed on the petition of the creditor. (C. 5, 31, 1.)

B. Security (*satisdatio*) was required from curators precisely as in the case of *tutores*. Until security was given, the curator could not administer. (C. 5, 42, 1.)

RESTRAINTS ON INVESTITIVE FACTS (*Excusationes Curatorum*).

The office of curator, like that of *tutor*, was compulsory on those who were duly nominated. To compel the performance of the task was within the extraordinary jurisdiction of the

Prætor. (D. 26, 7, 1, pr.) If after acting in the administration a curator withdrew, he could be removed with infamy (D. 26, 7, 5, 2), but continued responsible for all loss resulting from his refusal. (D. 26, 7, 17.) Generally speaking, a curator could claim the same exemption as a *tutor*. But there were exemptions confined to curators.

1. A man that has been *tutor* to anyone, cannot be forced to become curator to the same person against his will. Nay, even although the father that appointed him *tutor* by will added that he appointed him curator also, yet he cannot be forced to undertake that duty against his will. This was settled by a rescript of the late Emperors Severus and Antoninus. (J. 1, 25, 18.)

The same Emperors declared in a rescript that a husband appointed curator to a wife can excuse himself, even though he concerns himself in her affairs. (J. 1, 25, 19.)

DIVESTITIVE FACTS were the same generally as in the case of *tutela*.

REMEDIES.

A. Remedies in respect of Rights and Duties.

I. Duties of Curator.

1. *Actio utilis curationis causa.*

This action corresponds to the *actio tutelae directa*. It could be brought only when the curator had ceased to hold office. (C. 5, 37, 2; C. 5, 37, 14.) It provided the same remedies as the *actio tutelae*, and in the same Court. (D. 27, 3, 32, 6.)

2. *Actio Negotiorum Gestorum.*

This action could be brought during the continuance of the curator in office, for any violation of his duty. (D. 27, 3, 4, 3.)

Against heirs of curators the same remedies were available as against the heirs of *tutores*. (D. 27, 3, 1, 23.)

II. Duties of minor, etc., to curator.

1. *Actio utilis contraria curationis causa.*

This was governed by the same rules as the action of the *tutor* against his pupil. (D. 27, 4, 1, 2.)

B. Remedies to Investitive Facts were the same as in *tutela*.

C. Remedies to Divestitive Facts were also generally the same; but although a *pupillus* could not apply for the removal of a *tutor*, a minor could.

Persons over the age of puberty acting under the advice of a family council (*ex consilio necessariorum*), may bring a charge against their *tutores* on suspicion. So the late Emperors Severus and Antoninus settled by rescript. (J. 1, 26, 4.)

BOOK III.

INHERITANCE AND LEGACY

BOOK III.

INHERITANCE AND LEGACY.

Part I.

INHERITANCE.

First—Definition of Universal Succession and Inheritance.

An "Inheritance" (*hereditas*) is defined as a universal succession to a deceased person. It is necessary, therefore, to determine what is meant by universal succession.

The Institutes, both of Gaius and Justinian, distinguish between singular succession (*acquisitio singularum rerum*) and universal succession (*acquisitio per universitatem*). Examples of singular succession fill Books I. and II. When a person acquires ownership, usufruct, servitudes, emphyteusis, mortgages, or acquires by contract rights *in personam* against another,—in all these cases there is said to be singular succession. But when a person became owner of a freewoman under the *Senatus Consultum Claudianum*, or obtained *potestas* over another by *arrogatio* (p. 204), he was said to acquire *per universitatem*. The distinction between those cases is apparent. If I acquire from another his house and lands, it may be that I acquire all he has, but that is an irrelevant circumstance; I acquire it as specific property, not as being *all* that he is owner of. But a person obtaining the *potestas* is entitled to *all* the property held by the person arrogated. Again, the *paterfamilias* became responsible for the debts of the person arrogated, to the extent of the property acquired through the arrogation. Acquisition *per universitatem* is thus much more complex than acquisition of specific articles.

The distinction may be looked at from another point of view. Some rights all men have, such as the right to life and liberty; some duties all men owe, as to respect the life and liberty of others. But there are rights enjoyed by particular individuals only, and duties binding only particular individuals: such are the rights that a man has in things belonging to him, and the duties he owes to others, either by his own promise or by the provisions of law. Now, if we take all the rights and duties of this sort that a man has at a given moment, we may describe them as constituting his legal personality. If, then, all these rights and duties are at one stroke transferred to another, there is a universal succession. A new-comer steps into the shoes of his predecessor, enjoying the same rights and duties, and may be regarded as clothed with his legal personality. If to this we add that the successor does not acquire these rights and duties piecemeal, that the total is not composed of addition of parts, but that all the rights and duties are conveyed as a whole, at one moment, by one act,—we have got as near as a general description can go to the notion of universal succession.

As thus described, the notion of universal succession is too large. In no instance did the whole legal personality of a man pass to another. Thus, public offices could not pass, and even within the circle of private rights and duties many did not pass. According to the old law, a usufruct could not pass in a universal succession; and we have seen examples, as in *adstipulatio*, of rights and duties so distinctively personal that they could not pass to another. Instead of saying, therefore, all the rights and duties attached to a man at a given moment pass to another, it is necessary to say, "as many such rights and duties as the law permits to be transferred."

Before proceeding to the great example of universal succession—INHERITANCE—it will be convenient to recount the other instances mentioned in the Institutes.

I. The Enslavement of Women by the *Senatus Consultum Claudianum*. Justinian mentions this as a mode of universal succession. (J. 3, 12, 1.) The master of the slave with whom a freewoman persisted, after repeated warnings, in cohabiting, could become her owner. He was thus a universal successor. This statute was repealed by Justinian (p. 169)

II. *Arrogatio, Coemptio in manum.*

1. Succession to Rights.

There is also another kind of universal succession, introduced neither by the statute of the XII Tables nor by the Prætor's edict, but by the law that is received by consent. (J. 3, 10, pr.; G. 3, 82.)

If, for instance, a *paterfamilias* gives himself in adoption, or if a woman agrees to pass *in manum*, then all their property, corporeal and incorporeal, and all debts due to them, are acquired by the adopting father or the *coemptionator*—except, indeed, those that come to an end because of the *capitis deminutio;* usufructs, for instance, the obligation of freedmen to service contracted by oath, and all that comes under a statutory proceeding (*legitimum judicium*). (G. 3, 83.)

When, for instance, a *paterfamilias* gives himself to be arrogated, over all his property, corporeal and incorporeal, and over all debts due to him, full rights were formerly acquired by the arrogator—except, indeed, over those that come to an end because of the *capitis deminutio;* obligations to service, for instance, and his rights as an agnate. Use and usufruct, indeed, were formerly reckoned with these; but a constitution of ours has forbidden them to be taken away by the *capitis deminutio minima.* (J. 3, 10, 1.)

But now all acquisition by *arrogatio* has been narrowed down by us to limits like those set to parents by birth. Nothing, indeed, except the usufruct is acquired through the *filiusfamilias* for a father, either by birth or by adoption, in all property that comes to the son from without; the ownership the son keeps entire. But on the death of the son adopted by *arrogatio*, while still in the household of his adoption, the ownership as well passes to his *arrogator*, unless there are still alive other persons that, under our constitution, come in before the father in respect of property that he cannot acquire. (J. 3, 10, 2.)

2. Succession to Duties.

(1.) Hereditary Debts.

On the other hand, the *coemptionator* or the father by adoption is not answerable for the debts of the person given in adoption or passing *in manum*, except hereditary debts. For those, since the father by adoption or the *coemptionator* is now himself the deceased's successor, and falls back into the position of heir, he is directly liable at law; while the person given in adoption, or passing *in manum*, is freed, because he or she ceases even to be the heir. (G. 3, 84.)

(2.) Debts contracted by the person adopted, or woman married.

But for the debts formerly owed by those persons on their own account, neither is the father by adoption nor the *coemptionator* liable; nor does the person given in adoption, or passing *in manum*, remain bound, for the *capitis deminutio* sets them free. And yet against the latter a *utilis actio* is given by undoing the *capitis deminutio.* If then they do not defend themselves against this action, all the goods that would have been theirs if they had not placed themselves in subjection to another, the Prætor allows the creditors to sell. (G. 3, 84.)

Sometimes, further, we hold by a fiction that our opponent has not undergone *capitis deminutio.* If, for instance, a man or woman under obligation to us by contract, undergoes this change of status, a woman by *coemptio*,

a male by *arrogatio*, then by the *jus civile* he or she ceases to be in our debt, and we are not allowed to bring a direct *intentio* (statement of claim) that he (or she) ought to give. But that it may not be in the power of such a person to mar our rights, a *utilis actio* against him or her has been brought in, undoing the *capitis deminutio*;—an action, that is, in which there is a fiction that he or she has not undergone this change of status. (G. 4, 38.)

By the *jus civile* arrogation extinguished the debts, excepting hereditary debts, of the *arrogatus*. This, however, was confined to contracts, and did not apply to delicts for which the *arrogatus* continued liable to be sued. (D. 4, 5, 2, 3.) It is not easy to understand either the rule or the exception of hereditary debts. But the Prætor granted a *utilis actio* against the *arrogatus*, thus reviving the extinguished debts; and notwithstanding that the goods he possessed were now, in consequence of the arrogation, the property of the *arrogator*, the creditors were allowed to seize them and satisfy themselves. From the next passage it appears that in Justinian's time the action was against the *arrogator*, but his liability was limited to the goods he acquired from the *arrogatus*.

On the other hand, for all debts due by the person given in adoption, the *arrogator* is not strictly liable at law. But he will be sued on his son's account; or if he refuses to defend him, the creditors are allowed by our magistrates that have such authority, to take possession of the goods that the son would have had in usufruct as well as in ownership, if he had not placed himself in subjection to another, and to dispose of them in the way prescribed by statute. (J. 3, 10, 3.)

III.—*Addictio Bonorum Libertatis Causa.*

According to the Roman law, all bequests and testamentary dispositions fell to the ground if no one accepted the office of heir. An insolvent inheritance was very likely to meet this fate, with the result that all the bequests of freedom became void. To prevent this, an arrangement was introduced by Marcus Aurelius, by which a person having no claim to the inheritance was assigned it in default of all heirs, in order that the gifts of freedom might be supported. The terms of the rescript are given by Justinian.

A new case of succession has been added by a constitution of the late Emperor Marcus (Aurelius). For if slaves that have received freedom from their master in a will under which no one enters on the inheritance, wish the goods to be adjudged to them in order to preserve their freedom, their prayer is heard. This is contained in a rescript of the late Emperor Marcus to Popilius Rufus, worded as follows:—"If to Virginius Valens, who by his will gave, among other things, freedom to certain slaves, no successor in case of intestacy appears, and his goods, therefore, ought to be brought to sale, then the magistrate that looks after the matter shall, on application, carry out your wishes, so as to protect the freedom of those to whom freedom has been left directly, as well as of those to whom it has been left in the form of a trust. The goods must therefore be adjudged to you, on your giving security to the creditors for payment of the entire sum due to each. Those then to whom freedom has been directly given shall be free just as if the

inheritance had been entered on. Those again that the heir is asked to manumit shall obtain their freedom from you. If, however, you wish the goods to be adjudged to you only on this condition, that even slaves to whom freedom has been given directly shall become your freedmen, then to this wish of yours, if the persons whose status is in dispute consent, we grant our authority. Further, that the profit from this rescript of ours may not be brought to nought in another way by the *fiscus*, that is, laying claim to the goods; those, too, that attend to our affairs, are to know that to any advantage in money freedom is to be preferred: they must, therefore, gather in the goods in such a way as not to impair the freedom of those that could have gained their freedom if the inheritance had been entered on under the will." (J. 3, 11, pr.—1.)

One of the slaves themselves might obtain the inheritance on the same terms. (C. 7, 2, 15, pr.)

This rescript comes to the aid not only of the grants of freedom, but of the deceased. It saves their goods from being taken possession of by the creditors and sold; for undoubtedly if in such a case the goods are adjudged, no forced sale (*bonorum venditio*) follows, seeing that some one has appeared to defend the deceased, and that too, a fit person, who gives security to the creditors for the entire amount. (J. 3, 11, 2.)

In the first place, then, this rescript applies whenever grants of freedom are made by will. But what if a man dies intestate after making grants of freedom by *codicilli*, and the inheritance is not entered on by a successor in case of intestacy? The leniency shown by the constitution applies. Certainly, too, no one can doubt that if the deceased made a will, and gave freedom by *codicilli*, then the slaves can enjoy their freedom. (J. 3, 11, 3.)

The constitution applies, as its very words show, when no one appears as a successor in case of intestacy. As long, therefore, as it is uncertain whether one will appear or not, the constitution will not come into force. But as soon as it is certain that no one appears, the constitution will apply. (J. 3, 11, 4.)

If a man that can claim a full restoration of rights (*restitutio in integrum*) holds back from the inheritance, can the constitution come in despite this? We answer that the goods ought to be assigned. What, then, if, after they are assigned, in order to uphold the grants of freedom, the man is fully restored to his rights? Assuredly we shall not have to say that the freedom is to be recalled that the slaves have once enjoyed. (J. 3, 11, 5.)

This constitution was brought in to uphold grants of freedom. If, then, there are none such, it never comes into force. What, then, if a master, while alive, or in the prospect of death, made grants of freedom, and with a view to avoid all question whether or not this was done to defraud creditors, the slaves wish the goods to be adjudged to them? is their prayer to be heard? It is better that they should be heard, although the words of the constitution fall short of this. (J. 3, 11, 6.)

But as we clearly saw that many such branches of the subject were wanting in this constitution, we passed a very full one, into which cases of many kinds have been gathered, so as to make the law on this kind of succession very full. These cases anyone can learn by reading the constitution. (J. 3, 11, 7.)

The person that obtains this *addictio* is regarded as heir. He is entitled to all the property of the deceased, and can bring all actions that could be brought by the deceased. (D. 40, 5, 4, 21.) The creditors, whom he is bound to pay in full, unless they have agreed to accept a composition (C. 7, 2, 15, 1), may sue him on his promise (D. 40, 5, 4, 22), or, which was more generally the case, as if he were their own debtor, by *utiles actiones*. (D. 40, 5, 3.)

The security required was the simple promise of the person to whom the inheritance was assigned, or sureties, or pledges. (D. 40, 5, 4, 8.) If sureties were given, one of the creditors was selected by the judge, to whom the sureties should give their promise. (D. 40, 5, 4, 9.)

In case of competition among several persons to obtain the inheritance, they that applied simultaneously were all chosen ; but if one was prior, he was preferred, subject to his giving the required security. (C. 7, 2, 15, 4.) If, after one has been appointed, another offers to give freedom to all the slaves, if the first applicant professed his ability to manumit only some, then he is preferred ; but no applicant is admitted after a year. (C. 7, 2, 15, 5.)

Justinian provides for another contingency, which one would have thought could scarcely occur. Suppose some of the slaves object to manumission, are their wishes to be respected, so as to prevent the others attaining their freedom ? It seems that the burden of patronage was so irksome, that it was sometimes better to be the slave of one man rather than to be the freedman of another. Justinian decided that the refusal of some slaves should affect themselves only, and that the others who desired freedom should be allowed to enjoy it. (C. 7, 2, 15, 2.)

INHERITANCE.

(*HEREDITAS: BONORUM POSSESSIO.*)

DEFINITION.

The universal successor of a deceased person is a *heres*, and what he succeeds to is called *hereditas*.[1] The heir steps into the shoes of the deceased, enjoying his rights, and burdened with his responsibilities. (D. 50, 17, 59.) The terms *hereditas*, *heres*, are employed (D. 5, 3, 3; D. 50, 16, 130) when the universal successor succeeded in virtue of his rights under the *jus civile ;* when, however, he obtained his position in virtue of the intervention of the Prætor, he was called *bonorum possessor* (D. 50, 17, 117), and what he succeeded to was called *bona*. (D. 50, 16, 208.) But by whichever title a person became universal successor, his rights and duties were the same.

---

[1] *Hereditas nihil aliud est quam successio in universum jus quod defunctus habuit.* (D. 50, 17, 62.) *Hereditas* is nothing else than the succession to the whole legal position the deceased held.

and the difference in name, when it occurs, indicates merely whether the title is Prætorian or derived from the *jus civile*. (D. 37, 1, 2; D. 37, 1, 3, 2.) (See *postea* Intestate Succession, Second Period.)

An inheritance (*hereditas, bona*) did not necessarily consist of corporeal property; there need not be a single article; what the heir took was the totality of rights and duties possessed by the deceased at the time of his death. (D. 37, 1, 3, 1; D. 5, 3, 50, pr.)

For convenience, both the "*heres*" and "*bonorum possessor*" will be called "heir;" and "*hereditas*" and "*bona*" "inheritance."

Second—Rights and Duties of the Heir.

In the Hindoo law, which presents many points of resemblance to the early Roman law, "inheritance" is inextricably mixed up with religious theories and observances. The heir is the person whose duty it is to perform the sacred rites to the deceased, and the person whose duty it is to do so is heir. There is plausible ground for the theory that connects this system of law with ancestral worship. An opinion has been widely spread among races of low culture, that everything in nature has a double or shadow of itself; that the warrior has a spirit, and so likewise his dog, and his wives, and slaves, and his weapons of war, and implements of domestic comfort. If he dies, his spirit goes about disconsolate, unless it is provided with ghostly food, and surrounded by ghostly attendants. In this way is explained the origin of sacrifices of food, weapons of war, trusted slaves and wives, on the death of important persons. The destruction of these was the means of setting their shadows or ghosts free, and thus enabling them to reunite with the ghost of their departed master. At all events, there can be little doubt that the rites performed by the heir were supposed to be in some way or other essential to the comfort of the deceased. The property that the heir obtained was necessary to enable him to perform the sacrifices required for the comfort of his ancestor's soul.

Where such a state of belief prevailed, the anxiety was naturally great to have an heir. The man for whom no rites were performed was a miserable outcast in the ghostly world, wandering about naked and disconsolate. To avert this calamity, men naturally desired to leave children behind them, who, and whose children and more remote descendants, should keep alive the fire on the family altar, and present the offerings

so necessary to the happiness of their ancestor. Moreover, there was another side to the picture. The dead had need of the living, but so also the living had need of the dead. The spirits of the departed were not mere empty voices; they retained power to injure, and could blast those that neglected to pay them their dues. Thus was the family tied together, the old generations with the new, in a bond of reciprocal services. Nor, if an ancestor were neglected, had his family alone to rue the impiety, for his malignant influence might be exerted against the State, if it suffered the family to do wrong. Hence the perpetuation of the family and its sacred rites was a matter of national importance.

This theory would enable us to understand some of the most singular and apparently arbitrary points of the early Roman law of inheritance. But the characteristic of Roman law, as it has come down to us, is, that it is emphatically, as contradistinguished from Hindoo law, a purely secular system. If it ever was steeped as deeply in religion as the Hindoo law, it had at an early date relegated the religious element to the domain of moral duties, or to the care of the Pontifex Maximus. Still there are traces in the authorities of an extinct, but once vital, sacerdotal element. As a general rule, no person could acquire by *usucapio* unless he were a *bona fide* possessor; but to this "inheritance" formed an exception. A thief could acquire the ownership of an inheritance after possession for a single year. Gaius explains that the reason for this strange sanction of lawlessness was the great desire of the ancients to have vacant inheritances filled up, in order that there might be some one to perform the sacred rites, which were specially called for at the time of death. (G. 2, 55.)

> On the other hand, again, one is sometimes allowed to take possession of what is another's, and to acquire it by use; and yet it is held there is no theft, as in the case of things belonging to an inheritance of which the (necessary) heir has not yet obtained possession; for it is held that if there be a necessary heir there can be no *usucapio pro herede*. (G. 3, 201.)

Cicero carries us further back. He says (De Leg. ii. 19, 47-49) that he has often heard the son of Publius Scaevola repeat from his father that no man could be a good Pontifex Maximus who did not know the *jus civile*. Cicero, in showing the limits of this proposition, refers to the jurisdiction concerning the sacred rites (*sacra*) to be performed on one's decease. The maxim of the XII Tables setting up as an object the per-

petuation of the family worship (*perpetua sacra sunto*), was applied by the Pontifex. It was his duty to see that the religious observances were duly performed. That burden fell upon the heir in the first instance. But this was merely a duty to be executed after his accession, under the supervision of the Pontifex Maximus; it had nothing to do with his title as heir, and did not influence his appointment. Still the connection is one that deserves to be remembered.

In considering the duties of the heir, an important line is to be drawn between his position before and after Justinian. The legislation of Justinian forms the transition between the ancient heir and the modern executors or administrators.

A. Rights of the Heir.

Generally, the heir succeeded to all the rights (whether *jus in rem* or *jus in personam*) of the deceased. (D. 29, 2, 37; D. 5, 3, 18, 2; D. 5, 3, 19, pr.) The exceptions have been already noticed in detail.

B. Duties of the Heir prior to Justinian.

The duties of the heir fall into two classes; (1) those imposed upon him as a universal successor (*in universum jus*) of the deceased; and (2) those imposed on him by the deceased, either in a will, or, in later times, in *codicilli*. There were important differences between wills and *codicilli*, but it will be convenient at present to disregard these, and to speak of all creditors, whether under a will or *codicilli*, as legatees.

I. *Duties of the Heir to the Creditors of the Deceased.*

We have already seen in detail for what debts of the deceased the heir was liable. The chief exception was in the case of penal actions. (D. 35, 2, 32, pr.) (Pp. 55, 327, 331.)

The heir was bound to pay all the debts of the deceased, even if he obtained no property from him whatever. (D. 37, 1, 3, pr.)

This was one of the obligations that were said to arise *quasi ex contractu*.

The rule of law is the same in the case of an heir that has come under an obligation to his co-heir in a proceeding *familiae erciscundae* on those grounds. (J. 3, 27, 4.)

The heir, too, is understood to be under an obligation on account of the legacies, but not properly by contract; for the legatee cannot properly be said to have carried on any business affairs either with the heir or with the deceased. But because the heir is not bound *ex maleficio*, he is understood to owe the legacy by a quasi-contract. (J. 3, 27, 5.)

Confusio.—When a creditor became heir to his debtor, or a debtor to his creditor, the two opposite characters of debtor and creditor were united in the same person, and the obligation was necessarily extinguished. A person cannot be debtor to himself or creditor to himself. In this way an obligation might be put an end to, and accordingly *confusio* is generally enumerated as a mode of extinguishing obligations. It will be seen presently that, owing to the introduction of inventories by Justinian, *confusio* as a divestitive fact practically ceased to exist.

Separatio bonorum.—In order to understand the Roman law of inheritance, it is necessary never for one moment to lose sight of the fact, that until the introduction of inventories by Justinian, from the very earliest times, THE HEIR WAS BOUND TO PAY ALL THE DEBTS OF THE DECEASED, EVEN IF HE OBTAINED NO PROPERTY FROM HIM WHATEVER. (D. 37, 1, 3, pr.) If the debts exceeded the value of the property left to the heir—in other words, if the deceased died insolvent—the inheritance was said to be *damnosa.* In a few instances, however, even prior to Justinian, the Prætor allowed the estates of the heir and the deceased to be treated as separate. This was called the *separatio bonorum.* (D. 42, 6, 1, pr.)

1. When the inheritance is solvent, and the heir insolvent, the creditors of the deceased on petition will obtain a separation of the property of the deceased from that of the heir, so that the creditors of the heir cannot recover any of the property inherited from the deceased until the creditors of the deceased are paid in full. (D. 42, 6, 1, 1.)

The creditors that obtain a *separatio* are paid in full out of the effects of the deceased, even in preference to those to whom the heir has pledged property belonging to the deceased. (D. 42, 6, 1, 3.) But if they have once elected to separate the goods of the deceased, they cannot, if there is a deficiency, claim the balance of their debts from the heir. (D. 42, 6, 5.) They may, however, if they prove unavoidable ignorance, have the *separatio* rescinded. (D. 42, 6, 1, 17.)

When the inheritance is insolvent, and the heir solvent, but the two together are insolvent, the creditors of the heir cannot have a separation. A debtor by contracting new debts can always diminish the property divisible among creditors, and a debtor who to disappoint his creditors accepts a burdened inheritance, does no more. (D. 42, 6, 1, 2 ; D. 42, 6, 1, 5.)

Suppose, again, the inheritance is solvent, the heir is insolvent and dies, or, if not insolvent, leaves enough to pay his creditors, but not his legatees. Can the legatees of the first inheritance demand a separation? As against the creditors of the first inheritance they cannot, but after these are satisfied in full, they may, apparently, proceed against the creditors of the heir (D. 42, 6, 6, pr.), and at all events against his legatees. (C. 7, 72, 1.)

A boy (Gaius) under the age of puberty is heir to his father (Titius), and dies before reaching puberty. Maevius is the heir substituted for him in this event. Maevius is insolvent. The creditors of Titius, and even of Gaius, can claim a separation against the creditors of Maevius. (D. 42, 6, 1, 7.)

Sempronius makes Attius his heir; Attius makes Julius his heir; Julius makes Maevius his heir. Maevius becomes heir to Julius, and is insolvent. The creditors of Attius and Julius can claim a separation as against the creditors of Maevius. Suppose Attius were insolvent, the creditors of Julius cannot claim a separation as against the creditors of Attius. (D. 42, 6, 1, 8.)

2. When the heir of an insolvent inheritance is a slave who obtains his freedom and the inheritance from the deceased, he may obtain a separation of the property that he acquires after the testator's decease, and he is allowed also to claim as a creditor on the estate of the deceased, if any sums were due to him by his master (of course only as *naturalia debita*). (D. 42, 6, 1, 18.)

II. *Duties of the Heir to Legatees.*

THE HEIR IS BOUND TO PAY ALL LEGACIES AND *fideicommissa* SO FAR AS THE PROPERTY THAT DESCENDS TO HIM GOES, BUT NOT FURTHER.

In the old times a man might lawfully spend his whole patrimony in legacies and grants of freedom, and leave nothing to the heir except an empty name. This seemed to be allowed by the statute of the XII Tables, which provided that the directions of a testator as to his property should be held binding, in these words :—"As the legacies of what is his are, so let the law be (*uti legassit suae rei, ita jus esto*)." The result of this authorisation was that the heirs named in the will held back from the inheritance; and so many men died intestate. (G. 2, 224.)

If the heir named did not accept the inheritance, the will was void, the legacies and bequests of freedom fell to the ground, and the wishes of the testator were entirely frustrated. It was thus even more for the sake of the testator than of the heir that a series of enactments was passed, having for their object to ensure a substantial interest in the property to the heirs, and thus to induce them to enter and give effect to the testator's dispositions.

1. *Lex Furia* (B.C. 183).

The *lex Furia*, therefore, was passed, by which no one, with certain exceptions, was allowed to take more than a thousand *asses* as legacies or gifts in prospect of death. But this statute, too, failed to effect what it wished. A man, for instance, that had a patrimony of five thousand *asses*, could bequeath one thousand to each of five persons, and so spend the whole of the patrimony. (G. 2, 225.)

Ulpian cites this as an instance of a *lex minus quam perfecta*, because it imposed a penalty of fourfold the excess beyond 1000 *asses* taken by any one legatee, but did not declare the legacy invalid beyond that amount. (Ulp. Frag. pr. 2.) *Cognati manumissoris* (see *postea*, Intestate Succession) were excepted from the limit of 1000 *asses*. (Ulp. Frag. 28, 7.)

A *lex perfecta* prohibits something, and declares it void, if it is done. It is *imperfecta* if it forbids something, but imposes no penalty, nor declares the thing, if done, to be void, of which class Ulpian quotes the *lex Cincia* as an instance. (Ulp. Frag. pr. 1.) The *lex Falcidia* was *perfecta*, and invalidated all legatees to the extent to which they deprived the heir of his *Falcidia Quarta*.

2. *Lex Voconia*.—According to Theophilus, this was a *plebiscitum* carried by Quintus Voconius Saxa, Tribune of the Plebs, at the suggestion of the elder Cato. Supposed date, B.C. 169.

The *lex Voconia* was therefore passed at a later time, which provided that no one could lawfully take more, as legacies or gifts in prospect of death, than the heirs took. Under this statute, plainly, in any case the heirs would have something. But yet a little defect sprang up; for by dividing his patrimony among many legatees, the testator could leave so little to the heir that it was not for the heir's advantage to undertake, for the sake of this gain, the burden of the whole inheritance. (G. 2, 226.)

The *lex Voconia* contained two other provisions, (1) A woman could not be instituted heir to any man whose fortune was registered at the census as 100,000 *asses* or upwards. (Cic. II. Verr. i. 41, 42, § 107-108.) (2) Women might be legatees for more than 1000 *asses* allowed by the *lex Furia*, provided the amount did not exceed one-half the testator's estate. (Quint. Declam. 246.)

3. *Lex Falcidia*, carried by Publius Falcidius, Tribune of the Plebs, under Augustus, B.C. 40.

The *lex Falcidia* therefore was passed, which provided that no one might lawfully bequeath more than three-fourths of his property. Necessarily, then, the heir would have one-fourth of the inheritance. This is the law now in use. (G. 2, 227.) In grants of freedom too, excessive licence was restrained by the *lex Fufia Caninia*, as we related in the first book of these Commentaries. (G. 2, 228.) (See p. 182.)

The terms of the *lex Falcidia* were:—"Quicunque civis Romanus post hanc Legem rogatam, is quantam cuique civi Romano pecuniam jure publico dare, legare volet, jus potestasque esto; dum ita detur legatum, ne minus quam partem quartam hereditatis, eo testamento heredes capiant. Eis, quibus quid ita datum, legatumve erit, eam pecuniam sine fraude sua capere liceto. Isque heres, qui eam pecuniam dare jussus damnatus erit, eam pecuniam debeto dare, quam damnatus est." (D. 35, 2, 1, pr.)

We have still to look narrowly at the *lex Falcidia*, the latest placing a limit on legacies. In old times, indeed, by the statute of the XII Tables, the power of leaving legacies was unrestrained, so that a man might lawfully spend his whole patrimony in legacies, since that statute had this provision, "As the legacies of what is his are, so let the law be." But it seemed best to narrow this licence in leaving legacies. Such provisions were made in the interest of the testators themselves, for often men died intestate because the heirs named in the will refused to enter on inheritances from which they would have no gain, or a very trifling gain. To remedy this, then, both the *lex Furia* and the *lex Voconia* were passed; but neither of these seemed able to accomplish its aim. Last of all, therefore, the *lex Falcidia* was passed, which provides that no one can lawfully leave more than three-fourths of all his goods in legacies. Thus whether one heir or several heirs be appointed, he or they must have left them one-fourth part. (J. 2, 22, pr.)

Exceptions. — The statute did not apply in the following cases :—

1. To the will of a soldier made while on service, but it did apply to the will of a veteran. (D. 35, 2, 40, pr.)

While yet a civilian, a man makes a will. Afterwards, when a soldier on service, he adds *codicilli*. The Falcidian law does not apply to the property disposed of by the *codicilli*, but it does to the property disposed of by the will. (D. 35, 2, 96.)

A soldier on service makes a will, and after leaving the service, *codicilli*. The Falcidian law applies to the *codicilli*, but not to the will; in other words, the heir will retain one-fourth of the property disposed of by the *codicilli*, but not necessarily any of that dealt with by the will. (D. 29, 1, 17, 4.)

2. To a legacy of a debt to a creditor. If, however, more is left to the creditor than the testator really owes him, the excess, but the excess alone is liable to be reduced for the Falcidian fourth (*Falcidia quarta*). (D. 35, 2, 14, 1; D. 35, 2, 5.)

3. If a slave is bequeathed on trust to be manumitted, and nothing is left to the legatee out of which the fourth could be paid, the *lex Falcidia* does not apply (D. 35, 2, 33, pr.); but if any other property is given to the legatee, his legacy is regarded as including the value of the slave, for the purpose of the Falcidian fourth. (D. 35, 2, 35.)

4. When Justinian introduced Inventories, the heir lost his right to the *Falcidia quarta* if he failed to make a proper inventory; and Justinian also allowed the testator, if he chose, to refuse the fourth to his heir. (P. 756.) If the heir paid the legatees in full, he could not reclaim the fourth. (C. 6, 50, 19.)

5. When an heir entered under the *S. C. Trebellianum* by compulsion, at the risk of the *fideicommissarius*, he was not allowed the *quarta*.

With these exceptions, the Falcidian law applied to every sort of valuable right, and against every kind of legacy or gift *mortis causa*. (Paul, Sent. 3, 8, 1; C. 6, 50, 5; D. 35, 2, 1, 7.)

The mode of valuation.—As the Falcidian law required a clear fourth of the inheritance to be reserved for the heir, four points required to be settled:—(1) What was a clear fourth? (2) How was the property valued? (3) How were the legacies valued? and (4) At what moment was the valuation taken from?

1. What was a clear fourth?

In taking an account of the property, as required by the *lex Falcidia*, all debts are first deducted, and also the funeral expenses, and the prices of the slaves that are manumitted. Next, as regards the remainder, the account is so handled as that under it a fourth part shall remain with the heirs, and three-fourths be divided among the legatees, each receiving a proportionate part, according to the legacy left him. Suppose, for instance, that 400 *aurei* were left in legacies, and that the whole patrimony from which the legacies ought to be drawn amounts only to 400 *aurei*, then a fourth must be subtracted from the share of each legatee. Suppose, again, that 350 *aurei* were left in legacies, then an eighth ought to be subtracted. Lastly, suppose the testator left 500 *aurei* in legacies, then to start with a fifth, and next a fourth ought to be subtracted; for we must first subtract all that is in excess of the goods, and next, that part of the goods that ought to remain with the heir. (J. 2, 22, 3.)

The deductions embrace—(1.) Funeral expenses (D. 35, 2, 6), but not the expense of a tombstone. (D. 35, 2, 1, 19.)

(2.) Debts due by deceased, including what the deceased owed the heir. (D. 35, 2, 87, 2.)

An insolvent testator has made legacies. The heir compounds with the creditors, by which he gets something for himself. The legatees cannot claim any portion of this surplus, because the heir has got it not *qua* heir, but in virtue of the composition. (D. 35, 2, 3, 1.)

The testator Titius along with Gaius is jointly bound for 10 *aurei*. How much of this is to be debited to Titius? If Titius and Gaius are partners, then the share of each is certain; but if not, you must wait the event, for Gaius may be able to pay nothing or he may pay all. (D. 35, 2, 62, pr.)

(3.) The value of slaves manumitted at once or at a certain future day is not reckoned, but if the manumission depends on a future and uncertain event, the value is taken in the same way as that of other conditional obligations, according to the rules to be presently explained. (D. 35, 2, 36, 2; D. 35, 2, 37, pr.)

(4.) Legacies for permanent additions to temples or churches (*dona deorum*). (Paul, Sent. 4, 3, 3; Nov. 131, 12.)

(5.) The expenses of realising the estate. (D. 35, 2, 72.)

2. The property must be valued at its actual and present worth (D. 35, 2, 42; D. 35, 2, 62, 1), and could not be taken at any arbitrary figure named by the testator. (D. 35, 2, 15, 8.) The standard of value was what the thing would fetch in the market, not what a person who had a special liking for it might give. (D. 35, 2, 63, pr.) If the heir sells at a figure above or below the true market value, it is the latter, and not the price he gets, that is taken into account. (D. 35, 2, 3, pr.)

Conditional obligations were the most difficult to appraise. One method was to fix the value at what the conditional obligation would fetch if sold simply as a chance. But the better way was to treat it either as unconditional or as having failed. If the promise was taken as unconditional, its value was added to the inheritance, and the heir stipulated with the

legatee for the return of a proportion, if afterwards it turned out that the condition failed, and that nothing was due. If the promise was taken as having failed, the heir by stipulation promised to pay the legatee his due proportion, if afterwards the conditions were fulfilled and the money was paid. (D. 35, 2, 73, 1.)

3. Valuation of the legacies.

In order to estimate how much was due to the heir, it was essential to arrive at the amount or value of the legacy. In a few cases this presented some difficulty.

(1.) A testator bequeathes land belonging to another. The heir buys it at an excessive price. For the purpose of the Falcidian fourth, he cannot value the legacy at the price he paid, but only at a fair price. (D. 35, 2, 61.)

(2.) In a suit for a legacy, the oath of the legatee as to its value is made. Not that which is penal, but the real value is reckoned for the Falcidian fourth. (D. 35, 2, 60, 1.)

(3.) In conditional legacies, the mode approved by Paul was mutual guarantees, and not the price that the conditional legacy might fetch if sold. This has been explained in reference to the valuation of conditional obligations forming part of the inheritance. (D. 35, 2, 45, 1.)

(4.) Legacy from a future day (*ex die relictum*). A deduction is made in respect of the advantages enjoyed before the time arrives from the use of the thing by the heir. (D. 35, 2, 73, 4.)

(5.) A perpetual annuity. The value is the principal that, with interest at 4 per cent., would yield the annual sum. (D. 35, 2, 3, 2.)

(6.) Annuity for life. Æmilius Macer gives the following table for the valuation of life annuities. The rule was to multiply the annual allowance by the probable number of years that the annuitant would live, and the quotient is the value of the legacy. (D. 35, 2, 68, pr.)

ANNUITY TABLE OF ÆMILIUS MACER.

From	0 to 20 years	the duration of life is taken at	30	years.
„	20 „ 25	„	28	„
„	25 „ 30	„	25	„
„	30 „ 35	„	22	„
„	35 „ 40	„	20	„
„	40 „ 50	(59 less the actual age of annuitant).		
„	50 „ 55 years	the duration of life is taken at	9	years.
„	55 „ 60	„	7	„
„	60 onwards,	„	5	„
Legacy to Municipality		the time allowed is	30	„

4. Time of the Valuation.

The amount of the patrimony to which an account under the *lex Falcidia* applies, is the amount when the testator died. If, therefore, he had, for instance, a patrimony of 100 *aurei*, and left in legacies 100 *aurei*, the legatees profit nothing by the fact that before the inheritance is entered on so great an addition has been made to it by means of the slaves, or by the birth of children to the female slaves belonging to the inheritance, or by the increase of the cattle, that after spending 100 *aurei* in paying the legacies, the

heir will have a fourth of the inheritance ; but it is necessary none the less to subtract one-fourth from the legacies. If, on the contrary, he left seventy-five *aurei* in legacies, and before the inheritance is entered on the goods are lessened, by fire, it may be, or by shipwrecks, or by the death of slaves, so that the substance that is left is not more than seventy-five *aurei*, or perhaps even less, still the legacies are due entire. But this brings no loss on the heir, for he is free not to enter on the inheritance. The legatees then must in consequence agree with the heir for some part ; since otherwise the will may be abandoned and they obtain nothing. (J. 2, 22, 2.)

The usual course was to appoint an arbiter to value the property. This valuation might be had at the instance of the smallest legatee, but it did not bind the rest. Usually, however, the heir gave notice to the legatees to appear before the arbiter, and generally also to the creditors to prove their debts. If the heir offers what appears to be the clear balance, the legatees must promise by stipulation to return any excess that they may eventually be shown to have received. (D. 35, 3, 1, 6.) It was entirely for the arbiter to determine what accounts he would require to be produced, and generally what proof he might deem necessary or sufficient. (D. 35, 2, 95, 2.)

c. Duties of the Heir after the Introduction of Inventories.

The liability of the heir to pay all the debts of his ancestor, even when nothing was left to enable him to do it, was not an essential constituent of universal succession. In *arrogatio*, for example, the new *paterfamilias*, although a universal successor, was not by the civil law responsible for any debts of the person arrogated, and even under the Prætor's edict was never obliged to pay more than he acquired through the son.

But this liability was an essential part of the law of inheritance from the earliest period. The principle, indeed, was never touched until the changes introduced by Justinian.

We must know, however, that the late Emperor Hadrian allowed a man, although over five-and-twenty, to renounce an inheritance on which he had actually entered, because a huge debt came to light, that at the time he entered was unknown. This the late Emperor Hadrian granted as a special favour to one. The late Emperor Gordian, however, afterwards extended this to all soldiers, but to them only. But our goodness has granted this favour to all the subjects of our empire alike, and has written a constitution at once perfectly fair and noble. If its tenor be observed, men may lawfully enter on an inheritance, and yet be liable only to the value of the goods as they actually turn out. In such a case, then, they need not call in the aid of deliberation, unless they neglect to observe our constitution, and think they must deliberate, and so prefer to take on their shoulders the ancient burden of entry. (J. 2, 19, 6.)

The principle upon which Hadrian and Gordian proceeded was to rescind the acceptance of the inheritance and relieve the heir from his position altogether. Justinian made a far deeper change. He conceived the plan of retaining the heir, by depart-

ing from the ancient rule that the heir was answerable for all the debts of the deceased. This was to break up an association of ideas riveted by the practice of more than a thousand years. The ideas of an heir and of unlimited liability were indissolubly associated for ages. It was a bold and successful stroke to convert the heir into a mere official, designated by the deceased for the purpose of winding up his affairs and distributing his property. The heir was now a mere executor, with the privilege of being residuary legatee, and, if the testator did not forbid it, of retaining the Falcidian fourth.

Justinian makes two classes of heirs, those that do not, and those that do, make an inventory. Those that do not make an inventory are in a worse position than the heir by the old law. They are liable for all the debts of the deceased (C. 6, 30, 22, 1), and are heirs, in the old sense, to all intents and purposes. (C. 6, 30, 22, 12.) And not only so, but they are deprived of the Falcidian fourth (Nov. 1, 2, 1), and they must pay all the legacies, even if the effects of the deceased should be insufficient for the purpose. (Nov. 1, 2, 2.) Practically, therefore, if there was any doubt as to the solvency of the inheritance, the heir was compelled to make an inventory. (C. 6, 30, 22, 1.)

I. *Duties of Heir that has made an Inventory to Creditors of Deceased.*

In the first place, the legal personality of the heir and of the deceased was no longer regarded as one. The doctrine of *confusio* was an inevitable corollary from the old conception of heirship. But it was a significant part of the change made by Justinian, that the claims of the heir against the deceased, and of the deceased against him, were now put in the same position as if the heir were entirely unconnected with the succession. The heir ranks as a creditor on the estate of the deceased.

Under Justinian's reforms a question arises that could not occur under the old law—the question of priority of payment among creditors. Under the old law, each creditor was entitled to payment in full from the heir; but when an inventory was made, it became important to determine in what order the creditors should be paid if the inheritance was insolvent.

Order of Priority.

(1.) Funeral expenses.

(2.) Cost of registering the will.

(3.) Cost of inventory, and generally other necessary expenses incidental to winding up the affairs of the deceased. (C. 6, 30, 22, 9.)

(4.) The heir may pay those whose claims are before him, and if nothing remains, he is not bound in respect of any creditors subsequently turning up. (C. 6, 30, 22, 4.)

(5.) Among those whose claims are before him, creditors secured by mortgage, and those having priority by law, come before unprivileged creditors. (C. 6, 30, 22, 9.)

If any creditors are unsatisfied, their only recourse, if they are prior mortgagees, is to compel subsequent mortgagees to buy them off, or to give up the property mortgaged. (C. 6, 30, 22, 6.)

Again, if legatees have been paid, any creditor may compel them to discharge their claim to the extent of their legacies (C. 6, 30, 22, 5); but creditors have no claim on the heir (C. 6, 30, 22, 7), or on any purchaser from the heir of property sold to discharge debts and legacies. (C. 6, 30, 22, 8.)

The heir was not bound to pay any debt until the time allowed for making the inventory had expired. (C. 6, 30, 22, 11.)

When the heir lives near the property, the inventory must be begun within thirty days, and finished within ninety days from the time the heir learns that the will has been opened, or that he is heir *ab intestato*. (C. 6, 30, 22, 2.) If the heir lives at a distance from the place where the property, or the greater portion of it is, a year is allowed for the completion of the inventory, reckoning from the death of the deceased, not from the time the heir learns his position. In this case, the signature to the inventory may be made by agents on the spot. (C. 6, 30, 22, 3.)

The inventory consisted of an enumeration of all the deceased possessed at the time of his death, and must contain an attestation by the heir—(1) that it is accurate and complete; and (2) that he has not misused and will not misuse any of the property in his custody. (C. 6, 30, 22, 2.)

The inventory must be in writing, signed by the heir; or, if the heir cannot write, a special notary must sign it at his request in the presence of witnesses who know him, and he must mark it with the sign of the cross. (C. 6, 30, 22, 2.)

II. *Duties of Heir that has made an Inventory to Legatees.*

The heir is bound to pay the legatees only in so far as the effects go; but Justinian altered his rights with regard to the Falcidian fourth in two important particulars.

1. The heir was not entitled to the fourth, if the testator declared he should not have it. (Nov. 1, 2, 2.)

2. If the testator did not refuse the fourth, still the heir was not entitled to it, unless he made an inventory with certain additional formalities. The heir must invite the legatees to

appear, if they live in the same city, or their agents, if they are persons that, from their rank, age, or other reason, are entitled to the privilege of being represented by an agent. If they do not accept the invitation, then three witnesses (at least) belonging to the city must be present, trustworthy, substantial men of the highest respectability. An inventory is to be made in their presence, and with their testimony that everything is entered the heir may rest content. (Nov. 1, 2, 1.)

JOINT-HEIRS.

Either one man or more, to any number whatever that one wishes, may lawfully be made heirs. (J. 2, 14, 4.)

Rights and Duties.

I. Rights and Duties as between the Joint-Heirs themselves.

(1.) Rights to the effects of deceased (*res hereditariae*).

Each joint-heir is joint-owner of every article of property derived from the deceased. But each can dispose of his share without the consent of the others, and the purchaser becomes a joint-owner with them. (C. 3, 37, 3.) Each heir is entitled to partition, so that he may have the individual ownership of a part of the property according to his share. (D. 10, 2, 54; D. 10, 2, 1, pr.) This was given by an old action mentioned in the XII Tables, *judicium familiae erciscundae.*

In regard to the property inherited, joint-heirs are thus joint-owners, and liable to the obligations of joint-owners. (D. 10, 2, 22, pr.) The rules then applicable to joint-ownership are valid in regard to joint-heirs. (D. 10, 2, 56; D. 10, 3, 4, 3; D. 10, 2, 16, 6.)

(2.) *Jus accrescendi.* If one of several persons nominated heir for any reason does not become heir, his share is divided among such as become heirs, in proportion to their respective shares.

Where there are several statutory heirs, and some pass the inheritance by, or are hindered by death, or some other cause, from entering upon it, then their share accrues to the rest that have entered; and although those that have entered may have died before such accrual, yet their share belongs to their heirs. (J. 3, 4, 4.)

A testator leaves two-thirds of his inheritance to a son that may be born after the will is made, and one-third to a daughter that may be born after the will is made. A son only is born. He is sole heir to the whole property. (D. 28, 2, 28, 4.)

The *lex Julia et Papia Poppaea* introduced a very important

alteration in the *jus accrescendi*. The *lex Julia* provided that if the heir named in the will survived the testator, but died before the will was opened, or if he died in the lifetime of the testator, his share should be *caduca*, and become the property of the Exchequer (*Fiscus*). This applied against all joint-heirs, unless they were descendants or ancestors of the deceased within the third degree. The old law was, however, left standing, when the nomination of the heir was void *ab initio*, or the heir nominated never was born.

A peculiarity of the *jus accrescendi* is, that it operates without the consent and even against the wish of the heir whose share is increased by it. If a person once becomes heir, he cannot prevent his share being increased. (D. 29, 2, 53, 1).

A. and B. are made joint heirs for one-half, and C. is made heir of the other half. A. dies. His share accrues solely to B., who now gets one-half. (D. 28, 5, 20, 2.)

Let Titius be heir. Let Gaius and Maevius be heirs in equal parts. Gaius and Maevius are not conjoint heirs of one-half; they are taken together rather for speed in writing that to indicate that they jointly divide the inheritance with Titius. Therefore, if Gaius or Maevius dies, his share is equally divided between the survivors. (D. 28, 5, 66.)

A. is named heir for one-fourth, B. for one-fourth, and C. for one-half. A. dies without being heir. Suppose A.'s share is worth 60 *aurei*, then C. gets forty *aurei* and B. twenty. (D. 28, 5, 59, 3.)

Maevius, Titius, and Seius are joint-heirs equally to Attius. Titius alone enters on the inheritance of Attius, and dies leaving Seius his heir. What share does Seius acquire in the inheritance of Attius? As heir of Titius, he at once gets his share, which is one-third; if he refuses to enter on the inheritance of Attius, his share is divided equally between Maevius and Titius, so that without himself entering on the inheritance of Attius, he gets the third of Titius and the half of his own third. But a third and a sixth together make one-half of the whole inheritance of Attius; if he enters on the inheritance of Attius he then gets his own third and the third of Titius, making together two-thirds. (D. 28, 5, 59, 7.)

There was in old times another mode of acquisition under the *jus civile*—that, namely, by the right of accrual (*jus accrescendi*), which was of this kind. If a slave was owned in common by Titius and another, and that other alone gave him freedom, either by *vindicta* or by will, in that case his share was lost and accrued to his partner. But it was the worst of examples that the slave should be defrauded of his freedom, and that as the result a loss should be inflicted on his humaner masters, while to the sterner gain accrued. Regarding this, then, as altogether invidious, we have thought it needful to heal it with a dutiful remedy by a constitution of ours. In it we have found a way by which the manumitter and his partner, and the slave that received his freedom, may all alike enjoy a boon from us. The freedom runs on and is effectual—indeed, to favour freedom, even the old legislators most plainly decided many points in defiance of the general rules. The man that gave it is allowed to rejoice that his liberality is confirmed. The partner, lastly, is kept from suffering any loss, for he receives a price

for the slave proportioned to his share of the ownership, as determined by us. (J. 2, 7, 4.)

(3.) Custody of the Title-deeds.

On a division of the property, in case of dispute, the judge settled who should have the title-deeds. (C. 3, 38, 5.) The title-deeds were not to be assigned to him that offered most for their custody. (D. 10, 2, 6.) They were either to be deposited in the temple of Vesta, or given to one of the heirs. If given to an heir, he must furnish copies to the other heirs, and bind himself to produce the original when required. The general rule was to prefer the heir that had the largest share in the inheritance; if they had equal shares, a selection was made by lot, or by agreement among themselves they might choose a third party, to whom the documents should be entrusted. (D. 10, 2, 4, 3; D. 10, 2, 5.) Other things being equal, a preference was to be given to the elder over the younger, to men over women, to freeborn men over freedmen, and generally to those of higher over those of lower rank. (D. 22, 4, 6.)

II. Duties of Joint-Heirs in respect of Creditors.

In respect of the sums due to or by the deceased, the joint-heirs were not either joint-creditors or joint-debtors. Each was severally liable or entitled according to his own share. Thus an heir for one-half could not sue any debtor of the deceased for more than one-half of the debt, nor be sued by a creditor of the deceased for more than one-half. This decision was established by the XII Tables. (C. 3, 36, 6.)

It is manifest that if an heir were responsible not merely for the debts in proportion to his own share, but had to make good the default of all the other heirs, it would have been more dangerous to accept a part than the whole of an inheritance. From this danger the heirs were freed by the provision of the XII Tables. But a grave inconvenience necessarily resulted. A creditor of the deceased had to divide his claim into as many parts as there were heirs, and to sue each separately. So a debtor of the deceased was exposed to as many actions as there were heirs. Two ways of avoiding this inconvenience were resorted to. The testator might apportion the debts among his heirs, requiring each to pay specific debts, and giving each an exclusive right to specific debts due to the deceased. The heirs were obliged to respect this assignment. (D. 10, 2, 20, 3.) Again, either by reciprocal stipulations or by order of a judge, the sums due to and by the deceased might be divided. The

judge could not, indeed, make any heir a sole creditor or debtor in respect of any particular sum, but in a circuitous way the end in view was accomplished. When a sum was due to the deceased, the heir to whom the debt was assigned sued him partly in his own name, and partly as the agent of all the other heirs (*procurator in rem suam*), and thus received the entire debt, the debtor obtaining at the same time a full discharge. When a debt was due by the deceased, and one of the heirs to whom it was not assigned is sued for his part, he can require the heir that is obliged to pay the debt to come in and defend the action. But, doubtless, this did not prejudice the creditor's right against the other, if the heirs sued failed to pay the whole of the debt. (D. 10, 2, 3; D. 10, 2, 2, 5.)

The rule of division does not apply to a creditor secured by mortgage. The heir to whom the thing mortgaged is given must pay the whole debt. (C. 4, 16, 2.)

III. Duties of Joint-Heirs to Legatees.

1. Each of several heirs is bound to pay legacies (not specifically charged upon any heir) in proportion to the property he gains, but no further, and is not obliged to make up any deficiency caused by the insolveney of any of the other heirs. (D. 31, 1, 33, pr.)

Again, each heir is entitled, under the *lex Falcidia*, to a clear fourth of his share.

The following question has been raised: Suppose two heirs are appointed, say Titius and Seius, and that the part given to Titius is either entirely exhausted by legacies given through him by name, or burdened beyond measure: while through Seius there are left either no legacies at all, or legacies that reduce his share only one-half. Now Seius has a fourth of the whole inheritance or more; is Titius then to be allowed to keep back nothing from the legacies left through him? The decision is that he can keep back enough to have the fourth part of his share unimpaired. For the account under the *lex Falcidia* is to be taken in the case of each heir singly. (J. 2, 22, 1.)

A testator left 400 *aurei* to Titius and Maevius. The share of Titius was burdened with legacies to the extent of 200 *aurei;* and the heir, whoever he should be, had to pay another 100 *aurei* in legacies. Maevius did not accept. Titius cannot require a reservation of a *Falcidian* fourth of the 200 *aurei* charged on the share; but as, after paying 300 *aurei* in legacies, he retains a clear fourth of the whole, he must be content with that. (D. 31, 1, 61, pr.)

Gaius and Titius are each made heirs for one-fourth, and Gaius is made heir for the other half, subject to a condition. If the condition is fulfilled, the quarter and half shares of Gaius must be conjoined for the purpose of reckoning the *Falcidian* fourth. (D. 35, 2, 87, 3.)

Special Investitive Facts.

1. What words constitute heirs jointly?

The question is one of intention. Did the testator intend the persons named to take jointly or severally or successively?—that is, the second to take only if the first failed.

Titius imo Seius heres esto. }
Titius heres esto imo Seius. } Seius alone is heir. (D. 28, 5, 47, pr.)

(1.) *Primus et fratris mei filii aeque heredes sunto.*

(2.) *Primus et fratris mei filii heredes sunto.*

In the first instance, all are heirs jointly and in equal shares. In the second Primus gets one half, and the nephews the other half. (D. 28, 5, 13, pr.)

Titius ex parte dimidia heres esto, Seius ex parte dimidia; ex qua parte Seium institui, ex eadem parte Sempronius heres esto. Titius gets one-half, and Seius and Sempronius each a quarter. The true construction is that Seius and Sempronius are joint-heirs of one-half, and Titius sole heir of the other half. (D. 28, 5, 15, pr.)

2. The rules that determine the shares of the respective heirs.

An inheritance is usually divided into twelve parts (*unciae*), all included under the name of the *as*. These parts, too, have their own names, answering to those from an *uncia* to an *as*,—namely these: *uncia; sextans* (sixth part, *i.e.* 2 *unciae*); *quadrans* (fourth part, *i.e.* 3); *triens* (third part, *i.e.* 4); *quincunx* (five-twelfths, *i.e.* 5); *semis* (half, *i.e.* 6); *septunx* (seven-twelfths, *i.e.* 7); *bes* (two-thirds, *i.e.* 8); *dodrans* (three-fourths, *i.e.* 9); *dextans* (ten-twelfths, *i.e.* 10); *deunx* (eleven-twelfths, *i.e.* 11); *as*, *i.e.* 12. But it is not necessary that there should be precisely twelve parts, for there are as many *unciae* in the *as* as the testator wished. If, for instance, a man names in his will one heir, and him, say *ex semisse*, then the whole *as* will contain six *unciae* only; because no man can die testate as regards part of his goods, and intestate as regards the other part, unless indeed he be a soldier, whose intention in making the will is alone looked to. On the other hand again, a man can divide his inheritance into as many *unciae* as he pleases. (J. 2, 14, 5.)

An inheritance was a universal succession; it included the whole of a man's property and transferable rights. An heir therefore could not succeed to a part of the property of deceased. It was considered inconsistent with this principle to allow one heir to take *ex testamento* and another *ab intestato*. It destroyed the unity of the universal succession. But to this rule the wills of soldiers were an exception.

(1.) Each heir is assigned a particular share by the testator.

Let us see what the law is if a share is not assigned, and yet no one has been appointed heir without having a share assigned him; as when three heirs are appointed, each to have a fourth. In this case it is agreed the unassigned share tacitly accrues to each heir in proportion to his share, and is held just as if (in the instance given) they had been appointed by the will heirs each of one-third. Conversely, again, if the shares amount to more than an *as*, each is tacitly lessened; so that if, for instance, four heirs were appointed in the will, each to have a third, then the shares are to be held just as if each had been appointed in the will heir of one-fourth. (J. 2, 14, 7.)

A. and B. are named heirs ; A. for one-fourth and B. for one-half. This is the same as giving A. one-third and B. two-thirds of the whole. There is no intestacy as to the remaining fourth. (D. 28, 5, 13, 3.)

A. and B. are heirs ; A. for 12 and B. for 6 parts. This is equivalent to making A. heir for two-thirds and B. for one-third. (D. 28, 5, 13, 4.)

A. and B. are together made heirs for one *as*, and C. is made heir for one-half and one-sixth of an *as*. In this case the testator makes the *as* = 20 ounces, of which A. and B. get 6 each, and C. gets 8. (D. 28, 5, 13, 6.)

Titius is heir for a third, B. for two-thirds, and then Titius for another sixth. Here the *as* is equal to 14 ounces or parts, of which B. gets 8 and Titius a third (4) and a sixth (2), or in all 6. (D. 28, 5, 13, 7.)

Clemens Patronus in his will provided that if a son should be born to him, he should be heir ; if two sons, they should be heirs in equal parts ; so if two daughters : if a son and daughter, the son should get two parts and the daughter one. Two sons were born and one daughter. Each of the sons gets two parts, and the daughter one, taking the *as* to consist of 5 parts. (D. 28, 5, 81, pr.)

(2.) Several are made heirs, but nothing is said as to their respective shares.

If more heirs than one are appointed, a division of shares becomes needful only if the testator wished them not to inherit in equal shares. For it is sufficiently certain that if no shares are named, then they are to inherit in equal shares. (J. 2, 14, 6.)

(3.) Several are named heirs ; to some of them the testator assigns specific shares, to others none. It is in this case that the mode of dividing an inheritance into twelve equal parts becomes of practical importance.

But if the shares are expressly stated in the case of some, and anyone else is named without a share, then if any part of the *as* is wanting, he inherits that as his share ; and if more than one are appointed in the will without shares, then they will all unite in taking that share. If, however, the shares make up the full *as*, then those named are called on to take half, and he or all of them the other half. It makes no difference whether it is the first or the middle one or the latest that is appointed in the will without a share, for that part is understood to be given him that is not assigned. (J. 2, 14, 6.)

If more than twelve *unciae* have been distributed, the one that is appointed without a share will have all that is wanting to make up two *asses*. In the same way, if the sum of two *asses* is already fully made up, he shall have what is wanting to a third. All these parts are afterwards called back to the standard of the *as*, although there are more *unciae* than the *as* contains. (J. 2, 14, 8.)

A. is heir for one-fourth, B. for one-fourth, and C. without any part being named. C. gets one-half of the whole. (D. 28, 5, 17, pr.)

A. gets 6 ounces, B. 8, and C. is made heir for the residue. The shares of the heirs will be—A. three-twelfths, B. four-twelfths, and C. five-twelfths. (D. 28, 5, 87.)

A. gets one-fourth, B. gets three-fourths, C. is also heir, but no part is mentioned. As A. and B. together make up one *as*, C. gets another *as*, and therefore C. gets one-half of an *as*, and A. one-fourth, B. three-fourths of the remaining half. (D. 28, 5, 20, 1.)

"I name Lucius Titius my heir for two parts, and Publius Maevius for one-fourth." The testator is considered to have reckoned the *as* as consisting of three-fourths, of which Titius gets two and Maevius one. (D. 28, 5, 78, 1.)

"I name Lucius Titius heir for 2 ounces, Gaius Atticus for one part, Maevius for one part, and Seius for two parts." Here Titius alone is considered to have a share assigned. He gets 2 ounces out of the *as*, the remaining 10 being divided, so that 5 ounces go to Seius and 5 are divided equally between Maevius and Atticus. (D. 28, 5, 47, 2.)

THIRD.—INVESTITIVE FACTS.

CHAPTER I.

TESTAMENTARY SUCCESSION.

First.—THE FORMAL WILL (*TESTAMENTUM*).

I. ESSENTIAL ELEMENTS IN A WILL.

HAVING considered the juridical character of "*hereditas*" in the Roman law, and the Rights and Duties of the Heir (*Heres, Bonorum possessor*), we now come to the Investitive Facts, or the modes by which a person becomes heir, or, in other words, enters upon an inheritance. Our first division is the modes by which a universal successor was appointed by some expression of the wishes of the deceased. This includes the Roman Will (*Testamentum*).

But is a will nothing but an instrument for appointing heirs? Are not *tutores* also named, and legacies given by will? Why then introduce the complex subject of testaments as merely an investitive fact applying to "*hereditas?*" The reason is that the essence of a Roman will was the nomination of a universal successor to a deceased person; if a will failed in that point, it was wholly and absolutely worthless; if it accomplished that object, it could, but it need not, effect other purposes as well. In respect, therefore, of its juridical essence and validity, a will was nothing more than a lawful mode of appointing an heir. Even after the great change made by Justinian, limiting the liability of the heir (see p. 754), the essence of the will continued to be the valid and successful appointment of an heir. If none of the heirs named in the will could or would accept the inheritance, the will was void, and the legacies failed of effect.[1]

In adopting this arrangement, the fact is not overlooked that there was a tendency in Roman law throughout to give increasing importance to what has been described as an

[1] Hence the maxim, *Nemo pro parte testatus, pro parte intestatus decedere potest.* (J. 2, 14, 5.) A will must dispose of the whole property and rights of the testator.

adventitious part of the will; namely, the distribution of the property of a deceased person in legacies. The heir, at least after the reforms of Justinian, was appointed for the sake of the legatees; he was employed merely to wind up the estate and distribute the effects of a dead person. Still, in contemplation of law, these—the real objects of the will—were entirely dependent on the appointment of an heir. If that failed, everything failed. Even Justinian did not go so far as to say that a will should not fail from want of an heir, which was the only step required in order to put the law in harmony with practical wants. If the heir named refused to enter, the will collapsed. The acceptance of the heir appointed was the keystone of the testamentary arch.

Why was this? Why did so practical a people as the Romans continue to submit to a law of wills, that for all practical purposes was arbitrary and extremely inconvenient, continually frustrating the objects of testators, and disappointing intended legatees? The explanation of this puzzle is found in the fact that, in the time of Augustus, a new mode of expressing a last will was introduced, which successfully enabled testators to avoid all the snares and pitfalls of the law of testaments. The mountain was too great to remove, but a way was found of simply walking round it. The device invented for this purpose was the informal will of the Roman law—*codicilli.* The name "codicil" is unlucky, because it irresistibly suggests to an English reader the idea that *codicilli* were merely a postscript to a pre-existing valid will. But *codicilli* might exist although no will was previously made, the heirs *ab intestato* being the executors. The *codicilli,* although in fact often dependent on a prior will, were in law quite independent of the will. Here then was a ready means of avoiding the numerous difficulties and complications arising from the law of wills. But this was not all. The ingenuity of the jurisconsults served them in good stead for courage. They would not openly attack the time-honoured testament, but they altered its character by what was known as the "codicillary clause." This provided, as will be shown afterwards in detail, that if a will proved informal, and so invalid, it should be held to be "*codicilli,*" and so valid, and binding upon the heirs *ab intestato.* In most instances this completely prevented the frustration of the testator's intentions through irregularities in the making of his will.

In order that a will should be an investitive fact of a *hereditas*, two things were necessary—(1) a will valid at the death of the testator; and (2) acceptance of the inheritance by the persons named as heirs. A will may be valid when it is made, but be invalid at the time of testator's death.

Hence we must examine—(1) what is necessary to the initial validity of a will; and (2) how a will initially valid may be revoked.

In order that a will should be valid when made, five things were necessary :—

A. Certain forms must be observed.

B. Certain persons must be expressly disinherited or appointed heirs.

C. Certain persons must be provided for.

D. An heir or heirs must be properly appointed.

E. No legal incapacity in their several parts must attach to—I. The testator; II. The witnesses; or III. The heir.

A. Forms of Wills.

I.—Obsolete Forms.

1. Will made by special legislation in the *Comitia*.

Of wills there were at first two kinds. One kind they used to make in the *Comitia Calata*, held twice a year for that purpose. (G. 2, 101.)

The *Comitia* here referred to means the *Comitia Curiata*. Aulus Gellius says that in the *Comitia* wills were made and "*detestatio sacrorum*." Opinion has differed in regard to the meaning of "*detestatio*." According to De Coulanges, it refers to arrogation, when the person arrogated surrendered his own family rites to pass into a new family and share its *cultus*. The consent of the Pontiff seems to have related to the devolution of the sacred rites : and we gather from Aulus Gellius that the will was a legislative enactment (*rogando ut quis sibi heres esset, quae rogatio populi suffragio confirmabatur*). Apparently then, the first Roman will was a legislative act either substituting new heirs for the natural heirs, or which is perhaps more likely, giving an heir to a man who would otherwise die without heirs. This will was already obsolete in the time of Cicero. (De Orat. 1, 53.)

2. Will made on the eve of battle (*in procinctu*).

The other kind was made when in battle array (*in procinctu*), that is, when they went forth to fight in war; for the word *procinctus* means any army without baggage and in arms. (G. 2, 101.)

A will (*testamentum*) is so called because it attests the wishes (*testatio mentis*) of the maker. (J. 2, 10, pr.)

That we may not be in entire ignorance of anything ancient, we must know that in old times two kinds of wills were in use. Of these two kinds one was used in peace and times of ease; this was called the will in the *Comitia Calata*: the other when they were about to go forth to battle; this was called *procinctum*. (J. 2, 10, 1.)

An army in ancient times was simply the city in arms ; the *comitia* was simply the army at home and during peace. Plutarch, in his life of Coriolanus, says that when the soldiers were drawn up in battle array about to go forth to battle, they could make their wills by simply announcing to three or four witnesses the names of those whom they wished to be heirs. The decay of this form of will-making is remarked by Cicero. (Cic. *De Nat. Deor.* 2, 3.)

It is extremely difficult, considering the scanty references to the subject in the authorities, to make out the character of the will *in procinctu*. Was the testamentary power so fully recognised, that the privilege of the soldiers was simply that release from forms which they undoubtedly enjoyed through later times? But Gaius draws a clear line between that ancient form and the testaments of soldiers in his time. If the testamentary power was jealously regarded as an encroachment on the rights of the members of the family, and only allowed in exceptional cases, so to speak, by Act of Parliament, how was such facility given to the citizens in time of war? These are questions that, with the information we possess, it is not easy to answer.

3. Will made by *mancipatio*.

A third kind of will was afterwards added, made *per aes et libram* (with bronze and balance). By it a man that had not made a will either in the *Comitia Calata* or when in battle array, if he was pressed by the sudden approach of death, used to give a friend his household (*familia*)—that is, his patrimony by *mancipatio* (conveyance)—and to ask him for what he wished to be given to each person after his death. This will is called *per aes et libram*, because the whole procedure is by *mancipatio*. (G. 2, 102.)

The former two kinds of wills have passed into disuse. This kind alone, that is made *per aes et libram*, has been retained in practice. But the arrangements are not now the same as they used to be in old times. Then the *familiae emptor* (purchaser of the household)—that is, the person that received the *familia* from the testator by conveyance—held the place of the heir. Him, therefore, the *testator* used to charge (*mandabat*) with what he wished to be given to each person after his death. But now another person is appointed heir in the will, through whom the legacies are left ; and some one else, for form's sake and to copy the old law, is employed as *familiae emptor*. (G. 2. 103.)

The procedure in the matter is as follows :—The maker of the will summons, just as in all other conveyances, five witnesses, Roman citizens over puberty, and a balance-holder (*libripens*) ; and after writing out his will, conveys his *familia* to some one for form's sake. At that stage the purchaser uses these words, "That your *familia* and money are in my charge, protection (*tutela*), and keeping, *ex jure Quiritium*, I affirm, and that you may be able to rightly make a will according to the law of the State, with this bronze, and," as some add, "balance of bronze, be it bought by me." Then he strikes the balance with the bronze, and gives that piece of bronze to the testator as if by way of price. The testator next, holding the will he has written (*tabulae*), speaks thus :—"All this, as it is written on these tablets of wax, I so give, so

bequeath, and so attest; you, therefore, Quirites, bear me witness in this,"—this is called the *nuncupatio* (declaration).[1] The word *nuncupare* means to name openly; and undoubtedly what the testator has written specifically in the will, he appears in that general utterance to name and confirm. (G. 2, 104.)

A third kind of will was afterwards added, called *per aes et libram*, because the procedure took the form of a conveyance (*mancipatio*)—that is, an imaginary sale in the presence of five witnesses and a balance-holder, all Roman citizens over puberty, and of the *familiae emptor*, as he was called. But those two former kinds of wills have from of old passed into disuse; that made *per aes et libram* lasted longer. But it also has in part ceased to be used. (J. 2, 10, 1.)

At first this will took effect as a simple conveyance; it really became a will only when the estate was conveyed to a purchaser merely for the sake of form, and the heir was not disclosed until the death of the testator. Possibly this was the form of will referred to by the XII Tables.

The *testamentum per aes et libram* continued to exist after the time of Gaius, and is probably referred to in a constitution (C. Th. 4, 4, 3) of Honorius and Arcadius (A.D. 369), as it was the only will having five witnesses. It could not, however, have been resorted to after A.D. 409, when Honorius and Theodosius established a less formal written will.

4. The Prætorian Will.

The Prætor, however, if seven witnesses have set their seals to the will, promises the heirs appointed in it *bonorum possessio*, according to the terms of the will (*secundum tabulas*); if, then, there is no one to whom the inheritance would belong by statutory right in case of intestacy, a brother for instance born of the same father, or a father's brother, or brother's son,—in that case the heirs appointed in the will can retain the inheritance. The rule of law, indeed, is the same as if the will could not take effect on some other ground—that the *familia* had not been sold, for instance, or that the testator had not spoken the words of the formal declaration. (G. 2, 119.)

But let us see whether or not a brother, or a father's brother, if there are such, are to be preferred to the heirs appointed by the will. For a rescript of the Emperor Antoninus points out that the claimants of *bonorum possessio*, according to the terms of a will not rightly made, can defend themselves against persons that, as being successors in case of intestacy, bring a *vindicatio* for the inheritance by the *exceptio doli mali*. (G. 2, 120.)

The wills just named were ascribed to the *jus civile*. But afterwards, under the edict of the Prætor, a different form of making wills was brought in. By this form, under the *jus honorarium*, the testator was not required to convey away the property; but the seals of seven witnesses were enough, although by the *jus civile* the seals of witnesses were not necessary. (J. 2, 10, 2.)

---

[1] *Familiam pecuniamque tuam endo mandatelam, tuam custodelamque meam, quo tu jure testamentum facere possis secundum legem publicam, hoc aere,* et ut quidam adjiciunt *aeneaque libra, esto mihi empta; . . . . . haec ita ut in his tabulis cerisque scripta sunt, ita do, ita lego, ita testor, itaque vos, Quirites, testimonium mihi perhibetote.*

The principle upon which the Prætor interfered in this case is the same as that which appears in so many others—namely, to prevent the strict forms of law producing injustice. It is significant, however, that in allowing heirs to take in the absence of a proper *mancipatio* or *nuncupatio*, the Prætor required a new, less cumbrous, and more useful form instead. The will must be sealed, and seven witnesses were required. The number seven was obtained by adding the *libripens* and *familiae emptor* to the five required in a will *per aes et libram*. That was the condition of his assistance, just as part performance was the condition of his assistance in enforcing informal contracts. But there is an important difference. In contract, the Prætor interfered to prevent injustice through a strict adherence to the forms of law; in testaments, he interfered to prevent disappointment of the just expectations of the heirs, and the frustration of the testator's wishes. Manifestly, however, there was less clamant reason for interfering to prevent disappointment of heirs than to check injustice and fraud. Accordingly, the Prætor did not give relief if there were any heirs *ab intestato*, having a special claim to the succession. Thus a paternal uncle, brother's son, or brother by the same father—the next of kin according to the artificial rules of the old law—could demand the inheritance against the heirs appointed by an informal will. The decision of Antoninus altered all that, and formed the first step in the process by which the Roman will was established in its final shape.

II. Forms of Roman Will in the Time of Justinian.

1. Written Will.

Step by step men's practice, and the amendments made by the constitutions, began to join the *jus civile* and the Prætorian law into one harmonious whole. It was settled, therefore, that at one and the same time, as the *jus civile* in a way required, seven witnesses must be employed; that these witnesses must sign at the foot, a point first found in the constitutions; and that, as under the Prætor's edict, their seals should be set to wills. This branch of the law therefore seems to be threefold (*jus tripertitum*). The witnesses, and their presence together in order to publish the will, come down from the *jus civile*. The signatures of the testator and the witnesses at the foot are drawn from the observances under the sacred constitutions. The seals lastly, and the number of the witnesses, are due to the Prætor's edict. (J. 2, 10, 3.)

(1.) The will must either be written, or produced in the presence of seven witnesses, all present together with the testator until the ceremony is finished; and the witnesses must be present

of their own accord, and by invitation. (D. 28, 1, 21, 2; D. 28, 1, 20, 8.)

(2.) The testator must sign the part of the will shown to the witnesses in their presence; or if he cannot write, an eighth person must sign it for him in the presence of the witnesses. If the will is and purports to be written by the testator's own hand (hence called holograph), the absence of the signature is not fatal. (C. 6, 23, 21, pr.)

(3.) The witnesses, at the same time and place, and in the presence of the testator, must adhibit both their names and seals. (C. 6, 23, 12; D. 28, 1, 22, 4.)

But the witnesses may all use one ring to seal the will—indeed, what if the seven rings were all cut alike?—as Pomponius held. Even with another man's ring one may lawfully seal. (J. 2, 10, 5.)

(4.) The whole transaction must be uninterrupted, and unmixed with any other business (*uno contextu*). (D. 28, 1, 21, 3.)

1° The will need not be in the testator's handwriting, and its contents need not be disclosed to the witnesses. (C. 6, 23, 21, pr.)

2° It makes no difference whether it is on tablets, or on paper, or on parchment, or on any other material, that the will is made. (J. 2, 10, 12.)

3° To all these under our constitution, to secure that wills shall be genuine and that no fraud shall be employed, this addition has been made, that the name of the heir shall be stated in the handwriting of the testator or of the witnesses, and that everything shall take place according to the tenor of that constitution. (J. 2, 10, 4.)

The constitution referred to (C. 6, 23, 29) was found to be productive of much mischief, in consequence of the ignorance of testators of its provisions, or of their inattention; and it was repealed (Nov. 119, 9).

4° Duplicates must each be sealed. (D. 28, 1. 24.)

Of one will, too, several counterparts may be made, if each is made according to the required forms. Sometimes this is necessary, as when a man is going to sea, and wishes to carry with him and also to leave at home a formal declaration of his deliberate intention. Countless other reasons also, ever threatening men's ties, may make this needful. (J. 2, 10, 13.)

2. Private Nuncupative or Oral Will.

So much for wills made in writing. But if a man wishes to do without writing in drawing up his will, according to the *jus civile*, let him know that if he employs seven witnesses, and declares his wishes before them, this is a thoroughly complete will according to the *jus civile*, and firmly settled. (J. 2, 10, 14.)

In a constitution of Theodosius and Valentinian (C. 6, 23, 21, 2) this provision was embodied, subject to the rules as to the presence of the witnesses already stated. (C. 6, 23, 26.)

3. Public Nuncupative Will.

Without any formalities a person may declare his last will in the presence of a magistrate, or have a memorandum thereof entered on the records of the Court. (C. 6, 23, 19.)

III. Special Forms of Wills for Particular Classes.

1. Soldiers.

The careful observance of the rules just given for drawing up wills has been relaxed by the imperial constitutions in favour of soldiers, because of their want of skill. Their wills, although they have not employed the legal number of witnesses [nor conveyed their *familia*, nor made a *nuncupatio*], nor observed any other formality required in wills, are none the less rightly made, if only they have been engaged in service. (J. 2, 11, pr.; G. 2, 109.)

This was very properly brought in by a constitution of ours, and so in whatever shape their last wishes are found, written or unwritten, the will takes effect as the expression of those wishes. But at the times when they are free from the hardships of service, and living either elsewhere or in their own abodes, they cannot claim the aid of such a privilege. A will, indeed, even if *filiifamilias*, they are allowed to make, because they are soldiers; but it must be according to the law common to all, and with the employment of all those observances, even in their wills, that we have just set out as necessary in the wills of civilians. (J. 2, 11, pr.)

With express reference to soldiers' wills the late Emperor Trajan sent to Statilius Severus a rescript in these terms:—"The privilege granted to soldiers on service, of having their wills held valid, no matter how they are made, ought to be understood thus:—It ought first to be evident that a will was made; this can be done without writing, even by those that are not soldiers. The soldier, then, about whose goods a question is raised before you, if he called men together for the purpose of declaring his last wishes, and spoke so as to make it clear whom he wished to be his heir, and on whom he wished to bestow freedom, may be held, though there was no writing, to have made his will in this way, and his wishes must be held valid. But if, as often happens in the course of talk, he said to some one, 'I make you my heir,' or 'I leave you my goods,' this ought not to be respected as a will. No one has a greater interest in refusing to admit such an example than the very persons to whom the privilege has been granted. For otherwise it would not be hard, after the death of any soldier, for witnesses to come forward and affirm that they had heard the deceased say of anyone they thought fit that he left him his goods; and thus the true intentions of the deceased might be overturned." (J. 2, 11, 1.)

This favour is granted them by the imperial constitutions only so long as they are soldiers and live in camp. But veterans after their discharge, or persons that though soldiers make a will when not in camp, ought to make it according to the law common to all Roman citizens. A will, too, that they have made in camp not according to the law commonly in use (*communi jus*), but in a way of their own choice, will be effectual after their discharge for one year only. But what if the testator dies within the year, while the appointed condition under which alone the heir can take is not fulfilled within

the year? Is the will to take effect as if a soldier's? It is held that it does. (J. 2, 11, 3.)

But if a man, before becoming a soldier, has made a will, not valid in law (*non jure*), and after becoming a soldier, and while engaged on service, has unsealed it and added or withdrawn some things, or has in any other way shown his wish that it should take effect as a soldier's will, then we must say that the will is to take effect as if resulting from the fresh wishes of a soldier. (J. 2, 11, 4.)

This privilege was first granted for a limited time by Julius Cæsar, renewed by subsequent emperors, Titius, Domitian, Nerva, and finally established as a permanent part of the law under Trajan. (D. 29, 1, 1, pr.)

The same privilege was allowed to seamen in the service of the State. (D. 37, 13, 1, 1.)

It lasts only during the time of service, and for one year after a soldier's or sailor's retirement. (D. 29, 1, 38, pr.) But if the soldier is dismissed for misconduct, the privilege is extinguished at once. (D. 29, 1, 26, pr.)

We shall afterwards see that this is not the only point in the making of wills upon which soldiers were favoured.

2. Wills of the Blind.

The wills of persons suffering from blindness (whether congenital or from disease) may be made in the presence of seven witnesses with the aid of a notary (*tabularius*). The testator must openly declare the names, rank, and description of the heirs, and their shares, as also the legacies. The instructions are to be written by the notary all at one sitting in the presence of the witnesses, and signed and sealed by them and him in the usual manner. When a notary cannot be found, an eighth person who can write is to take his place. (C. 6, 22, 8.)

3. Wills of persons that cannot read.

A constitution of Justinian applies to persons that cannot read (*rustici*). It does not apply to the cities and camps of the Roman world. Where, however, few are found able to read and write, the old custom shall have the force of law; and where witnesses cannot sign their names, it is enough if they are present. If seven witnesses cannot be found, five, but not fewer, shall suffice. These witnesses must know the names of the heirs. If any can read and write, they may sign for the other witnesses in their presence. (C. 6, 23, 31.)

4. Persons suffering from contagious disease.

When the testator suffers from contagious disease, seven

witnesses are required; but if any of them are suffering from disease, the necessity of their being all present together is dispensed with. (C. 6, 23, 8.)

5. Parents and Children.

When a parent left his property among his children by an informal will, his dispositions took effect as a trust (*fideicommissum*). This relief was given by Diocletian and Maximian (C. 3, 36, 16) and Constantine (C. 3, 36, 26). Theodosius and Valentinian enacted that if the will refers to others than children, so much of it shall be void, and the property undisposed of go to the children. (C. 6, 23, 21, 1.)

IV.—Opening, Publication, and Inspection of Wills.

Any judge had power to order a will to be produced and read in public. (C. 6, 32, 1.) The Prætor had jurisdiction to compel the witnesses to appear and acknowledge (D. 29, 3, 4) or deny their seals. (D. 29, 3, 5.) Paul gives the following account of the formalities of opening a will. The witnesses that sealed the will, or the greater part of them, are to be present (if that is impossible, special arrangements were made, D. 29, 3, 7); and when they have recognised their seals, the string is to be broken, and the will opened and read. An opportunity is to be given for copying it, and thereafter it is to be sealed with an official seal, and deposited in the public archives, so that if the copies of it are lost, fresh ones may be had from the original. (Paul, Sent. 4, 6, 1.) In towns or municipalities, the opening and reading should take place in the Forum or Basilica between the second and tenth hour of the day. This ought to be done in the presence of the magistrates and with witnesses of respectability. (Paul, Sent. 4, 6, 2.) Whoever opens a will elsewhere, or in any other manner, is liable to a penalty of 5000 sesterces. (Paul, Sent. 4, 6, 2 A.) The will should be opened within three or five days, if the person having the custody of it is in the same place where the testator died; if not, within the same time from the date of his return. (Paul, Sent. 4, 6, 3.)

Testaments, and all documents that are wont to be notified in the tax-office (*censuale officium*) should be kept there, and not be removed. (C. 6, 23, 18.) Justinus refers to the attempts of the clergy to get jurisdiction over the publication of wills, and to take it away from the *Magister Census*. It is absurd and scandalous, he says, that they should affect to be skilled in law;

and he imposed on them for such offence a penalty of fifty pounds (*librae*). (C. 1, 3, 41.)

A will—the most secret of documents before a testator's death—becomes, after that event, in a manner a public deed. (D. 29, 3, 2, pr.) In any controversy regarding a will, the judge could order the person in whose custody it was (D. 29, 3, 2, 8) to produce it, in order that it might be read and copied. (D. 2, 15, 6; D. 29, 3, 1, 1.) Inspection was not allowed, if there was a doubt as to whether the testator was dead. (D. 29, 3, 2, 4.) Moreover, the date of the will was not shown, because it might have helped forgers to give a consistent date to a fabricated will purporting to revoke the true will. (D. 29, 3, 2, 6.)

B. Disherison.

If certain persons are not made heirs, or expressly disinherited, the will is void. At the same time, there was no person that a testator was compelled to make his heir. He could disinherit all, but he must do so expressly. Persons were disinherited either as individuals (*nominatim*) or in a class (*inter caeteros*).

A person is disinherited by name, either in the form, "Let Titius, my son, be disinherited (*exheres esto*);" or in the form, "Let my son be disinherited," with his own name not added—if, that is, there is no other son. (J. 2, 13, 1; G. 2, 127.)

It seems very strange that, throughout the whole history of Rome, a rule so arbitrary should have been inflexibly maintained, and instead of suffering the usual fate of the older parts of the law at the hands of Justinian, should have been made actually more stringent by him. The rule afforded no real protection to the persons in question, because the testator's power of expressly disinheriting them was unqualified. Testators were bound, as will be shown under the next head, to leave a portion of their property to their children, but they were not bound to make them heirs. Whence then so singular and inconvenient a rule—a rule that, owing to the ignorance or forgetfulness of testators, must constantly have defeated their testamentary dispositions?

The explanation is clearly given in a quotation from Paul in the Digest (D. 28, 2, 11), and throws an interesting light upon the early Roman ideas of inheritance. Paul observes that there is a sort of copartnership in the family property between a father (*paterfamilias*) and his children. The very names (*paterfamilias, filiusfamilias*) show this; to the *familia* they stand as one person, towards each other only in the natural relation

of father and son. When, therefore, the father dies, it is not so correct to say that they inherit his property, as that they acquire the free control of their own. Hence, although they are not named heirs by the deceased, they are still owners of the family property. By the old customary law, children could not refuse to be heirs to their father; the privilege of refusal was bestowed on them by the Prætors. Was there not a time when also the father could not deprive them of the property? Paul treats the children as being in possession until they are removed. The father has the power to remove them, and clear the ground for the introduction of new heirs; but unless he exercises that power, they remain, and there is no place for the heirs intended. The standpoint of the law, then, is this: A man's children are his natural heirs, and in a sense joint-owners of the family estate; but either by the XII Tables, or by custom only confirmed by the XII Tables, he acquired the right to eject those heirs, and put in whomsoever he pleased. The testamentary power was thus a usurpation of the rights of the natural heirs. It was a power to set them aside. Whoever, therefore, wished to appoint other heirs, must first pave the way by disinheriting the natural heirs, and so leave the inheritance open to the designated heirs to enter. We shall presently see how far compensation was provided for the natural heirs through the *Querela inofficiosi testamenti*. In speaking of "natural heirs" and "family," it must be kept in mind that the ancient family as based on the *potestas*, not that constituted by the tie of blood, is referred to. The persons that, if not made heirs, must be expressly disinherited, may be considered under four groups:—

1. Those living under the *potestas* or *manus* of the testator at the time of making his will, and who, if he were at that moment to die intestate, would be his heirs. (*Sui heredes.*) (Ulp. Frag. 22, 14.)

2. Those not included in group (1.), that between the time of making his will and his death are under his *potestas* or *manus*, and who by his death intestate would succeed as heirs. This includes children unborn at the time of his death, but born within ten months afterwards.

3. Emancipated children.

4. Adopted children.

5. Changes by Justinian.

1. Persons under the *potestas* or *manus* of the testator at the time of making the will, who, if he were then to die intestate, would succeed as heirs.

(1.) *Filiusfamilias.*

In order, however, that a will may take effect in any case, it is not enough to observe the rules set forth above. A man that has a son *in potestate* ought to take care to appoint him heir, or to disinherit him by name; for if he does not, but passes him over in silence, the will is void. So far is this carried that [as our teachers think] even if the son dies in the lifetime of the father there can be no heir under the will, because the will was bad from the first. (J. 2, 13, pr.; G. 2, 123.)

But the authors of the opposite school think otherwise. If, indeed, the son is alive at the time of his father's death, undoubtedly he bars the heirs appointed in the will, and becomes a *suus heres* by way of intestacy; and this they own. But if he is cut off before his father's death, the inheritance can, they think, be entered on under the will, as there is no son to bar the way: because, of course, they hold that the will was not made void from the first by the fact that the son was passed over. (G. 2, 123.)

If a son is disinherited by his father, he ought to be disinherited by name; for otherwise he cannot be disinherited. (G. 2, 127.)

According to the text of Justinian, it appears that the point in dispute was settled in favour of the school of Gaius.

(2.) Daughters and other descendants of both sexes under *potestas*.

As regards all the other children, if the testator passes them over the will takes effect. But the persons passed over come in (*adcrescunt*) for a share along with the heirs appointed in the will; if the latter are *sui heredes*, for share and share alike; if they are outsiders, for half the property. For instance, if a man appoints say three sons heirs, and passes over a daughter, then the daughter comes in as an heir for one-fourth; and, besides, the Prætor also protects her in this share, because she would have had it in case of intestacy. If, however, he appoints outsiders his heirs, and passes over a daughter, then the daughter comes in and is made heir of one-half. All we have said of a daughter we shall understand to be said of a grandson, and also of all descendants, whether male or female. (G. 2, 124.)

What then? Although daughters, according to what we have said, withdraw from the heirs appointed in the will one-half only, yet the Praetor promises them *bonorum possessio* contrary to the terms of the will (*contra tabulas*); and on this principle outside heirs are shut off from the whole inheritance, and become heirs *sine re*. (G. 2, 125.)

The result of this *bonorum possessio* no doubt would be, that there would be no difference between females and males. But lately the Emperor Antoninus pointed out in a rescript that female *suae heredes* are not to obtain more by *bonorum possessio* than they would by their right to come in (*jus adcrescendi*). The like rule holds for emancipated females; namely this, that what they would have had by their right to come in if they had been *suae heredes*, that they are to have by means of *bonorum possessio*. (G. 2, 126.)

But descendants, male or female, can be disinherited, not only by name but as "all others;" that is in this way, "Let all others be disinherited." These words are usually thrown in after the appointment of the heir. This is so, however, only by the *jus civile*. (G. 2, 128, as restored.)

The Prætor orders all males, both sons and all others—grandsons that is, and great-grandsons—to be disinherited by name. Female children, however—daughters that is, and granddaughters, and great-granddaughters—may be disinherited either by name or as included in "all others." (G. 2, 129, as restored.)

As regards daughters or other descendants through males, whether male or female, this rule was not in ancient times observed. But if they were not named as heirs in the will, or disinherited, the will was not thereby invalidated; only they were afforded a right to come in for a fixed share; moreover, it was not necessary for ascendants to disinherit such persons by name, but it was lawful to do this by including them among "all others." (J. 2, 13, pr.)

From the circumstance that the Prætor and the Emperors made the law on the subject of disherison vary with the law of intestate succession, it is perhaps not improbable that the distinction in sec. 124 of Gaius throws us back on a time when the right of daughters to the succession was not so clearly established as the right of sons. It may be an indication of a preference of the male to the female line that had disappeared even so early as the XII Tables.

2. Persons falling under the *potestas* or *manus* after the will is made, but before the testator's death. In this class is included posthumous children of the testator.

(1.) Posthumous children (*postumi*). These are children of the testator, who if born in his lifetime would have been under his *potestas*, and entitled to succeed him if he died intestate.

Posthumous descendants ought to be either appointed heirs or disinherited. In one respect they are all on the same footing; namely this, that whether it is a posthumous son or any of the other descendants, male or female, that is passed over, the will takes effect, but is afterwards broken by the birth of a posthumous descendant, male or female, and on that ground wholly invalidated. If, therefore, a woman, from whom there is hope of posthumous issue, miscarries, there is nothing to bar the heirs named in the will from entering on the inheritance. Females, indeed, were usually disinherited either by name, or as included in "all others," provided only that if they were disinherited as included in "all others," some legacy should be left them, that they might not seem to be passed over through forgetfulness. But male posthumous descendants—a son that is, and so on—could not, it was held, be rightly disinherited, except by name, in this way, namely:—"Let whatever son may be born to me be disinherited." (J. 2, 13, 1; G. 2, 130-132, as restored.)

The form for appointing posthumous grandchildren heirs was introduced by Gallus Aquilius, hence the name—*Postumi Aquiliani*. (D. 28, 2, 29, pr.) It ran in the following terms:—"If my son die in my lifetime, then if any grandson or granddaughter by him is born to me after my death, within ten months of the death of my son let them be heirs."

Ulpian put it simply that the *safer* way was to disinherit male posthumous children expressly (*nominatim*). (Ulp. Frag. 22, 22.)

(2.) In the same position as posthumous descendants are those that by

succeeding to the position of a *suus heres* become as if by being born afterwards *sui heredes* to their ascendants. Suppose, for instance, a man has a son, and by him a grandson or granddaughter in his *potestas*, then because the son is a degree before the other, he alone has the rights of a *suus heres*, although the grandson also and the granddaughter, his children, are in the same *potestas*. If now the son dies in the father's lifetime, or in any other way you please passes out of his *potestas*, then at once the grandson or granddaughter succeeds to his portion, and they obtain in that way the rights of *sui heredes* just as if they had been born afterwards. In order, then, that his will may not be broken in that way, the testator must, just as he ought either to appoint as heir or to disinherit by name the son himself, that his will may not be wrongly made, so also either appoint as heir or disinherit a grandson or granddaughter by that son. For if not, if the son perchance dies in his lifetime, then the grandson or granddaughter, by succeeding to his portion just as if born afterwards, will break the will. This was looked forward to in the *lex Junia Vellaea*, which points out a way of disinheriting them like that used for posthumous children [the males by name, the females either by name or as included under "all others," provided only that to the latter some legacy is left.] (J. 2, 13, 2 ; G. 2, 133-134, as restored.)

When such grandchildren are born after the making of the will, during the lifetime of the testator, they must be expressly disinherited or made heirs. (D. 28, 2, 29, 12.) The date of the *lex Junia Vellaea* is uncertain ; usual date given is A.D. 46. Hence the name *Postumi Vellaeani*.

3. Emancipated children.

Emancipated sons it is by the *jus civile* unnecessary either to appoint as heirs or to disinherit ; because they are not *sui heredes*. But the Prætor orders all, females as well as males, if they are not appointed heirs, to be disinherited ; the males [even of a lower degree] by name, the females as included among "all others." If, however, they are neither appointed heirs nor disinherited as we have said above, the Prætor promises them *bonorum possessio* contrary to the terms of the will. (J. 2, 13, 3 ; G. 2, 135.)

By the old civil law, succession went to the family as constituted by the *potestas ;* and therefore emancipated children had no part in the inheritance to their parents. But when the Prætors enabled them to succeed, the corollary seems to have been made, that they must be expressly disinherited. This shows that the rule of express disherison was in harmony with public sentiment, otherwise it would never have been extended to a case where it was not required by the old law.

4. Adopted and arrogated children.

Adopted children, as long as they are in the *potestas* of their adopted father, are held to have the same rights as children begotten in lawful marriage. They must therefore be either appointed heirs or disinherited, according to what we have set forth in regard to children by birth. But if emancipated by their adopted father, neither by the *jus civile*, nor so far as regards the Prætor's edict, are they reckoned among his descendants. On this principle it is that conversely, as far as regards their parent by birth, so long as they are in the family of their adoption they are reckoned

as outsiders, so that it is not necessary either to appoint them heirs or to disinherit them. But when emancipated by their adopted father, they then at once come to be in the same case in which they would have been if emancipated by their actual father by birth. (J. 2, 13, 4.)

Under the legislation of Justinian, the adopting father, except when he was an ascendant by blood, was not required to make the adopted son heir.

5. Final changes by Justinian.

Such were the rules brought in by antiquity. But we hold that between males and females in this branch of law there is no difference; for in the procreation of men, both alike discharge a natural duty. The ancient statute of the XII Tables also called all alike to the succession in cases of intestacy, and this the Prætors afterwards seem to have followed. By a constitution, therefore, we have brought in a simple and uniform law for sons and daughters, and all other descendants through males, not only for those actually born, but also for the posthumous; and have provided that all, whether *sui heredes* or emancipated, must be either appointed heirs or disinherited by name. If this is not done, the effect in invalidating the wills of the ascendants, and in taking away the inheritance, is the same as if sons are passed over, whether they are *sui heredes* or emancipated, or whether they have been already born, or being still in the womb have been born afterwards. As regards adopted children also we have brought in a fixed arrangement, which is contained in the constitution we have passed about adopted children. (J. 2, 13, 5.)

This change faithfully followed the practice of the Prætors in accommodating the rules of disherison to the rules of intestate succession.

6. In certain cases natural heirs could be passed without mention.

1. A mother or a mother's father need not either appoint as heirs or disinherit their descendants, but can leave them out. Indeed, silence on the part of a mother, or of her father, and of all ascendants on the mother's side, is as effectual as disinheriting on a father's part. Nor, indeed, need a mother disinherit a son or daughter, or a mother's father a grandson or granddaughter by his daughter, if he or she is not appointed heir; and this whether we inquire as to the *jus civile*, or as to the edict of the Prætor by which he promises *bonorum possessio* contrary to the terms of the will to descendants that are passed over. Another support, however, is reserved for them, which will be made plain to you a little later. (J. 2, 13, 7.)

A woman never had *potestas*. Her children, therefore, were not *sui heredes*, and had no right to her property apart from her testament or the *Senatus Consultum Orphitianum*. The same reasoning applies to her father and other ascendants.

The reference in the end of the section is to the legitim (*legitima portio*) presently to be described.

2. If a soldier engaged on service makes a will, and does not disinherit his children, either already born or posthumous, by name, but passes them over in silence, and this not in ignorance whether he has children, the imperial constitutions provide that his silence shall have the same effect as if he had disinherited the children by name. (J. 2, 13, 6.)

C. Legitim (*Legitima Portio*).

A will is void if the parents or children, or, in certain cases, the brothers and sisters, of the testator are disinherited.

Under the last head (B.) it appeared that a will was void unless certain persons were expressly appointed heirs or disinherited ; under the present head fall to be considered the cases where disherison was fatal to the will. What was the ground upon which the Roman law imposed on testators the duty of providing for certain persons, under a penalty of having their entire testamentary disposition made void ?

Since ascendants often without cause either disinherit their descendants or leave them out, a rule has been brought in that descendants may bring an action *de inofficioso testamento* (to have the will set aside as undutiful), when they complain that they have been unjustly passed over or unjustly disinherited. It is brought under colour of the plea that the ascendants were not of sound mind when they drew up the will. But the meaning of this is not that the ascendant was really mad, but that the will, though rightly made, disregarded the duty of natural affection : for if he were really mad, the will is no will at all. (J. 2, 18, pr.)

Evidently this principle of Roman law must be traced to the same origin as the rule requiring express disherison. It follows from the community of interest that the children had with the father in the family property. That property was gathered by their help as well as his (for by the *potestas* the father became owner of all that accrued to or was gained by his son), and it would have been extremely harsh to allow him to bequeath the whole of the property to strangers. It is to be remarked, however, that there is a notable distinction between the class of persons that must be expressly disinherited, and those to whom some property must be left. The former class, as has been pointed out, was based on a purely technical idea—namely, that until they were put out, the children living under the *potestas* of any one became at once, on his decease, his heirs. Hence, in the subsequent changes made as to the persons that required to be disinherited, the order of intestate succession was closely followed. But the duty of a testator to make some provision for his children was based on a moral rather than on a technical conception. When the testamentary power was first sanctioned, it was recognised as an invasion of the rights of the family ; but no hard and fast line was adopted to prevent the testator leaving his family destitute. Just as during his life he was bound to provide for his family, but not according

to any fixed amount settled by law, so in leaving the property away from the family he was apparently left to his discretion. Moreover, gross misconduct on the part of the children was regarded as a just reason for disinheriting them. The obligation to leave something to his children stood from the first on a moral basis, and hence the class of persons to benefit by it did not vary according to the expansion of technical rules, but was based on the natural family relations as arising from the tie of blood.

At first the amount that testators must leave was not fixed, and the children were allowed to resort to the desperate expedient of upsetting the will, only when no other means existed by which they could obtain redress.

Persons that in virtue of any other right come into the inheritance in whole or in part, cannot take proceedings to have the will set aside as undutiful. But posthumous children can; for there is no other right in virtue of which they can come into the inheritance. (J. 2, 18, 2.)

A person under the age of puberty is arrogated. The arrogator disinherits him and dies. The will is not void, because he has his fourth according to the constitution of Antoninus Pius. The *querela inofficiosi testamenti* is therefore excluded. (D. 5, 2, 8, 15.)

The subject may be considered under the following heads :—

1. The duty of testators.
   - (1.) The persons to whom something must be left.
   - (2.) The amount that must be left.
   - (3.) Satisfaction of legitim otherwise than by testament.
2. Limitations to this duty.
   - (1.) Arising from misconduct of the persons to whom the duty is owed.
   - (2.) Special exception.
3. The effect on a will, when some, but not enough, property is left to satisfy the legitim.

1. Duty of testators.

(1.) Not only are descendants allowed to bring against an ascendant's will the charge that it is undutiful, but ascendants too can bring the charge against a descendant's will. A sister, moreover, or a brother, is under the sacred constitutions preferred to base persons appointed heirs by will; they cannot, however, on that account, take proceedings against all heirs. Kinsfolk more remote than brothers and sisters can in no way take proceedings; or if they do, they cannot win. (J. 2, 18, 1.)

Not only children by birth, but children adopted according to the arrangement made by our constitution, can bring an action to have the will set aside as undutiful; but only if there is no other right in virtue of which they can come into the goods of the deceased. (J. 2, 18, 2.)

A woman adopts children. She is not bound to leave them anything, because adoption has only a limited effect when made by women. (D. 5, 2, 29, 3.) But she must provide for her children by birth. (Paul, Sent. 4, 5, 2.)

A father that has given his son in adoption has a right to legitim from them. (D. 5, 2, 30, pr.)

According to the constitution of Constantine (A.D. 319) (C. Th. 2, 19, 1), only consanguineous brothers, and not sisters or uterine brothers (*i.e.* having one mother, but a different father), had this privilege. In Justinian's Code, sisters have the same privilege, but uterine brothers are still excluded. (C. 3, 28, 27.) Their right also was restricted. The right of children and parents as against each other was absolute against all heirs (D. 5, 2, 31, 1), but the right of consanguineous brothers and sisters was only against heirs of bad character (*qui infamiae vel turpitudinis, vel levis notae macula adspergantur*). This refers to persons of bad or doubtful reputation, or even to freedmen, unless they have deserved their reward by extraordinary services to the deceased. The preference of such persons to the brothers and sisters of the testator was, as it were, adding insult to injury, and these two things combined enabled them to upset the will.

(2.) The amount that must be left.

The amount, after the analogy of the *lex Falcidia*, is one quarter of the amount the complainant would have obtained had the deceased died without making a will. (D. 5, 2, 8, 6.)

A man ought to have a fourth in order to disable him from bringing an action to have the will set aside as undutiful. (J. 2, 18, 6.)

But in saying a fourth, we must be understood to mean that whether there is one person or more than one allowed to bring this action, to him or them one-fourth may be given, to be divided among them proportionally, each taking one-fourth of his share instead of the whole. (J. 2, 18, 7.)

Justinian altered this proportion in the case of children, and enacted that when a testator had any children not exceeding four, he must leave to them one-third of his entire property; if they exceeded four, then one-half. (Nov. 18, 1.) By the old law, each of four children would have got $\frac{1}{4}$ *ab intestato*, and been entitled to $\frac{1}{16}$ as legitim, in order to prevent the *querela inofficiosi testamenti*. Under the new rule, each gets a fourth of a third—*i.e.*, $\frac{1}{12}$ of the whole. If there are five children, each by the old rule would have got $\frac{1}{20}$ $(\frac{1}{4} \times \frac{1}{5})$ of the inheritance; under the new rule they get $\frac{1}{16}$ $(\frac{1}{3} \times \frac{1}{4})$. If there are six children, by the old rule each would have got $\frac{1}{24}$ $(\frac{1}{6} \times \frac{1}{4})$: by the new rule each gets $\frac{1}{12}$ $(\frac{1}{2} \times \frac{1}{6})$.

(3.) Satisfaction of legitim.

The fourth may be given by way of inheritance, or of legacy, or of a trust, or as a gift in prospect of death, or as a present *inter vivos* in those cases only that are mentioned in our constitution, or in the other ways contained in the constitutions. (J. 2, 18, 6.)

If a testator made his son sole heir, the *querela* could not be brought, however much the property might be burdened with debts and legacies; but the son had always the benefit of the Falcidian fourth. (Paul, Sent. 4, 5, 5.)

In A.D. 279, Zeno enacted that if a testator had given a dowry (*dos*) or son's portion (*donatio ante nuptias*), the amount so settled in marriage should be reckoned as part of their legitim. (C. 3, 28, 29.)

There was more doubt as to other gifts made during life.

Ulpian says, if a gift is made expressly in satisfaction of the legitim, it should avail, so far as it goes, to exhaust the duty of the donor; at all events, he says, it must be considered as part of the inheritance for the purpose of hotchpot (*collatio*). (D. 5, 2, 25, pr.)

If a son accepts money from his father, and agrees, in consideration of it, not to demand his legitim, the pact is no bar to his suing for the full amount of his legitim on the death of his father. (Paul, Sent. 4, 5, 8.) If, however, the father has during his life given him money on the express condition that it was to be in part satisfaction of his legitim, and the son after the father's death has kept the gifts, he cannot upset the will, but may compel the heirs to make up the deficiency, if any exists. (C. 3, 28, 35, 2.)

2. Restrictions on the duty of testator.

(1.) Arising from the misconduct of persons to whom the legitim was due.

As the duty of the testator was based on a moral claim, it ceased to exist if there was grave misconduct on the part of the persons entitled. For a long time there was no definite standard by which the delinquencies of children should be judged, as there was at first no definite share of the inheritance they could claim. The question was one for the discretion of the judge, guided by precedents and occasional imperial constitutions. It will suffice, however, to give the causes of disherison as they were finally settled by Justinian. In order to deprive a person of his legitim, it was necessary that the testator should specify in his will for what reason he exercised his power of disherison. These reasons were all connected with a breach of paternal, filial, or fraternal duty. (Nov. 115, 3.)

Grounds for Disinheriting a Child.

1°. Assaulting the parent.

2°. Other serious and disgraceful injury.

3°. Accusing the parent of any crime, except treason.

4°. Associating with dabblers in witchcraft.

5°. Attempting the parent's life by poisoning or otherwise.

6°. Adultery with father's wife or concubine.

7°. Informing against a parent, and putting him to great costs.

8°. Refusing to become surety for a parent to procure his release from prison.

9°. Successfully frustrating an attempt of a parent to make a will, the parent afterwards being enabled to do so.

10°. Following the profession of comic actor or gladiator, except when the parent did so too.

11°. A daughter prostituting herself, or marrying a freedman without her parent's

consent. But she was excused if a dowry and husband were not provided for her before she was twenty-five.

12°. Neglecting to take charge of an insane parent.

13°. Neglecting, although able, to redeem a parent from captivity.

14°. Heterodoxy of the child: orthodoxy is to be in communion with the Church, and to hold the faith as settled by the Councils of Nicaea, Constantinople, Ephesus, and Chalcedon. (Nov. 115, 3, 14.)[1]

Grounds for Disinheriting Parents. (Nov. 115, 4.)

Of the reasons above given, the following numbers apply reciprocally to offences by parents against children:—Nos. 3, 5, 6, 9, 12, 13, 14. As regards 14, there is a notable provision in the Code. If the parent is heretical and the child orthodox, the latter is to have its legitim notwithstanding any offence it may commit against the parent. If it is free from offence, then the child must get as much as it would have obtained if its parent had died intestate. (C. 1, 5, 13.)

Grounds for Disinheriting Brothers and Sisters. (Nov. 22, 47, pr.)

1. Attempts on the life of the testator by his brother or sister.
2. Accusation of a capital offence.
3. Endeavouring to deprive him of his property.

(2.) Special exemption from duty of providing legitim.

A soldier making his will while on service was not obliged to leave anything to his parents, children, or brothers, or sisters. (D. 5, 2, 27, 2; C. 3, 28, 9; C. 3, 28, 24.) But, as in the instances already mentioned, the privilege was confined to soldiers on service, and did not belong to veterans. (D. 5, 2, 8, 3.)

3. The effect on a will of a failure to provide the legitim.

(1.) When nothing was left to the person entitled to legitim, and on that ground the will was attacked, the result was to make the will void and create an intestacy. (D. 5, 2, 6, 1; C. 3, 28, 30, 1.) The petitioner recovered the inheritance, either as *Heres* or as *Bonorum Possessor*, according to the nature of his title; the gifts of liberty were annulled; the legacies were made void, and if they had been paid before the controversy was raised, the money could be demanded back. (D. 5, 2, 8, 16.) The successful petitioner must admit all that are equally near with him to the testator in the order of succession, unless they refused to join in the suit, or renounced their claim. (D. 5, 2, 23, 2.)

---

[1] *Bis septem ex causis exheres filius esto:—*
Si patrem feriat, si maledicat ei;
Carcere conclusum si negligat; aut furiosum;
Criminis accuset; vel pavet insidias;
Si dederit damnum grave; si nec ab hoste redemit;
Testarive vetet; se societque malis;
Si mimos sequitur; vitietve cubile paternum;
Non orthodoxus; filia, si meretrix.

If there was more than one heir named in the will, it might happen that as against some the petitioner might succeed, and against others fail.

A mother died, having named two heirs in her will—her daughter Seia for a quarter and a stranger for three-quarters, leaving another daughter, Sempronia, wholly unprovided for. Sempronia brings her complaint, and succeeds. What are the rights of Seia? Sempronia petitions for and obtains the half of the inheritance, Seia retaining her portion as heir in respect of the other half. This was supposed to conflict with a favourite technical rule, that a person could not die as to part of his property testate, and as to part intestate, and that the universal successors must come in under one right or the other. This rule, however, did not apply to cases like the present; it was enough if the will provided for the whole inheritance at the time it was made. The neglect to provide the legitim for Sempronia made the will voidable only, not void. (D. 5, 2, 24; D. 5, 2, 15, 2; D. 5, 2, 19.)

In such a case, when a will is only partially set aside, what is the effect on the legacies and gifts of freedom? The rule, as stated by the Emperor Gordian (A.D. 240), was, that inasmuch as the petitioner succeeded *ab intestato*, she was released from the legacies (including *fideicommissa*), but was bound to respect and support the bequests of freedom. (C. 3, 28, 13.)

The effect, then, of wholly failing to provide legitim, was to make the will voidable at the instance of the person unprovided for. But this might be prevented by various circumstances.

(1°.) Acquiescence by the persons disappointed in the act of the testator. This acquiescence might be explicit (D. 5, 2, 31, 3), or inferred from the acts of the person disappointed. The acceptance of a legacy was conclusive, because unless the will were treated as valid, the legacy was not due. (D. 34, 9, 5, pr.) So if the person buys the inheritance, or any property in it, from the heirs, or hires land from them, or pays them what he owed to the testator, or does any other act recognising their title, he is debarred from upsetting the will. (D. 5, 2, 23, 1; C. 3, 28, 8, 1.)

EXCEPTION.—If a *tutor*, acting on account of a *pupillus* actually in his protection (*tutela*), receives a legacy under his father's will, although nothing has been left the *tutor* himself by his father, he can none the less bring an action on his own account to have his father's will set aside as undutiful. (J. 2, 18, 4.)

Conversely, if on account of his *pupillus*, to whom nothing has been left, he brings his action, and is overcome, he himself does not lose a legacy left him in the same will. (J. 2, 18, 5.)

(2°.) When the disherison is due to ignorance.

A mother believing her soldier son to be killed, made no provision for him in her will. He can claim the inheritance *ab intestato* (D. 5, 2, 27, 4), but according to a decree of Hadrian, only on condition that he pays the legacies, and gives effect to the bequests of freedom. (D. 5, 2, 28.)

(3°.) If the heir does not defend the inheritance when it is attacked by a person claiming legitim, and judgment goes by default, the legacies and bequests of freedom are not affected. The heir alone, against whom the action is brought, is bound by it. (D. 5, 2, 17, 1; D. 49, 1, 14, 1.)

(4°.) If on a suit being brought, a compromise (*transactio*) is made with the heirs, the will remains valid, and the legacies must be paid, and bequests of freedom carried out. (D. 5, 2, 29, 2.)

(2.) If the testator leaves something, but not enough, to satisfy the legitim.

All this must be taken to apply to those cases only where nothing at all has been left in the testator's will. Our constitution brought this in out of respect to nature. But if any share of the inheritance, however small, or anything is left them, then the complaint that the will is undutiful (*de inofficioso querela*) is at rest; only what they lack must be made up to them to the amount of a fourth of their legal portion, although no clause was thrown in directing it to be made up at the discretion of a good man. (J. 2, 18, 3.)

At first the law was very strict, and even when the heirs included some of the testator's children, the child left out was not compelled to ask the amount to be made up, but could upset the will. (Paul, Sent. 4, 5, 7.) Previous to the change made by Justinian (C. 3, 28, 30, pr.), a clause was usually inserted in wills, that if the provision for the legitim should prove insufficient, the heirs should increase it to the proper amount (*si quid minus foret, ei suppleretur*). The effect was, that as the person could sue for a supplement under this clause, he could not resort to the *querela inofficiosi testamenti*, because that remedy was allowed only when no other was available. The enactment of Justinian made that clause a rule for all wills, so that whether the clause was inserted or not, if anything was left in satisfaction of legitim, it prevented the will being made void. (C. 3, 28, 36, pr.) The will was to be supported, but the legitim must be satisfied.

D. Appointment and Substitution of Heirs.

The essential object of a will was to appoint an heir. If no legacies were given, and there were no persons to disinherit, a will might consist of no more than five words, "Be Lucius Titius my heir" (*Lucius Titius mihi heres esto*); or if it were a nuncupative will, in presence of the heir designated, three words sufficed, "Be Lucius heir" (*Lucius heres esto*). (D. 28, 5, 1, 1.) The appointment of heirs will be considered under four heads.

1. Simple appointment of heirs. (*Institutio heredum.*)
2. Substitution of heirs to take in default of persons nominated. (*Substitutio vulgaris.*)
3. Substitution of heirs to a child under puberty. (*Substitutio pupillaris.*)
4. Substitution of heirs to insane persons. (*Substitutio exemplaris.*)

I. Appointment of Heirs (*Institutio heredum*).

1. The proper part of the will for the appointment of the heirs is immediately after the disherison of those requiring to be disinherited. (D. 28, 5, 1, pr.) If a legacy were given before the appointment of the heirs, it was void, because it depended upon the designation of the heirs (Ulp. Frag. 24, 15); and

according to the Sabinians, but not the Proculians, even the nomination of *tutores* was void, although that took nothing away from the inheritance. (Paul, Sent. 3, 6, 2.) But Justinian altered the law upon this point, and declared that a will should be valid and perfect although the appointment of the heirs did not precede the giving of legacies. (See Legacy, Third Period.)

2. The form of appointment.

It is not, however, enough, in order that the will may take effect under the *jus civile*, to observe all we have set forth above as to the sale of the *familia* and the witnesses, and the formal declaration. Before all else, we must carefully inquire whether the heir has been appointed with the customary formalities. If he has been appointed in any other way, the fact that the testator has sold his *familia*, has employed the witnesses, and has formally declared the will in the way we have stated above, is of no avail. The formal mode of appointment is this, "Let Titius be heir;" but the form, "I order that Titius be heir," seems now to be approved. The form, however, "I wish Titius to be heir," is not approved; and the forms, "I appoint him heir" (*Titium heredem instituo*); and again, "I make him heir" (*heredem facio*), most disapprove. (G. 2, 115-117.)

In A.D. 339, Constantius and Constans enacted that whatever the form of words used, the appointment of heirs should be valid if the intention of the testator could be clearly ascertained. (C. 6, 23, 15.) But the appointment must be in express language; it could not be inferred from the testator throwing upon a person duties belonging to the heir, as to pay debts or legacies. (D. 28, 5, 65.)

3. An heir could not be appointed for specific articles or property of the testator (*ex certa re*). An heir was a universal successor, but to make him successor to specific articles was to convert him into a singular successor. Such an appointment did not, however, invalidate the will; the clause specifying the articles was rejected as superfluous, as if it had never been written. (D. 28, 5, 1, 4.) But if there were several heirs, such an appointment was treated as a pre-legacy (*praelegatum*); *i.e.*, as something to be taken out of the inheritance before it was divided among the heirs, thus putting the recipient in the position of a legatee, and subjecting him to a deduction of the Falcidian fourth.

A person appointed a freedman heir of his maternal property in Pannonia, and Titius to be heir of his paternal property in Syria. This is construed as an equal division, but in a partition the judge will follow the wishes of the testator, having regard to the rights of each heir to a Falcidian fourth. (D. 28, 5, 78, pr.)

Two heirs are named, one to the Cornelian estate, and the other to the Libyan. One of the properties is three-fourths, the other one-fourth of the wealth of the deceased. The two heirs will take equal shares, as being appointed without any parts assigned, but on a partition each will be entitled to the estate specifically left him. (D. 28, 5, 35, pr.) As, however, they are equal in law, each must pay one-half of the

debts; and if the debts exhaust all that is left to one, then the appointment is void. Otherwise, the things bequeathed are subject to a deduction of a Falcidian fourth, as in the case of legacies. (D. 28, 5, 35, 1.)

By a constitution of Justinian, if some of the heirs were appointed for particular things, and others for an aliquot part of the inheritance, or without the addition of any shares, the former were to be regarded simply as legatees, and those named with an aliquot share, or no share of the inheritance, were alone to be heirs. (C. 6, 24, 13.)

4. An heir cannot be appointed from a fixed time or for a fixed time,—as "five years after I die," or "from such and such kalends," or "until such and such kalends let him be heir." The addition of the day must, it is held, be regarded as idle; and everything is just as if the heir had been appointed unconditionally. (J. 2, 14, 9.)

5. Conditional appointment.

An heir can be appointed either simply (*pure*) or conditionally. (J. 2, 14, 9.)

An impossible condition in the appointment of heirs, and in legacies, as also in trusts and grants of freedom, is regarded as if it had never been written (*pro non scripto*). (J. 2, 14, 10.)

If more conditions than one are appended to the appointment, then if they are put jointly—as, for instance, "If that and that are done"—all must be obeyed; but if alternatively—as, for instance, "If that or that is done"—it is enough to comply with any one at pleasure. (J. 2, 14, 11.)

The subject of conditions will be discussed under Legacy.

II. Common Substitution (*Vulgaris substitutio*).

1. Substitution of a single heir for a single nominated heir.

Sometimes we make two or more degrees of heirs, thus:—"Let Lucius Titius be my heir; and decide within the first hundred days after you know and can. Unless you so decide, be disinherited. Then let Maevius be my heir, and decide within the hundred days,"[1] and so on. We can go on to make as many substitutes as we please. (G. 2, 174.)

A man can in his will make several degrees of heirs; as, for instance, "If he is not to be heir, let such and such another be heir." Then the testator may go on to substitute as many as he pleases, and to appoint, as a last resort, a slave necessary heir. (J. 2, 15, pr.)

If then the heir appointed in the first degree decides to enter on the inheritance, he becomes heir, and the substitute is shut out. If he does not decide, he is set aside, even although he acts as heir (*pro herede*), and into his place the substitute next comes; and so on if there are several degrees, in each singly on the like principle. But if a time to decide (*cretio*) is given

[1] *Lucius Titius heres esto, cernitoque in diebus (centum) proximis, quibus scies poterisque. Quodni ita creveris, exheres esto. Tum Maevius heres esto cernitoque in diebus centum.*

without words to disinherit, that is as follows : " If you do not decide, then let Publius Maevius be my heir," the effect is found to be quite different ; because if the first omits to decide, but acts as heir, the substitute is admitted to a share, and both become heirs with equal shares. If, however, he neither decides nor acts as heir, he is undoubtedly set aside altogether, and the substitute succeeds to the whole inheritance. But Sabinus held that so long as the first can decide, and in that way become heir, even although he has not acted as heir, the substitute is not let in : whereas once the time for deciding has come to an end, though acting as an heir, he lets in the substitute. But by the other school it was held that even if some of the time for deciding still remained over, yet by acting as heir he let in the substitute for a share, and could no longer turn back to decide. (G. 2, 176-178.)

A will, even after the death of the testator, did not operate as an investitive fact of the *hereditas ;* it was simply a formal offer of the inheritance which, until it was accepted, had no effect. Hence a formal acceptance was necessary in order to exclude the substitute. As soon as the person named became heir, the possibility of the substitute succeeding was destroyed. (C. 6, 26, 5 ; D. 29, 2, 7, pr.) The passage from Gaius has no place in the later law, but its full explanation must be reserved for a later stage.

EXCEPTION.—If a testator thinks another man's slave is a *paterfamilias*, and appoints him his heir, or if he does not become heir, names Maevius as his substitute ; and if that slave, by his master's orders, enters on the inheritance, Maevius is let in for a share ; for the words, " If he is not to be heir," used of a man that the testator knows to be subject to another's power, are taken thus :—" If he neither is to be heir nor makes any one else heir." But when they are used of a man that the testator thinks a *paterfamilias*, the meaning is :—" If he has not acquired the inheritance for himself, or for the person to whose power he has afterwards come to be subject." This was settled by Tiberius Caesar in regard to his own slave Parthenius. (J. 2, 15, 4.)

Two distinct objects were served by substitution. (1.) It provided against a failure of the will through the death or refusal of the heir appointed ; and by adding on successive substitutes, and finally substituting a slave, the risk of an intestacy was greatly reduced. (2.) During the whole of the Empire, until Justinian, the laws of escheat (*leges caducariae*) were in force, and in certain cases the shares of deceased heirs went to the Exchequer instead of to the co-heirs. (See p. 758.) This danger was entirely removed by reciprocal substitution of the co-heirs. Thus, if A. and B. are named heirs, and A. is substituted in default of B., or B. in default of A., there is no opportunity for the Exchequer to come in. But although substitution had the same general effect as the *jus accrescendi*, some difference existed between them.

(1.) The *jus accrescendi* took effect without the consent, and even in opposition to

the wishes, of the heir ; but a substitute need not accept any new share unless he pleased.

(2.) The representatives of a deceased heir, succeeding in his place, took by the *jus accrescendi ;* but if several co-heirs are reciprocally substituted, the shares of those that refuse go wholly to the surviving heirs. (D. 28, 6, 45, 1.)

(3.) A difference emerged when there were several co-heirs. (See p. 758.)

2. Substitution when more than one heir is nominated.

We may lawfully name as substitutes either one or more, and that either in the place of one, or again in the place of more than one. (G. 2, 175.)

Several may be named as substitutes in the place of one, or one in the place of several, or one in the place of one ; or the heirs appointed may be made substitutes to one another in turn. (J. 2, 15, 1.)

X. appoints A. as heir for $\frac{1}{3}$, B. for $\frac{1}{3}$; and if B. fails to enter as heir, then C. is to take $\frac{2}{3}$. B. does not enter. C. gets $\frac{1}{3}$ as B.'s substitute, and $\frac{1}{3}$ as being himself appointed. (D. 28, 5, 9, 15.)

X. appoints A. as heir for $\frac{1}{2}$, B. for $\frac{1}{2}$; and if A. does not become heir, then C. to have $\frac{3}{4}$. Suppose A. enters ; A. and B. get each $\frac{1}{2}$, and C. is excluded. If A. does not enter, how much should C. get? The answer given is, that B. gets 6, and C. gets 9 parts ; the *as* being taken as equal to 15 ounces. Their shares stand to each other as—$\frac{1}{2} : \frac{3}{4} :: \frac{3}{4} : \frac{3}{4} :: 2 : 3 : : 6 : 9$. (D. 28, 5, 15, 1.) In this case, therefore, C. takes 6 parts as B.'s substitute, and 3 parts as a nominee himself. (D. 28, 5, 16.)

(1.) A substitute of a substitute is a substitute to the heir appointed. (*Substitutus substituto est substitutus instituto.*)

But if an heir is appointed, and a co-heir is made his substitute, and then some third person made substitute to both, the late Emperors Severus and Antoninus decided by a rescript that no distinction should be made, but that the substitute should be let in for both shares. (J. 2, 15, 3.)

Titius and Gaius are co-heirs. Titius is substitute for Gaius, and Sempronius for Titius. Titius dies before the testator, and Gaius refuses. Manifestly Sempronius will get the share of Titius ; but will he get the share of Gaius, to whom he was not substituted? If Gaius died first, and Titius became substitute, he acquired a right to the whole, and of course Sempronius had the same right. But when the share of Gaius never in any way accrued to Titius, it was difficult to see how it could pass from him to Sempronius. This difficulty was removed by the rule stated in the text. (D. 28, 6, 27.)

A. and B. are co-heirs. B. is substitute to A. C. is substitute to B. B. never took, nor A. C. gets the whole.

(2.) Reciprocal substitution established a species of *jus accrescendi*, notwithstanding the *lex Julia et Papia Poppaea.*

A., B., C., D. are nominated heirs, and reciprocally substituted (*eosque omnes invicem substituo*). A., B., and C. enter on the inheritance. D. refuses ; afterwards C. dies. The share of D. goes to A., B., and C. ; then C.'s share goes to A. and B., and not to C.'s heirs. (D. 28, 6, 23.)

X. appointed Titius and his son heirs, and substituted them reciprocally. Then he added as heirs Gaius, Marcus, and Maevius, and added, "I substitute all reciprocally." Held that this clause did not apply to father and son, who were specially substituted the one for the other. (D. 28, 6, 41, 5.)

If heirs are appointed with unequal shares, and made substitutes to one another in turn, without any mention therein of shares, the testator is held to have given them the same shares as substitutes that he gave them in the appointment. So a rescript of the late Emperor Pius settled. (J. 2, 15, 2.)

A. is heir for 1 ounce, B. for 8, and C. for $\frac{1}{4}$ *as*. C. repudiates. C.'s $\frac{1}{4}$ is regarded as made up of 9 parts, of which 1 accrues to A., and 8 to B., unless an intention to the contrary is clearly expressed by the testator. (D. 28, 6, 24.)

III. Substitution for children (*Substitutio Pupillaris*).

1. Difference between common and pupillary substitution.

To his descendants under puberty that a man has in his *potestas*, not only can he name a substitute, as in the manner above stated—that is, so that if he has not heirs the other shall be his heir; but in one respect he can go further, so that if he has heirs, and they die while still under puberty, some one shall be their heir. For instance, a man may speak thus:—"Let Titius my son be my heir. If my son shall not be my heir, or if he shall be my heir, and dies before he comes to be his own *tutor*" (that is, comes to puberty), "then let Seius be my heir."[1] Now, in this case, if the son is not heir, the substitute becomes the father's heir. But if the son is heir, and dies before puberty, then the substitute becomes the son's heir. For usage has appointed that, when descendants are of such an age as to be unable to make a will for themselves, their ascendants may make it for them. (J. 2, 16, pr.; G. 2, 179-180.)

In a substitution to a *pupillus* therefore (*pupillaris substitutio*), arranged after the fashion already stated, there are in a way two wills—one the father's, and the other the son's—just as if the son had appointed an heir to himself. At all events, assuredly the one will governs two cases; that is, two inheritances. (J. 2, 16, 2; G. 2, 180.)

No one can make a will for his descendants, unless he makes one for himself too. The will for the *pupillus* is indeed a part of the father's will, and follows upon it; and so entirely, that if the father's will cannot take effect, not even the son's can. (J. 2, 16, 5.)

2. Such substitution can be made only by a *paterfamilias* to children under his *potestas*, and the substitution cannot be postponed beyond the age of puberty. Hence no pupillary substitution can be made for emancipated children. (D. 28, 6, 2, pr.) The children must be under the *potestas* both at the time of making the will and of the testator's death. (D. 28, 6, 41, 2.)

To a male, therefore, up to fourteen, a substitute can be appointed; to a female up to twelve. If this time goes by, the appointment of a substitute vanishes away. (J. 2, 16, 3.)

But the substitution might be for a less period, until the child reached ten, and another substitute might take thenceforward to fourteen. (D. 28, 6, 38, 1; D. 28, 6, 43, 1.)

[1] *Titius filius meus heres mihi esto: si filius meus heres mihi non erit, sive heres erit et prius moriatur, quam in suam tutelam venerit tunc Seius heres esto.*

Not only to the descendants under puberty that they appoint their heirs can ascendants name substitutes, so that if the descendants become their heirs, and die before the age of puberty, their heir may be the man the ascendants wish; but also to those they disinherit. Therefore, in that case whatever the *pupillus* acquires by inheritances, or legacies, or gifts of near kinsfolk and friends, all belongs to the substitute. (J. 2, 16, 4; G. 2, 182.)

All we have said about naming substitutes to descendants under puberty, whether they are appointed heirs or disinherited, we must understand likewise of posthumous children. (J. 2, 16, 4; G. 2, 183.)

To an outsider, or to a son over puberty that is appointed heir, no one can name a substitute, so that if the outsider or grown-up son becomes heir, and dies within a fixed time, that other may be his heir. This only is allowed: the testator may bind him by a trust to give up to another his inheritance, in whole or in part. The nature of this right we will lay down in its proper place. (J. 2, 16, 9; G. 2, 184.)

The father cannot make the substitute to his child heir to his own property and not also to the child's; such a substitution would be against the rule that an heir cannot be appointed to definite things. (D. 28, 6, 41, 8.) Hence the substitute must be heir not only to the father's inheritance, but also to the child's. (D. 28, 6, 10, 5.) The exceptions are not important. (D. 28, 6, 16, pr.) Conversely, the substitute to a child cannot take the child's property without the father's (D. 28, 6, 10, 2), nor can an heir under the father's will, who is also substituted for the child, enter on the father's inheritance, without also accepting the child's. (D. 28, 6, 10, 3.) If the child did not enter on the father's inheritance, the better opinion was that the substitute need not take both (D. 29, 2, 42; D. 28, 6, 12); but from this opinion some jurists dissented. (D. 42, 5, 28.)

It is usual to guard the *pupillus* from the risk of plots against him, after the parent's death, in this manner: The common way to appoint a substitute is to do it openly (*vulgaris substitutio*), that is, in the place in which we appoint the *pupillus* heir: for it calls the substitute to the inheritance only if the *pupillus* never becomes heir at all. This happens when he dies in the lifetime of the parent. In that case we cannot suspect the substitute of any wrong-doing; since, while the testator lives, no one knows anything that is written in the will. But the other appointment of a substitute by which we call one in even although the *pupillus* has become heir if he dies under puberty, we write on tablets lower down. These tablets we seal up with a thread and with wax of their own; and in the earlier tablets we provide that the lower tablets shall not be opened while our son is still alive and under puberty. But it is far safer to have both kinds of appointment sealed up apart in tablets lower down. For if they are (not) sealed up and set apart as we have said, it can be understood from the earlier that in the other too the same person is the substitute. (G. 2, 181.)

But if anyone is so apprehensive as to fear that his son while still a *pupillus* may, from the fact that a substitute to him has been openly appointed, be exposed after his death to the risk of plots, he ought to proceed thus:—The appointment of a substitute in the common way ought to be made openly and in the first part of the will; but the other appointment calling in a substitute in case the *pupillus* should become heir and die under the age of puberty, ought to be written separately, and in the lower part of the will. This latter part, then, he ought to seal up with a thread and with wax of its own;

and in the earlier part of the will he ought to provide that the lower tablets are not to be opened while his son is alive and still under the age of puberty. In any case this is plain, that the appointment of a substitute to a son under puberty takes effect none the less because it is written in the same tablet in which the testator appoints him his heir, dangerous though this may be to the *pupillus*. (J. 2, 16, 3.)

So entirely were the son's and father's wills held to be one that the Prætor was satisfied with seven seals for both. (D. 28, 6, 20, pr.) But the father's will might be in writing and the son's oral, or the father's oral and the son's in writing. (D. 28, 6, 20, 1.) The father's will must, however, precede the pupillary substitution in order of time (D. 28, 6, 16, 1), even when they are made at the same sitting. (D. 28, 6, 20, pr.) Moreover, the father ought to appoint his own heirs first, before substituting for his son. (D. 28, 6, 2, 4.)

Either to each descendant singly, or to the one that shall die last under the age of puberty, a substitute can be appointed: to each singly if he wishes none of them to die intestate; to the last if he wishes the right of regular inheritance to be kept unbroken among them. (J. 2, 16, 6.)

A substitute to a child under puberty may be appointed either by name, as "Titius," or generally as "whoever is to be my heir." These latter words call in as substitutes, on the death of the son under puberty, all that have been appointed heirs in the will, and have become heirs each to the share in which he was made heir. (J. 2, 16, 7.)

The form, "Whoever shall be my heir, let him be heir to my son while under the age of puberty," is called by the commentators "*breviloqua*." It was construed to apply only to the testamentary heirs appointed by the will. (D. 28, 6, 8, 1.)

X. appointed heirs, Titius, and Gaius X.'s son, a child. Maevius was substituted for Titius, and "Whoever under the above writing shall be my heir" was substituted for Gaius. Titius did not enter. Maevius entered. Then Gaius died. Maevius got the share of Gaius as a pupillary substitute. (D. 28, 6, 34, 1.)

X. appointed heirs, his son Titius a child, and Stichus a slave of Marcus. He added a clause, "Whoever is heir to me, let the same be heir to my son." Stichus entered by command of his master. Held that Marcus could not be substitute for Titius, because his name did not appear as heir in the will. (D. 28, 6, 3.)

X. appointed heirs his two sons under puberty, substituting them for each other, and, for the survivor of them, Titius. The true construction of the clause was that the two sons were substitutes in the first degree, and only in default of both did Titius come in as a substitute in the second degree. (D. 28, 6, 25.)

IV. Substitution for the insane—*Substitutio Exemplaris.*

Stirred up by this principle, we have gone on to place in our Code a constitution providing that if ascendants have children, or grandchildren, or great-grandchildren, of whatever sex or degree, that are of unsound mind, then they may lawfully, although these descendants are over puberty, appoint as substitutes any determinate persons, after the example of the appointment of substitutes to *pupilli*. If, however, the descendants come again to their senses, then this appointment of a substitute is invalidated. This also follows the example in the case of the *pupillus;* for there too, after he has grown up, the appointment is invalidated. (J. 2, 16, 1.)

Before Justinian, a parent of a dumb or insane son or

daughter could, even after they had reached puberty, make a substitute for them on leave being obtained by special petition to the Emperor. This substitution lasted until the disability was removed. (D. 28, 6, 43, pr.) Justinian allowed this privilege in all cases without any petition,. subject to the following rules (C. 6, 26, 9) :—

1. A parent of either sex may substitute to any insane child.

2. Such parent could not do so without leaving to the child its legitim (*legitima portio*).

3. If the insane person has any children, these must be substituted ; and failing them, the children of the testator.

E. Incapacity (*Testamenti factio*).

If, therefore, we are asking whether a will can take effect, we ought, first of all, to observe whether the maker had *testamenti factio* (capacity to take any part in making a will or any benefit under a will). If he had, then next we must inquire whether he made his will according to the rule of the civil law—unless, indeed, he is a soldier ; for they, because of their excessive want of skill, are, as we have said, allowed to make a will in any way they please, or in any way they can. (G. 2, 114.)

In the case of outside heirs this rule is observed, that there must be *testamenti factio* with them, whether they themselves are appointed heirs, or persons in their *potestas*. At two times this is looked into—at the time of making the will, in order that the appointment may stand ; and at the time of the testator's death, that it may be carried out. More than this, there ought to be *testamenti factio* with the heir at the time he enters on the inheritance as well, and that whether his appointment is simple or conditional. For the heir's rights ought to be looked into at that time above all at which he acquires the inheritance. But as for the time between making the will and the testator's death, or the fulfilment of the condition, no change of status in that interval harms the rights of the heir ; because, as we have said, there are three times (only) to be looked to. (J. 2, 19, 4.)

Testamenti factio seems to belong not only to him that can make a will, but to him that under another's will can take himself, or can acquire for another, although he cannot make a will. A madman, therefore, a dumb man, a posthumous child, an infant, a *filiusfamilias*, and another's slave, are said to have *testamenti factio*. They cannot, indeed, make a will, but under a will they can acquire either for themselves or for another. (J. 2, 19, 4.)

To make a will valid, the testator, witnesses, and heirs must be capable of holding their several parts ; they must have with each other *testamenti factio*. (Ulp. Frag. 20, 8.)

I. Incapacity of Testator.

1. The loss of freedom.

1°. Slaves cannot make wills, except slaves belonging to the

State (*servus publicus Populi Romani*). These could leave half of their property (*peculium*) by will. (Ulp. Frag. 20, 16.)

2°. The will of a man in the hands of the enemy, made there, does not take effect although he comes back. But a will made while he was in the State takes effect, if he comes back, by the *jus postliminii*; or if he dies there, by the *lex Cornelia*. (J. 2, 12, 5.)

Capture by brigands did not take away a man's legal right to freedom, and therefore did not affect his testamentary capacity. (D. 28, 1, 13, pr.) (See p. 169.)

2. The loss of citizenship.

1°. A *Latinus Junianus* was made incapable by the express provision of the *lex Junia Norbana* (Ulp. Frag. 20, 14); unless he acquired the *Jus Quiritium* within 100 days. (Ulp. Frag. 17, 1.)

2°. The *dediticii* could not make wills; not as Roman citizens, for they were aliens (*peregrini*); and not as aliens, for they were not members of any other State. An alien makes a will according to the law of his own country. (Ulp. Frag. 20, 14.)

3°. Hostages could not make wills (D. 28, 1, 11), and on their death their property went to the Exchequer. (D. 49, 14, 31.)

4°. The old punishment of *interdictio aqua et igni* vitiated any existing will, and created an incapacity to make another. (D. 28, 1, 8, 1.) The punishment of deportation, which superseded it, had the same effect (D. 28, 1, 8, 2); but not *relegatio*, as the latter did not deprive the offender of his citizenship. (D. 28, 1, 8, 3.)

5°. If a person convicted of a capital crime dies pending an appeal, his will is valid, unless he has committed suicide to escape punishment. (D. 28, 1, 13, 2; C. 6, 22, 2.)

3. Incapacity arising from the ancient forms of wills.

1°. Women could not make wills so long as these were made in the *Comitia Calata*; but they could make the will *per aes et libram*, with the consent of their *tutores*. (Paul, Sent. 3, 4, 1.)

We must observe, besides, that if a woman *in tutela* makes a will, she ought to make it by authority of her *tutor*, or it will be void by the *jus civile*. (G. 2, 118.)

In old times, in order to make a will, a *fiduciaria coemptio* used to take place. At that time, indeed, women (with certain exceptions) had not the right of making a will in any other way than by making a *coemptio*, then being reconveyed, and lastly manumitted. This necessity for a *coemptio*, however, at the instance of the late Emperor Hadrian, the Senate remitted; and thus women, they resolved, have the same rights as if they had made a *coemptio*. (G. 1, 115 A.)

But the Senate, at the instance of the late Emperor Hadrian, as we have pointed out above, allowed women, even without making a *coemptio*, to make a will, if only they were at the time above twelve years of age, and had the authority of their *tutor*. This was the way in which those not freed from *tutela* ought to make a will. (G. 2, 112, as restored.)

Women, therefore, seem to be in a better position than men. A man under fourteen cannot make a will, even although he wishes to, and has the authority of his *tutor*. But a woman, after her twelfth year, obtains the right of making a will with the authority of her *tutor*. (G. 2, 113.)

Gaius starts a question to which he is unable to give a decided answer: Can a woman make a Prætorian will without the authority of her *tutor?*

This certainly refers to men's wills, and also to those of women that have made wills that are void because, for instance, they have not sold the *familia*, or have not spoken the words of the formal declaration. But whether this constitution refers also to those wills of women that they have made without authority from a *tutor*, we shall see. (G. 2, 121.)

We are speaking, however, not of women in the statutory *tutela* of ascendants or of patrons, but of those that have *tutores* of the other kind, whom they can force, even against their will, to give their authority; whereas in the former case it is well known that an ascendant or a patron cannot be set aside by a will made without his authority. (G. 2, 122.)

In the time of Justinian, the testamentary capacity of women was unrestricted, the *tutela* of women having fallen into desuetude.

2°. The dumb, because they could not pronounce the words of the *nuncupatio*, and the deaf, because they could not hear the voice of the *familiae emptor*, could not make a will *per aes et libram*. This incapacity disappeared when wills were made in writing. (Ulp. Frag. 20, 13.)

A dumb man, again, or a deaf man, cannot always make a will. But in speaking of a deaf man, we mean a man that does not hear at all, not a man that is slow of hearing. A dumb man, too, is understood to be a man that cannot speak out at all, not a man that speaks slowly. But often men, even of literary education and learning, by various mishaps, lose the power both of hearing and of speaking. To their aid, too, therefore, our constitution comes to enable them in certain cases and in certain ways according to its rules to make a will, and to do all other acts that are allowed them. If, however, a man, after making his will, by ill-health or any other mishap, comes to be dumb or deaf, his will none the less remains valid. (J. 2, 12, 3.)

EXCEPTION.—Nay, even though dumb and deaf, a soldier can make a will. (J. 2, 11, 2.)

3°. A blind man cannot make a will except by observing the rules that a statute of the late Emperor Justin my father brought in. (J. 2, 12, 4.)

4. Persons that could not be owners could not make wills.

It is not every one that can lawfully make a will. To begin with, persons subject to the power of another have not the right of making a will. So entirely does this hold, that even although their ascendants allow them, they cannot any the more make a rightful will. To this there are exceptions that we have already enumerated, and especially soldiers in the *potestas* of their ascendants, who are allowed by the imperial constitutions to make a will of all they have acquired in camp. At first, indeed, this was granted to those in service only, by the authority both of the late Emperor Augustus and of Nerva, as also of that best Emperor Trajan. But afterwards, by a document under the hand of the late Emperor Hadrian, even discharged soldiers —veterans, that is—were allowed to. If, therefore, they make a will about their *castrense peculium* (camp property of their own), it will belong to the man they leave as heir. But if they die intestate, with no descendants of

brothers surviving, it will belong to their ascendants by the law common to all. Hence we can understand that the goods a soldier in his father's *potestas* has acquired in camp cannot be taken away by the father himself, nor can the father's creditors sell them, or otherwise disturb them, nor on his father's death do they belong to the soldier's brothers in common with himself, but all that he has acquired in camp is exclusively his own. This is so, although by the *jus civile* the *peculia* of all persons in the *potestas* of their ascendants are reckoned among the goods of their ascendants, just as the *peculia* of slaves are reckoned among the goods of their masters. To this, of course, there are exceptions under the sacred constitutions, and especially ours ; and certain things on different grounds are not acquired. Except these, then, that have a *castrense peculium* or a *quasi castrense*, no other *filiusfamilias* can make a will ; or if he does, it is void, although he becomes his own master before he dies. (J. 2, 12, pr.)

It must be known, however, that after the example of the *castrense peculium* both earlier laws and the imperial constitutions have given certain persons a *quasi-castrense peculium*, and have allowed certain persons to dispose of this by will while still living *in potestate*. This our constitution extends more widely, allowing all to make a will in regard to such a *peculium* only, but under the law common to all. By looking carefully through the tenor of this constitution, a man can easily learn everything relating to the law just spoken of. (J. 2, 11, 6.)

5. Owners that cannot alienate cannot make wills.

1°. Madmen, again, because they want sense, cannot make a will. It is immaterial that the person under puberty comes to riper years, or that the madman afterwards becomes master of his senses before he dies. But if madmen make a will during a break in their madness, they are held to make it rightly. Undoubtedly, too, a will made before madness takes effect ; for neither wills rightly made, nor any other affairs rightly carried out, are annulled by the fact that madness comes on afterwards. (J. 2, 12, 1.)

But not old age or bodily disease, if they do not impair the mind. (C. 6, 22, 3.)

2°. Persons under puberty also cannot make a will, because their minds have no judgment. (J. 2, 12, 1.)

3°. A prodigal, again, that has been interdicted from managing his goods, cannot make a will. But a will made before the interdict is valid. (J. 2, 12, 2.)

6. Incapacity to make a will was in certain cases a form of punishment.

1°. Libellers (*ob carmen famosum damnati*). (D. 28, 1, 18, 1.)

2°. Manichaeans and Apostates. (C. 1, 5, 4.) Other heretics could make wills, but must leave all their property to their children, if orthodox. (C. 1, 5, 13, 1.)

7. Persons whose capacity was uncertain could not make a valid will. (D. 28, 1, 15.)

A slave is manumitted in the will of his master, but he does not know that the master is dead, and that an heir has taken under the will. Hence, if he makes a will, it is void, although both facts exist. (D. 28, 1, 14.)

A *paterfamilias* has gone abroad, but his son does not know that he is dead. Until he gets that information, he cannot make a will. (Ulp. Frag. 20, 11.)

II. Incapacity of Heirs.

There was a wide difference between the grounds of incapacity in making wills and in taking under wills. It is the difference between those that can dispose of property and those that may receive it.

1. Besides, soldiers are allowed to appoint aliens and Latins their heirs, or to leave them a legacy; although in any other case aliens are forbidden by the principles of the *jus civile*, Latins by the *lex Junia*, to take an inheritance and legacies. (G. 2, 110.)

Dediticii (Ulp. Frag. 22, 2) and deported prisoners could not be heirs. (C. 6, 24, 1.)

2. Some classes were specially disabled.

1°. Women by the *lex Voconia* (about B.C. 168).

This law forbade a testator registered in the census for 100,000 sesterces making a woman his heir. (G. 2, 274.) The prohibition was evaded by resort to trusts (*fideicommissa*), and the law itself fell into desuetude.

Vestal virgins could not be heirs, according to Labeo. (Aul. Gell. 1, 12, 18.)

2°. The unmarried, too, who are forbidden by the *lex Julia* to take an inheritance and legacies, and the *orbi* also, that is the childless, whom the *lex Papia* forbids to take more than a half of an inheritance and of legacies, under a soldier's will take the entire amount. (G. 2, 111.)

The *lex Julia*, here referred to, is supposed to be the *lex Julia de maritandis ordinibus*. (A.D. 4, or B.C. 18, p. 81.) The *lex Julia et Pappia Poppæa* is an amending Act, A.D. 9. A person is within the meaning of the *lex Julia* if, after attaining (probably) twenty years of age, he remains unmarried, if a man, till sixty, and if a woman, till fifty. (Ulp. Frag. 16, 1.) Such persons are disqualified from taking under a testament, unless they are *cognati* of the testator within the sixth degree. The *S.C. Pernicianum*, or *Persicianum* made the penalties of the Julian law perpetual in the case of those who had attained sixty or fifty years without being married. But a *S.C. Claudianum* allowed a man over sixty to escape if he married a woman under fifty. (Ulp. Frag. 16, 4.) *Coelebs* escaped the penalties if, after the death of the testator, he or she married within the time of *cretio* (see *postea* as to the meaning of this), usually 100 days. (Ulp. Frag. 17, 1, 22, 3.)

Besides being married, a man over twenty-five, or a woman over twenty could not take more than one-half of whatever was left them, if they had not at least one child. (Ulp. Frag. 16, 1.)

All these rules were abolished by the sons of Constantine. (C. 8, 58, 1.)

3. The person appointed heir must be a specific living individual. (*Incerta persona heres institui non potest.*)

A strange posthumous child is one that when born will not be among the testator's *sui heredes*. A grandson, therefore, by an emancipated son, is a strange posthumous child to his grandfather. A child, again, in the womb of a wife that has been married, when there was no *conubium* with her, is a strange posthumous child to his father. (G. 2, 241.)

A strange posthumous child cannot even be appointed heir, for it is an indeterminate person. (G. 2, 242.)

The right of *bonorum possessio* was brought in by the Prætor to amend the old law. Not only in regard to the inheritances of the intestate did the Prætor in that way amend the old law, as has been said above, but in the case of those also that made a will before they died. For if a strange posthumous child were appointed heir, by the *jus civile* he could not enter on the inheritance, because the appointment did not take effect. But by the *jus honorarium* he was made *bonorum possessor* when, namely, he was aided by the Prætor. In our day, however, such a person can rightly be appointed heir under our constitution, as being not unknown to the *jus civile*. (J. 3, 9, pr.)

Whosoever shall be first at my funeral, let him be heir. This is void for uncertainty. (Ulp. Frag. 22, 4.)

An unborn child was an *incerta persona*. Aquilius Gallus (see p. 777) introduced a clause for their admission, and effect was given to it, when, but for the death of the testator, the posthumous child would have been under his *potestas*.

Municipalities and corporations were held to be "*incertae personae*." (Ulp. Frag. 22, 5.) The reason was that there was no one to go through the solemn form of acceptance, "*cretio*;" and when that formality fell into disuse, there was no meaning in the objection. By a *Senatus Consultum* (? *Aproniauum*) the freedmen of municipalities were expressly allowed to leave their inheritance to the municipalities. (Ulp. Frag. 22, 5.) Leo (A.D. 469) authorised cities to be heirs (C. 6, 24, 12); and afterwards corporations, by special licence, enjoyed the same privilege. (C. 6, 24, 8.)

A legacy also to a strange posthumous child was void. A strange posthumous child is one that, if born, would not have been among the testator's *sui heredes*; and therefore a grandson conceived by an emancipated son was a posthumous outsider to his grandfather. (J. 2, 20, 26.)

But not even this class of cases has been altogether left to itself without any lawful amendment. In our Code a constitution has been placed, by which we have applied a remedy to this portion of the law, not only in the case of inheritances, but in those also of legacies and trusts, as becomes clear and bright if you read the constitution. But even by our constitution the *tutor* that is appointed ought to be determinate, because a man ought to provide for the *tutela* of his posterity by a determinate judgment. (J. 2, 20, 27.)

A strange posthumous child could be appointed heir formerly, and can be now, unless he is in the womb of a woman that cannot lawfully be our wife. (J. 2, 20, 28.)

Persons the testator has never seen can be appointed heirs; as when a testator appoints as heirs his brother's sons born abroad, not knowing who they are. For the testator's ignorance does not make the appointment void. (J. 2, 14, 12.)

Justinian abolished the rule, and allowed any posthumous child, corporation, or church to be heir; and so also classes of persons, as the poor, captives, clergy, etc. (C. 6, 48, 1.)

4. Spiritual beings.

Deities (or rather their temples) could not be heirs, except in those cases specially allowed by some law; such were Jupiter Tarpeius, Apollo Didymaeus of Miletus,

Mars in Gaul, Minerva of Ilium, Hercules Gaditanus, Diana of the Ephesians, the Mother of the Gods, Sipylene, worshipped at Smyrna, and Caelestes Selene, goddess of Carthage. (Ulp. Frag. 22, 6.)

With a change of religion a difference in the application of the law followed.

"Jesus Christ" was often appointed heir. Justinian construed such an appointment as a gift to the church of the place where the testator lived. (C. 1, 2, 26, pr.)

"An Archangel or Martyr" was often made heir, even, as Justinian says, by men of high rank and thoroughly versed in the law. This was construed as a gift to the shrine or church dedicated to the archangel or martyr in the place where the testator lived; if no such shrine or church existed, then to a similar one in the metropolitan city; and if none such, then to the church in the vicinity where the testator lived. (C. 1, 2, 26, 1.) If there is more than one shrine or church coming within the description, then that which is most venerated and frequented is to be chosen; if none such, then the poorest church in the place is to be heir. (C. 1, 2, 26, 2.)

5. Slaves.

1°. Testator's own slaves.

As freemen can be appointed heirs so also can slaves, whether our own or belonging to others. A slave of our own we ought to order to be at once both free and our heir, that is in this way:—"Let Stichus my slave be free, and be my heir;" or "Let him be my heir and be free." For if he is appointed heir without a grant of freedom, even although he is afterwards manumitted by his master, he cannot be heir, since the appointment in his person cannot stand; and, therefore, even although he has been alienated, he cannot by his master's orders decide to take the inheritance. (G. 2, 185-187.)

"Let Stichus be free; and if he shall be free, let him be heir." Was this form introducing liberty as a condition valid? A rescript of Marcus Antoninus states that the words, "if he shall be free," were to be regarded as surplusage, and the appointment was good. (D. 28, 5, 51, pr.)

Marcus Antoninus also departed from the strict rule requiring an express grant of freedom, and upheld an appointment when the slave was spoken of as "freedman." (C. 6, 27, 1.)

Heirs may be appointed, not only from freemen, but from slaves, whether our own or belonging to others. Our own, indeed, in old times, according to the opinion of most, we could not lawfully appoint unless we gave them freedom as well. But in our day, even without a grant of liberty under a constitution of ours, we are allowed to appoint them heirs. This we brought in, not as an innovation, but because it was juster, and was the opinion of Atilicinus, as Paul reports in his books, which he wrote as commentaries on Masurius Sabinus and Plautius. By a slave of one's own, moreover, is understood even a slave in whom the testator has the bare ownership while another has the usufruct. (J. 2, 14, pr.)

A slave that is appointed heir [and free] by his own master, if he remains in the same case, becomes under the will both free and at the same time a necessary heir. But if he is manumitted by the testator in his lifetime, he can, as he thinks fit, enter on the inheritance or not; because he does not become a necessary heir, since he does not obtain both freedom and the inheritance under his master's will. But it he is alienated, it is by the orders of his new master that he must enter on the inheritance; and in that way, through him,

the master becomes heir. The alienated slave can himself be neither free nor an heir, even although he is appointed heir with his freedom as well. For from giving him freedom a master that has alienated him seems to have turned aside. If another man's slave, too, is appointed heir, and is still in the same case, it is by his master's orders that he must enter on the inheritance. If, however, he is alienated, either in the testator's lifetime or after his death, before entering on the inheritance, it is by the orders of his new master that he must enter. But if he is manumitted either in the lifetime of the testator or after his death, but before entering, he can, as he thinks fit, enter on the inheritance or not. (J. 2, 14, 1 ; G. 2, 188.)

The appointment of a slave as heir must not violate the provisions of any law.

There is a case in which, although freedom is given as well, the appointment of a slave by his mistress as her heir cannot but be void. This is provided for by a constitution of the late Emperors Severus and Antoninus, of which the words are these :—" It is but reasonable a slave stained by adultery cannot be lawfully manumitted by will before the decision appears on the woman charged as a partner in his crime. Hence it follows that if his mistress bestows on him an appointment as heir, it is to be held of no force." The term " another's slave " is to be understood to include one in whom the testator has a usufruct. (J. 2, 14, pr.)

2°. A slave partly belonging to the testator, and partly to another, or wholly belonging to another.

If another man's slave is appointed heir, and is still in the same case, it is by his master's orders that he must enter on the inheritance. But if he is alienated by him, either in the testator's lifetime or after his death, before entering, it is by his new master's orders that he must decide. If he is manumitted before deciding, he can, as he thinks fit, enter on the inheritance or not. (G. 2, 189.)

If another man's slave is appointed heir, and has, as is common, time for decision given him, the day for a decision is understood to begin to run only if the slave himself knows that he has been appointed heir, and if there is no hindrance to keep him from informing his master, so that by his orders he might decide. (G. 2, 190.)

The slave of several owners, with whom there is *testamenti factio*, if appointed heir by an outsider, acquires the inheritance for each of the masters by whose orders he enters according to his share of the ownership. (J. 2, 14, 3.)

As a slave cannot take for himself but only for his master, it is hard to understand why a testator should name the slave as heir, instead of directly appointing his master. One suggestion is that the slave could be sold, as Gaius points out (2, 189), and the buyer thereby acquire the inheritance. Another suggestion (Ihering's) has even less probability, namely, that in case of the predecease of the master, the slave would preserve the inheritance for the master's heirs. But that cuts both ways ; for the slave might die first, and thereby prevent the master from acquiring, when it was his fortune to survive the testator.

3°. A slave when his master is dead, and no heir has entered on his inheritance (*servus jacentis hereditatis*).

Another man's slave after his master's death can rightly be appointed heir, because even with the slaves belonging to an inheritance there is *testamenti factio.* For an inheritance not yet entered on represents the person not of the future heir but of the deceased, since even the slave of a child still in the womb can rightly be appointed heir. (J. 2, 16, 2.)

6. Concubines and natural children.

Before the time of Valens, Valentinian, and Gratian, it was unlawful to leave property to a concubine or natural child. But these Emperors allowed the natural children, along with their mother, to take one-twelfth of their father's property by gift or inheritance when their father had legitimate children. If he had none, and no father or mother, they could take as much as one-fourth. Justinian says such legislation gave rise to continual attempts at evasion by secret trusts, which often proved abortive through the perjury of trustees. Accordingly he resettled this branch of law. When there were legitimate children, he continued the rule limiting the share of natural children to one-twelfth. (Nov. 89, 12, 2.) If there were no legitimate children, but ascendants of the deceased survivor, they got the *legitima portio*, and the natural children and concubine were allowed to inherit the whole of the residue. If one had no ascendants, he could leave all his property to them. (Nov. 89, 12, 3.)

7. Prostitutes and actresses (*probrosae feminae*) could not take even under a soldier's will. (Suet. Domit. 8; D. 29, 1, 41, 1.)

8. In the same speech the Emperor declared that he would not admit the inheritance of a man that by reason of a lawsuit left the Emperor his heir; and that he would not make good any will not regularly made, and in which he was for that reason appointed heir; that he would not admit the name of heir if given by bare word of mouth; and that he would not take possession of anything under any writing wanting in legal authority. In accordance with this, the late Emperors Severus and Antoninus have very often issued rescripts; "for although," say they, "we are freed from the statutes, yet we live by the statutes." (J. 2, 17, 8.)

III. Incapacity of Witnesses.

If the witnesses to a will are capable at the time of the making of the will, it does not signify that they afterwards become incapable. (D. 28, 1, 22, 1.) A knowledge of Latin was not necessary; it was enough if the witnesses knew the

nature of the transaction to which they were called as witnesses. (Paul, Sent. 3, 4, 13.)

I. Persons absolutely disqualified.

1°. Slaves.

When a witness was thought to be free at the time of making a will, but afterwards was shown to be a slave, rescripts both of the late Emperor Hadrian to Catonius Verus, and afterwards of the late Emperor Severus and Antoninus, declared that they of their liberality would come to the help of the will, so that it should be held to have been made as it ought. For at the time when the will was sealed, by the consent of all this witness was in the position of freemen, and there was no one to raise a question about his status. (J. 2, 10, 7.)

As witnesses those can be employed that have *testamenti factio*. But neither (2°) a woman, nor (3°) a boy under puberty, nor a slave, nor (4°) a dumb man, nor (5°) a deaf man, nor (6°) a madman, nor (7°) a man interdicted from managing his own goods, nor (8°) a man that the laws order to be treated as utterly dishonest and unfit to take any part in a will (*intestabilis*), can be employed in the number of the witnesses. (J. 2, 10, 6.)

This class included those convicted of bribing magistrates (*repetundarum damnatus*) (D. 28, 1, 20, 5); or adultery (D. 22, 5, 14); or libel (D. 28, 1, 18, 1); apostates (C. Th. 16, 7, 4), and many heretics. (C. 1, 3, 21.)

The reason why women could not be witnesses is that wills were at first made in the *Comitia Calata*, to which women were not admitted; but the disability was kept up, although the reason for it had ceased.

II. Incapacity arising from the relation of the parties.

1°. Those in the *familia* of the testator or *familiae emptor*. (*Domesticum testimonium.*)

Among the witnesses there ought not to be any one in the *potestas* either of the *familiae emptor* or of the testator himself. The reason is, that as the old law is copied, this whole business that is gone through to frame a will is believed to be gone through between the *familiae emptor* and the testator. In old times, indeed, as we have just said, the man that received the testator's *familia*, when conveyed to him, was in the position of heir; and so home testimony in the matter was disapproved of. Hence, if a man in the *potestas* of his father is employed as *familiae emptor*, his father cannot be a witness, no, nor even anyone in the same *potestas*—his brother, for instance. Again, if a *filiusfamilias* makes a will of his *castrense peculium* after his discharge, neither his father, nor any one in the *potestas* of his father, can properly be employed as a witness. To the balance-holder too, all we have said of witnesses must be understood to apply. For he too is numbered with the witnesses. (G. 2, 105-107.)

But a *paterfamilias* could be a witness to the will of his *filiusfamilias* concerning his *peculium castrense*. So a brother of the testator could also be a witness. (D. 28, 1, 20, 2.)

Among the witnesses there ought not to be anyone in the testator's *potestas*. And if a *filiusfamilias* makes a will of his *castrense peculium*

after his discharge, neither his father nor anyone in the *potestas* of the same father can rightly be employed as a witness; for home testimony in the matter is disapproved. (J. 2, 10, 9.)

A father as well as a person in his *potestas*, or again, two brothers in the *potestas* of the same father, can both become witnesses to one will. For it does no harm to a stranger's affairs that several witnesses are employed from one home. (J. 2, 10, 8.)

2°. Persons in the family of the *heres*.

A man in the *potestas* of the heir or legatee, or in whose *potestas* the heir himself or the legatee is, or who is in the same person's *potestas*, can be employed as witness and balance-holder. Indeed, so far does this go, that the heir himself too or the legatee may rightly be employed. Nevertheless, so far as relates to the heir, and to a person in his *potestas*, or in whose *potestas* he is, we ought to be very far indeed from using this right. (G. 2, 108.)

But neither the heir named in the will, nor a person in his *potestas*, nor his father that has him in his *potestas*, nor his brothers that are in the *potestas* of the same father, can be employed as witnesses. The reason is, that this whole business that is carried on in order to frame a will, is believed in our day to be carried on between the heir and the testator. In old times, indeed, all the law on that subject was thrown into great confusion; and the ancients, while they rejected the *familiae emptor*, and those that were joined into oneness with him by the *potestas*, from bearing witness to wills, yet allowed the heir and those united to him by the *potestas* to bear witness in regard to wills. True, even while allowing that, they used to advise them to be very far from abusing this right. But we, on the other hand, correct this very procedure they observed; and what they advised, we instead make compulsory by statute. Copying the early law, we rightly allow neither the *familiae emptor* nor the heir, who now represents the most ancient *familiae emptor*, nor the other persons united to them as has been said, any licence to bear witness for themselves in any way; and therefore we have not even allowed an old constitution of that kind to be inserted in our Code. (J. 2, 10, 10.)

But to legatees, and persons taking under a trust, and others joined with them, we do not deny the right to bear witness, because they do not succeed to the legal position. On the contrary, indeed, in a certain constitution of ours, we have specially granted this. Much more do we give such a licence to those in their *potestas*, or to those that have them *in potestate*. (J. 2, 10, 11.)

II. Revocation of Will.

A will was void or voidable if it failed in any of the five elements (A, B, C, D, and E) described above. It might, however, be perfectly valid at the time it was made, and before the death of the testator become void. We have now to consider what acts or events vitiate a will after it is validly made.

Explanation of terms:—

1. A will defective in respect of A, D, and E—*i.e.*, which was informal, or did not appoint an heir, or the testator, heir, or witnesses were incapable of acting their several parts—was called *testamentum injustum*, or *non jure factum*. (D. 28, 3, 1; Ulp. Frag. 23, 1.)

As regards B (disherison) there was a difference. If persons alive at the making of a will were not expressly disinherited, the will was said to be *injustum* (D. 28, 3, 3, 3), or *nullius esse momenti*. At all events, it was void *ab initio*.

A will defective in C (*legitima portio*) was voidable only, not void—*testamentum inofficiosum*.

2. A will valid when made may be broken (*ruptum*) in two ways:—(1) By the subsequent agnation of a *suus heres;* and (2) by making a new will. (Ulp. Frag. 23, 2.)

13. A valid will may fail of effect (*irritum*) in two ways:—(1) When the testator suffers a *capitis deminutio—i.e.*, subsequently becomes incapable of being a testator; and (2) when no one takes as heir under the will. (Ulp. Frag. 23, 4.) In the latter case the will is sometimes said to be *destitutum*.

In this case, we shall say that wills become null (*irrita*). Yet those also that are broken become null, and those that are not rightly made to start with are null. Those again that are rightly made, but afterwards become null by reason of a *capitis deminutio*, we might none the less speak of as broken (*rupta*). But it is undoubtedly more convenient to distinguish each separate case by a separate name. Some, therefore, are said not to be rightly made (*non jure fieri*); some to be rightly made, but to be broken (*rupta*) or to become null (*irrita*). (J. 2, 17, 5; G. 2, 146.)

A. A will is revoked when the testator makes a second will in accordance with the required forms.

ERASURES, INTERLINEATIONS.—Blots, erasures, or interlineations are not fatal defects in regard to the form of the will, but they may be viewed as signs of intention to revoke the will. (C. 6, 23, 12.)

The general rule was, that if a testator by himself, or by any one else, deliberately erased (*deleta*) or scored out (*inducta*) anything in the will, it was void; but if it was done by accident, or by some one else without his authority, the will was valid if it could be read; *i.e.*, if with the eyes one could decipher the writing. But if illegible, extrinsic evidence was not admissible to prove the contents. (D. 28, 4, 1, pr.) Hence if there is any accidental erasure, the will takes effect notwithstanding it contains the usual affirmation that the testator has made all the erasures (*liturae*), scorings out (*inductiones*), and interlineations (*superinductiones*). (D. 28, 4, 1, 1.)

A will rightly made may be invalidated by revocation. But a will cannot be invalidated merely by the fact that the testator afterwards wished it not to take effect. Accordingly, even if he cut the strings that fastened it, it still

continues valid by the civil law; even erasing or obliterating part of the will does not invalidate what is written, but only makes it more difficult of proof. What then happens if one demands the *possessio bonorum* on the ground of intestacy, and he that is named heir in the will brings a *petitio hereditatis?* . . . . . And so it is laid down by a rescript of the Emperor Antoninus. (G. 1, 151.)

Lucius Titius, while sane, made a will. Afterwards, when insane, he tore it up. The heirs under the will are entitled to the property, because being insane, he could not have a legal intention to revoke the will. (D. 28, 3, 20.)

Several copies of a will are made from one original, and one of the copies is perfected with all the necessary formalities. If the testator takes a copy deposited in a public office, and cancels it, the will is not necessarily void. If the claimants *ab intestato* prove that his intention was to revoke the will, such cancelling effects the purpose, but otherwise not. (D. 28, 4, 4.)

Nepos erased the names of the heirs in his will, leaving the rest of the will untouched. In the absence of heirs *ab intestato*, the Exchequer (*Fiscus*) claimed the inheritance. The Emperor Antoninus gave judgment in favour of the Exchequer, whereupon ensued the following argument:—Vivius Xeno said, I crave, Lord Emperor, your indulgent hearing. What judgment do you pronounce as to the validity of the legacies (which were not erased)? Caesar said, Do you contend that a will is valid in which the names of the heirs are scored out? Cornelius Priscianus (*Advocatus Leonis*), It is *only* the names of the heirs that are scored out. Calpurnius Longinus (*Advocatus Fisci*), No will can be valid under which no heir takes. Priscianus replied, But the testator made legacies and manumissions. Parties being removed, Antoninus Caesar took the case into consideration, and having ordered them again to be admitted, delivered judgment as follows:—This case seems to admit a favourable construction, and we accordingly decide that Nepos did not intend to cancel any part of the will except what he actually scored out. (D. 28, 4, 3.)

One of the heirs was a slave, who was at once made heir and free. Held that his name was struck out only as heir, and that the gift of liberty was valid. (D. 28, 4, 3.)

So far it appears that the legacies may be preserved, while the heirs are struck out. This is not inconsistent with the principle stated above, that the whole validity of a will depended on the heirs. In the present case the will is assumed to be valid, and to be revoked partially in regard to the heirs alone. The erasure did not impair the *formal* validity of the will. (C. 6, 23, 12.)

A testator cancelled or scored out a will, explaining that he did so on account of an objection to one of the heirs. Afterwards the will was sealed. Has it any force? Ulpian said, If he scored out the name of one heir only, the rest of the will is perfectly valid and effective; and even the legacies specifically charged upon that heir will be payable, assuming that to be the intention of the testator. Suppose, however, assigning the same reason, the testator struck out the names of all the heirs, is the will revoked as to all? It depends upon whether the testator wished to strike out only the peccant heir, or on his account to reject all. If the former, the rest are still heirs. If all are cut off, the legacies will still be due. (D. 28, 4, 2.)

A will cannot be invalidated (*infirmari*) merely by the fact that the testator afterwards wished it not to take effect (*valere*). More than that, even although a man after making an earlier will begins to make a later, but does not complete it, either because prevented by death or because he repents of what he is doing, yet the earlier will (*tabulae*)—as a speech of the late Emperor Pertinax provides—if rightly made, does not become null unless the next one is rightly ordered and complete. For an incomplete will is undoubtedly no will at all. (J. 2, 17, 7.)

A later will rightly completed breaks an earlier, no matter whether there is any heir under it or not; for the one point that is looked to is whether in any case there might be an heir. If, therefore, any one [under the later will, rightly made] refuses to be heir, or dies either in the lifetime of the testator or after his death, but before entering on the inheritance [or is shut out by the lapse of the time allowed to decide in], or fails in the condition on which he has been appointed heir [or because, being unmarried, he is removed from the inheritance by the *lex Julia*]—in all these cases the *paterfamilias* dies intestate. For the former will is of no effect, since it is broken by the later; and the later equally has no force, since there is no heir under it. (J. 2, 17, 2; G. 2, 144.)

If a man after completing a former will makes a later one equally rightly, then, even although the heir he appoints in it is heir only to certain specified things, yet the earlier will is taken away. This was laid down by the late Emperors Severus and Antoninus in a rescript. The words of that constitution we have ordered to be inserted, because it expresses something else besides. "The Emperors Severus and Antoninus to Cocceius of Campania. A will made, in the second place, although in it an heir is appointed only for certain specified things, takes effect in law (*jure*) just as if no mention of these things were made. But the heir it appoints, there should be no doubt, is bound to content himself with the things given him, or with the fourth made up to him under the *lex Falcidia*, and to give up the inheritance to those that were appointed in the former will; for this reason,—that words were inserted in the second will expressly stating that the former will should take effect." In this way too, then, it comes to pass that a will is broken. (J. 2, 17, 3.)

A testator in his second will appointed as heir any posthumous child he might have. He was so old and infirm that the chance of his having any children was extremely small. Nevertheless the will is valid, and revokes the first. (D. 28, 2, 9, pr.) But the first will would be valid if he were absolutely incapable of having any children, because in that case the heir named could not exist. (D. 28, 2, 6, 1.)

A valid will was made disinheriting posthumous children. A second will did not disinherit them, and after the testator's death a posthumous child was born to him. The first will is made void by the second, and the second is broken by the birth of the child. (D. 28, 3, 3, 4.)

Two wills are produced of different dates, each properly sealed, but the second on being opened is found to contain nothing—in short, is a "dummy will." The first is not revoked. (D. 28, 3, 11.)

EXCEPTION.—A Soldier's Will. (D. 28, 3, 2.)

A soldier made a will with the usual forms, and afterwards, as a soldier, disposed of his whole property by an informal will. He retired from the army and lived more than a year. The first will is invalidated by the second, although informal, and the second by the survival of the soldier for more than a year after leaving the service. (D. 29, 1, 36, 4.)

Lapse of Time.—By a constitution of Honorius and Theodosius (C. Th. 4, 4, 6), a will lapsed if it was not renewed after ten years; but Justinian abolished any such prescription, unless it was proved by witnesses, or from the conduct of the testator,

that he wished his will, after that period had expired, to become void. (C. 6, 23, 27.)

B and C. A will is revoked if, after it is made, any one comes into being whom the testator is bound to appoint heir, or expressly to disinherit, or to whom the testator is bound to leave some property (*legitima portio*). Provision, as we have seen (pp. 777, 786), could be made for the birth of children to the testator; but when a man adopted a child or obtained a wife *in manum*, his will was invalidated, and must be made over again.

A will rightly made takes effect until it is broken (*ruptum*) or made null (*irritum*). It is broken when, though the testator remains in the same legal position (*status*), the rightfulness of the will itself is spoiled. (J. 2, 17, pr.)

If, for instance, a man after making a will adopts a son, whether that son is a man *sui juris* adopted through the Emperor [people], or a person in the *potestas* of an ascendant adopted through the Prætor according to our constitution, his will is broken just as if a *suus heres* had since been born to him. (J. 2, 17, 1; G. 2, 138.)

The rule of law is the same if a wife passes *in manum* of the man after the will is made, or if a woman in his *manus* is married to him. For in that way she comes for the first time to be in the place of a daughter, and becomes as it were a *sua heres*. (G. 2, 139.)

The fact that either the woman or the son that has been adopted was appointed heir in the will, goes for nothing. As for disinheriting, it is idle to ask about that, since at the time of making the will neither was reckoned among *sui heredes*. (G. 2, 140.)

When a son dies or is emancipated after the will is made, his children become *sui heredes*. (Ulp. Frag. 23, 3.)

A son, again, that after a first or second conveyance is manumitted since he returns into his father's *potestas*, breaks a will previously made. The fact that in that will he was appointed heir, or disinherited, goes for nothing. (G. 2, 141.)

A like rule of law there formerly was in regard to a son on whose account, under a *Senatus Consultum*, a case of mistake is made good, because he was the offspring of an alien woman, perhaps, or of a Latin, taken to wife by mistake in the belief that she was a Roman citizen. For whether he was appointed heir by his ascendant or disinherited, or whether the father was alive when the case was made good, or whether it was after his death, in any event this broke the will as if he had been born since it was made. (G. 2, 142.)

But now, under a new *Senatus Consultum* made at the instance of the late Emperor Hadrian, if the case is made good while the father is still alive, this, just as in old times, breaks the will in any event. But if it is after the father's death, then the fact that the son is passed over breaks the will; but if in it he is appointed heir, or disinherited, the will is not broken —no doubt to keep wills carefully made from being rescinded at a time when they cannot be renewed. (G. 2, 143)

D. When the heirs named in the will die before the testator, or, surviving him, refuse the inheritance, or become incapable of taking it, the will is void (*testamentum irritum*). (D. 28, 3, 1; Ulp. Frag. 23, 4.)

E. The testator must retain his testamentary capacity at the time of his death, otherwise the will is void.

There is another way, also, in which wills rightly made are invalidated; when, namely, the maker undergoes *capitis deminutio*. In what ways this happens we have related in the First Book. (J. 2, 17, 4; G. 2, 145.)

EXCEPTIONS.—(1) Lastly, if a soldier gives himself in *arrogatio*, or being a *filiusfamilias* is emancipated, his will takes effect as being due to his renewed wish, and is not, it seems, made null by the *capitis deminutio*. (J. 2, 11, 5.)

(2) It is not in every respect, however, that those wills are null that [either from the first were not rightly made or] though rightly made, have become null [or been broken] because of a *capitis deminutio*. For if seven witnesses with their seals sealed the will, then the heir appointed therein can claim *bonorum possessio* according to the terms of the will (*secundum tabulas*) provided only the deceased was both a Roman citizen and in no one's *potestas* at the time of his death. If, however, the will became null because the testator lost citizenship or freedom as well, or because he gave himself in adoption, and was at the time of his death in the *potestas* of his adopted father, the heir appointed cannot claim *bonorum possessio* according to the terms of the will. (J. 2, 17, 6; G. 2, 147.)

Second.—THE INFORMAL WILL. (*CODICILLI.*)

(*HEREDITAS FIDEICOMMISSARIA.*)

A consideration of the elements of the Roman Will shows how great must have been the danger of an entire failure of the testator's intentions. In the first place, the form of will-making was a serious business. Even after the balance and scales were dispensed with, and the *libripens* was forgotten, the necessity of seven witnesses, each of whom might on one ground or another be incapable of acting, with the formalities of sealing, etc., involved no small trouble and risk. Then the will must disinherit individually or collectively a number of different persons, and it must provide portions for children and others having legal claims on the testator. The technicalities involved in this process must have been a source of endless disappointment to testators. Next the appointment of the heir, or the substitutions, and the capacity of the several persons to take as heirs, must have given rise to much vexation and trouble. After the will was duly made, it was not free from peril. The

subsequent agnation of a necessary heir rendered the whole of the proceedings nugatory, and required the will-making to be begun again from the very beginning. Lastly, even when the will was effectually made, and at the time of the testator's death was perfectly valid, the heirs named in the will might refuse to accept. It is true that by the time of Justinian some of the pitfalls had been removed, and the making of a will was not quite so formidable as in the time of Gaius: nevertheless, all the old constituents of the will were maintained in full activity. At the best the Roman will, for the purposes for which it was desired in later times, was a cumbrous and dangerous instrument.

That the Roman will continued in all its complexity to the time of Justinian, is due to the circumstance, already mentioned, that in the time of Augustus a new instrument was introduced, by which the Romans were enabled to escape the inconveniences of the old will.

The two points where the narrowness of the Roman will appears to have been most felt were the cumbrous formalities in making it, and the restrictions on the persons that could be appointed heirs. These two difficulties were removed at one stroke by giving legal effect to *codicilli*, and trusts (*fideicommissa*). In the time of Cicero neither had obtained legal recognition, and trusts contained in wills depended entirely on the honour of the heir. Cicero relates one or two instances that illustrate the first stage in the history of trusts, where they impose moral duties only, not legal duties. The cases mentioned by him further show the motives of testators in creating trusts. In one case a certain P. Trebonius had a brother, A. Trebonius, to whom he desired to leave his property, but who was proscribed, and therefore incapable of taking it. P. Trebonius named several honest and upright men as heirs, and among them a freedman of his own. He stated in his will that all the heirs should take an oath each to give one-half of his share to the proscribed brother, A. Trebonius. The freedman alone took the oath. The other heirs applied to Verres, and desired to be relieved from taking the oath, because it was an evasion of the *lex Cornelia*, which forbade an inheritance to be given to one proscribed. They obtained possession without taking any oath. This decision of Verres, Cicero does not quarrel with, because the oath was unlawful, and it might therefore be treated as a harmless superfluity (*non scriptum*);

but Cicero denounces the other part of Verres' judgment, which refused to the freedman his share of the inheritance on account of his being under an oath to restore the half of his share to the proscribed brother. (Cic. in Verr. 2, 1, 47.) In this case the testator was thwarted by the apparently conscientious scruples of the heirs, who thought themselves bound by the *lex Cornelia*, and by the erroneous judgment of Verres, who deprived the freedman of his share.

In another case, the testator, instead of trusting to the chance of the heirs taking an oath to obey his directions, asked and obtained the promise of the heir named in the will in his lifetime. Cicero, among others, was invited to a meeting of the friends of P. Sextilius Rufa, whose advice was asked by him under the following circumstances. He was appointed heir to Q. Fadius Gallus, who stated in his will that he had asked Sextilius to surrender the whole inheritance to his daughter Fadia, for by the *lex Voconia* he could not make Fadia his heir. The friends thought that he was not bound to surrender more than the *lex Voconia* allowed. (Cic. De. Fin. Bon. et Mal. 1, 17 (55).) In another passage Cicero mentions with commendation a case where a man gave up property left to him on a secret trust, of which no one but himself was aware. (Cic. De. Bon. et Mal. 1, 18 (58).) The case of Sextilius shows that when the trust was mentioned in the will, the testator hoped that the public disgrace of appropriating the money by the heirs would be sufficient to ensure its observance.

Justinian informs us by whom the sanction of law was first thrown around trusts.

Let us now pass on to trusts (*fideicommissa*); let us look first at inheritances left on trust. (J. 2, 23, pr.; G. 2, 246-247.)

We must know, therefore, that all trusts in early times were invalid, because no one was forced against his will to carry out what he had been asked to do. But since there were persons to whom inheritances or legacies could not be left, testators, if they left them, used to trust them to the faith of those that could take under a will. This, indeed, is why they were called trusts, because no bond of law, but only the honour of those that were asked, secured them. Afterwards the late Emperor Augustus first, after being stirred to action once and again by way of favour to particular persons, or because it was said to be for the Emperor's sake (*per ipsius salutem*) that some one was charged with a trust, or because of certain notable breaches of faith, ordered the consuls to interpose their authority. This seemed both just and popular, and was therefore step by step changed into a continual jurisdiction. So great then became the favour in which they were held, that after a little a special Prætor even was appointed to lay down the law as to trusts. He was called *fideicommissarius*. (J. 2, 23, 1.)

A. The *Fideicommissaria Hereditas.*

I. Definition.

Ulpian says, "A trust is not what is left by the words of the *jus civile*, but by entreaty. It is not from the stiffness of the *jus civile* that it proceeds; it is given according to the wishes of him that leaves it."[1]

Hence it might be in Greek, at a time when a will must be in Latin. (Ulp. Frag. 25, 9.)

In the first place, then, we must know that some heir must of necessity be appointed aright, and that to his faith the inheritance must be entrusted to give it up to some one else. If not, the will is void, since in it no one is properly appointed heir. (J. 2, 23, 2; G. 2, 248.)

If, then, a man writes, "Let Lucius Titius be heir," he can add, "I ask you, Lucius Titius [and beg of you], that as soon as you enter on my inheritance you surrender it to Gaius Seius, and give it up to him."[2] He can also ask the heir to give up a part, and he is free to leave the trust either simply or conditionally, or from a fixed day. (J. 2, 23, 2; G. 2, 250.)

The words chiefly in use for trusts are these: "I beg," "I ask," "I wish," "I entrust to your faith." Each by itself is as valid as if all had been heaped up into one. (J. 2, 24, 3; G. 2, 249.)

It makes no difference whether it is an heir appointed for the whole that is asked to give up the inheritance in whole or in part, or an heir appointed for part that is asked to give up either his whole part or a part of his part. In the latter case, too, we have ordered the same rules to be observed that we have spoken of in regard to the whole inheritance. [An account of the fourth part of that part is usually taken under the *Senatus Consultum Pegasianum.*] (J. 2, 23, 8; G. 2, 259.) (See p. 815.)

Paul adds other words, as usual, as *mando, deprecor, cupio, injungo, desidero, impero.* (Paul, Sent. 4, 1, 6.) In ordinary cases, *relinquo* or *commendo* was not sufficient; but as between father and son any words showing an intention to create a trust were given effect to. (Paul, Sent. 4, 1, 11.) In the time of Justinian, however, these distinctions were disregarded, and any words indicating the intention of the testator were sufficient.

II. *Fideicommissa* as Affecting the Position of the *Heres.*

In discussing the duties of a *heres*, nothing was said of his duties to a person to whom he was asked to surrender the whole or part of what was left him. It was not expedient to complicate the exposition, at that stage, with an account of a process essentially connected with the investitive facts; for,

---

[1] *Fideicommissum est quod non civilibus verbis sed precatione relinquitur; nec ex rigore juris civilis proficiscitur, sed ex voluntate datur relinquentis.* (Ulp. Frag. 25, 1.)

[2] *Lucius Titius heres esto, "poterit adicere:" rogo te, Luci Titi, petoque a te ut, cum primum possis hereditatem meam adire, eam Gaio Seio reddas, restituas.*

in the end, the *fideicommissarius heres* became a true universal successor, and therefore, like the *bonorum possessor*, to all intents and purposes an heir. This result was not, however, finally attained until the time of Justinian, so that the development of the law of testamentary trusts extended throughout the duration of the Empire, from Augustus to Justinian.

EXPLANATION OF TERMS.

Heres is used to designate the heir appointed by a will, or taking *ab intestato*.

Fideicommissarius is the *cestui que trust*, the person to whom, by way of trust, the heir is required to give up the whole, or a share, of the inheritance.

(A.) Duties of *Heres* to *Fideicommissarius*.

1. In respect of the *corpus* of the property. The *heres* must surrender to the *fideicommissarius* what he is required by the deceased.

(1.) The ordinary case was when the *heres* was asked simply to surrender the inheritance to another.

The *heres* must give up to the *fideicommissarius* all that he has obtained as heir, or such proportion thereof as he is charged to surrender. This includes all payments made to the heir even if in discharge of a mere natural obligation. (D. 36, 1, 47.)

A husband was suffered to manage his wife's extra-dotal property, and before he had rendered an account the wife died, leaving him sole heir. He was, however, charged to give up ten-twelfths of the inheritance to their son on his (the husband's) death, and two-twelfths to a grandson. The husband must account to the son and grandson for his administration of the wife's property. (D. 35, 2, 95, pr.) The trust includes her dowry, restored to her after divorce. If the property is actually restored, it is part of her goods in possession at the time of her death; if it is not restored, the husband owes the amount, by stipulation, to his wife, and he must pay it to the heir as a debt forming part of the inheritance. (D. 36, 1, 78, 9.)

But a *heres* is not bound to surrender to a *fideicommissarius* what he receives as legatee or *fideicommissarius*, and not as *heres*, unless such appeared to be the intention of the testator.

Titius and Gaius are appointed co-heirs. Titius is asked to surrender his inheritance to Maevius; Gaius is asked to surrender half his share to Titius. Is Titius bound to surrender what he receives from Gaius? No, that is excluded, because the word "inheritance" (*hereditas*) does not include legacy or trust (*fideicommissum*). (D. 32, 1, 96.)

A testator appointed his daughter Sextia for a quarter, and Seius and Marcius, sons of a sister, for other three quarters. Sextia and Marcius were substituted reciprocally, and certain things were given to Marcius as a pre-legacy (*per praeceptionem*). Marcius never entered, and died intestate, leaving Seius his heir. Does Sextia as substitute, or Seius as heir to Marcius, take the pre-legacy? It was held that Sextia got only the share of Marcius, and that Seius was entitled to the legacy. This decision is based on the same principle, that the term inheritance excludes legacy, and equally so whether Sextia takes as substitute or as *fideicommissarius*. (D. 32, 1, 32.)

A testator left several heirs, and among them three freedmen for three-fourths of his inheritance. To them he also gave his lands as a legacy (*praelegatum*), and charged them not to alienate the land, but that the survivor should have the whole. One of the three freedmen, Otacilius, was charged to surrender all his share of the inheritance (*hereditas bonave*) to another, deducting debts and legacies, and reserving 20 *aurei* to himself. This trust does not include his share of the lands left as a pre-legacy (*per praeceptionem*). (D. 36, 1, 78, 13.)

A testator appointed his children heirs, specifying their shares and giving them pre-legacies, on trust that whichever of them died without children should surrender his portion (*portio sua*) to the rest. Held to include the pre-legacies, because the word portion was not qualified by "portion of the inheritance" (*portio hereditaria*). (D. 36, 1, 3, 4.)

A testator appointed three heirs,—his brother Maevius for nine-twelfths, one Seius for two-twelfths, and Stichus, a slave of Seius, but a natural son of Maevius, for one-twelfth. He charged Seius to manumit Stichus. In *codicilli* the testator added that if Seius raised any controversy, the share of Stichus should go to Maevius, and Maevius was charged to surrender to Stichus whatever he got from the inheritance (*quidquid ad te pervenerit ex hereditate mea*). Seius accepted, and so was obliged to manumit Stichus. Suppose Seius raises a dispute about the one-twelfth given to Stichus, and it is forfeited to Maevius and recovered by him, must he surrender this one-twelfth as well as the nine-twelfths to Stichus? Yes, on account of the largeness of the words. (D. 36, 1, 78, 2-3.)

A daughter was made heir, and charged, if she died leaving children surviving, to surrender to her brother her share of her father's property (*partem ejus quae ad eam ex bonis patris pervenisset*). She died leaving a daughter. Must her heir surrender what was given to her by her father as dowry? No, that is not part of her father's inheritance; and even if the father had only promised a dowry, her heir will recover it as a debt due to the daughter. (D. 36, 1, 62, pr.)

A husband appointed his wife heir for one-third, and gave her dowry as a pre-legacy. "To Seia, my wife, I wish my sons to give the amount of her dowry brought to me on her behalf." He charged his wife to give up after her death her share of the inheritance and legacies (*quaecumque ei legasset*) to Titius, their son. This was held not to include her dowry left as a pre-legacy, unless this was manifestly the testator's intention. In the latter case, however, she could not be required to surrender it unless she got equal advantages to it under the will. (D. 36, 1, 78, 14.)

(2.) The right of the *fideicommissarius*, until the moment of surrender, is a right *in personam* against the heir charged with the trust, and against no one else. Up to that moment the heir alone has *jus in rem*, but when the surrender is made, the property at once vests in the *fideicommissarius* even before he has actual possession. (D. 36, 1, 63, pr.) Previous to that moment the heir is answerable for misconduct only in a fideicommissary suit; after that he may be sued like anyone else for theft or damage done by him to the property. (D. 36, 1, 70, 1.) The surrender confirms any alienations made by the *fideicommissarius* before (D. 36, 1, 56), and revokes all alienations made by the *heres*, except those for payment of debts of the deceased. (D. 46, 3, 104.) But the freedom of a slave manumitted by the *heres* was not revoked; the heir, however,

must pay his value to the *fideicommissarius*, and that even when the trust was in *codicilli* unopened, and of whose nature the *heres* could not be cognisant. (D. 36, 1, 25, 2.) By these restrictions the right of the *heres* was practically in abeyance. As the *fideicommissarius* had a right to call for the surrender, he was substantially owner. Thus, again, there emerges in Roman law a divided ownership; the *heres* is technical owner, but the *fideicommissarius* is beneficial owner.

(3.) *Quarta Pegasiana.*—The position of a *heres* asked to surrender an entire inheritance was the same as that of a *heres* before the *lex Falcidia*, when all the property was swallowed up in legacies. The result was a failure of the will, because the *heres* would not accept the risk and trouble when he was to get nothing for it. This danger was removed by the *Senatus Consultum Pegasianum*, A.D. 70, which gave the *heres* the same right to a fourth against the *fideicommissarius* that he had by the *lex Falcidia* against legatees. (D. 36, 1, 21; D. 36, 1, 68, 1.) This enactment applied also to those succeeding *ab intestato*. (C. 6, 49, 5.)

A *fideicommissarius* neglects for a long time to claim the surrender of an inheritance from the *heres*. Does the income obtained by the *heres* during this period count as part of the fourth that he is entitled to retain? No, because his income accrues to him from the negligence of the *fideicommissarius*, not from the will of the deceased. If, however, the claim of the *fideicommissarius* is suspended for a certain time, or until a future uncertain event, the income is given to the *heres* of the deceased, and counts as part of the fourth. (D. 36, 1, 22, 2.)

At first the right of the heir to the fourth was indefeasible; but a practice grew up, when a testator left a pre-legacy to a *heres*, to petition the Emperor to require the *heres* to be content therewith. (D. 36, 1, 30, 4.) Even when nothing was left to the heir, and the testator refused him a fourth, his will was generally supported and a fourth allowed to the heir, as appears from rescripts of Trajan, Hadrian, and Antoninus. (D. 36, 1, 30, 5.) Finally, Justinian allowed a testator to refuse the fourth altogether. (Nov. 1, 1, 2.)

2. In respect of the income of the property (*fructus*), the general rule was that the heir was entitled to the income or profits of the inheritance until the time when he was required to surrender it, unless the testator either expressly or by implication desired the income to be surrendered along with the inheritance. (D. 36, 1, 18, pr.)

A testator charged his *heredes* to give all they got from one-third of the inheritance to his foster-son Caius Maevius when he was fifteen years old; and meanwhile, that

they should invest a sum at interest sufficient to meet his wants; and he, moreover, assigned two slaves, out of whose earnings the son might be supported till he was fifteen. It was held that the testator clearly meant the foster-son to have the interest of the sum that ought to have been invested; and that must be reckoned as running not from the fifteenth year of the son's age, but from the death of the testator; and when the slaves were sold, the amount of their wages, and not merely interest, is due for the same period. (D. 36, 1, 78, 12.)

A testatrix appointed Pollidius heir, and charged him to give up the whole to her daughter when she had reached a certain age. The testatrix intimated that she took this course because she preferred to entrust the property to her relation Pollidius rather than to a *tutor*. She also gave Pollidius a legacy of land. Papinian, when Prætorian Prefect, gave judgment that Pollidius should give up to the daughter the whole income and profits of the inheritance from the death of the testatrix. He based this judgment upon two grounds: (1) that Pollidius got the land as a pre-legacy, from which it was inferred that he was to have no more; and (2) because the testatrix showed that her only object was to have a trustworthy guardian for her daughter's property, instead of incurring the risk of a *tutela*. (D. 22, 1, 3, 3.)

Ballista appointed Rebellianus heir on condition that he covenanted with the colony of Philippi, that if he died without children, whatever he got from the testator would go to the colony. This was held to imply a gift of the income as well as of the capital to the colony, on account of the covenant (*stipulatio*) required to be made. The covenant was in fact conditional, and once the condition was fulfilled, according to the rule, the contract was regarded as perfect from the time it was made. (D. 36, 1, 32.)

A testator said, "Whatever my heirs obtain from my inheritance, I charge them to give up on their death to my native colony, Beneventum." Here, because the heirs are not required to promise the amount, they are entitled to the income during their life. (D. 36, 1, 57, pr.)

Apportionment.—A daughter, Titia, sole heir, was asked to surrender to Gaius half the inheritance, deducting small legacies and debts, which left her more than a clear Falcidian fourth. Titia surrendered the half at the proper time. Before that time, Titia received interest accruing due after the testator's death, and at the time of surrender, contracts are running under which interest will be due, and rents. Can Gaius recover interest accruing between the death of the testator and the surrender of his share? Titia claimed all interest and rents because they were *fructus*, and because she surrendered at the proper time, and had not fallen into *mora*; and in the absence of *mora*, the *fructus* go to the heir. Marcellus stated that Titia could not claim the interest and rents that she could recover only by obtaining from Gaius a cession of his rights of action. The interest and rents that had accrued due and were payable before the surrender, she retained, as reward for her risk, trouble, or toil: but growing crops and interest not actually due form part of the inheritance, and must be delivered to Gaius. (D. 36, 1, 44, 1; D. 36, 1, 58, 2.)

3. The heir, prior to surrender of the trust property, must guard it with care, and is responsible for loss arising from negligence. The care required is not, however, the highest. It is that usually taken by the heir in managing his own property. (D. 36, 1, 22, 3.)

(B.) Duties of *Fideicommissarius* to *Heres*.

1. All expenses incurred by the heir in managing the property may be retained by him; if he does not retain them,

he may take back the property until the claim is satisfied. (D. 36, 1, 19, 2; D. 36, 1, 22, 3; D. 36, 1, 36.)

An heir is charged to manumit some of his own slaves and surrender the inheritance to them. He may retain the value of the slaves. (D. 36, 1, 27, 17.)

An heir obtained a pre-legacy of land. It turned out that the land did not belong to the testator. In the absence of any evidence showing the testator's knowledge that the land was not his, it was held that the testator wished the heir to have the land, and accordingly he may retain its value in surrendering the inheritance. (D. 36, 1, 72.)

2. The *fideicommissarius* must covenant with the heir to indemnify him in case he is held responsible for the eviction of purchasers from anything he has sold them out of the inheritance. (D. 36, 1, 69.)

A *heres* was required to surrender an inheritance, reserving some land. Suppose this land is pledged. The debt is part of the burdens of the inheritance, and therefore some jurisconsults held that the *fideicommissarius* should covenant to secure the heir against eviction by the creditor. Julian, however, thought such security could not be required. If the land, without security against eviction, would sell for one quarter the free proceeds of the inheritance, the *heres* has no claim on the *fideicommissarius*, because he gets his fourth; but if the land would not fetch so much, the *heres* is entitled to retain as much as would make up his fourth. (D. 36, 1, 1, 16.)

(c.) Duties of *Fideicommissarius* to Creditors and Legatees.

At first the *fideicommissarius* occupied an uncertain position. If the whole inheritance was to be restored to him, he could not be called a legatee, and yet he was not heir. It was a maxim of the Roman law that the character of heir was indivestible (D. 28, 5, 88); and hence in the law of inheritance there are, in strictness, no divestitive facts. The heir could surrender the property, but he did not cease to be heir; the only one that could sue or be sued in respect of actions connected with the inheritance was the heir.

When the inheritance is given up, he that gave it up remains none the less the heir. But he that receives the inheritance was regarded as in the position sometimes of an heir, sometimes of a legatee. (J. 2, 23, 3; G. 2, 251.)

We have now to trace the steps by which the *fideicommissarius* escaped from this ambiguous and unsatisfactory position, and was ultimately brought face to face with the creditors and legatees, in form as well as substance, an heir.

1. From Augustus to A.D. 56.

In old times, indeed, he was in the position neither of an heir nor of a legatee, but rather of a purchaser. The practice at that time was for the man to whom the inheritance was being given up, to buy it with a single coin for form's sake. All the stipulations, too, usually interposed between the vendor of an inheritance and the purchaser were actually interposed,

between the heir and the man to whom the inheritance was being given up—that is, in this way: the heir stipulated with the man to whom the inheritance was being given up, that for all he had been condemned to pay on account of the inheritance, or that he had otherwise given in good faith, he should be indemnified; and that in any case, if anyone went to law with him on account of the inheritance, he should be properly defended. The other—the man that was receiving the inheritance—used to stipulate in turn that if anything came from the inheritance to the heir it should be given up to him; as also that the heir should suffer him to pursue the actions pertaining to the inheritance as his procurator or *cognitor*. (G. 2, 252.)

This somewhat clumsy expedient was the only means of giving effect to *fideicommissa* from the time they were first sanctioned till the reign of Nero.

2. From A.D. 56 to A.D. 70.—*Senatus Consultum Trebellianum.*

But afterwards, in the time of Nero, when Trebellius Maximus and Annaeus Seneca were Consuls, a *Senatus Consultum* was made, providing that if an inheritance was given up to anyone on the ground of a trust, then all the actions that by the *jus civile* were open to the heir and against the heir, should be given to the man and against the man to whom the inheritance had been given up under the trust. After this *Senatus Consultum* [those securities fell out of use, for] the Prætor began to give *utiles actiones* to him and against him that received the inheritance, as if to the heir and against the heir. [They are set forth in the Edict.] (J. 2, 23, 4; G. 2, 253.)

The words of the enactment are given as follows:—

"Whereas it is most fair, in the case of all inheritances left upon trust, that any actions arising concerning the property should be taken up by those to whom the right and profits are transferred, rather than that the faith of the heir should expose him to peril; it is enacted that the actions heretofore given to or against heirs shall be given not to and against those required under a trust to surrender the property, but to and against those to whom under the will the property shall have been surrendered, so that for the future the last wishes of the deceased may be better upheld." (D. 36, 1, 1, 2.)

This enactment applied both to testamentary and intestate heirs. (D. 36, 1, 1, 5.) The heir might transfer the inheritance, either by actual delivery (*re*) or by a message either verbal or written. (D. 36, 1, 37, pr.) If the trust was conditional or postponed, the surrender had no effect until the time arrived or the event happened. (D. 36, 1, 9, 3; D. 36, 1, 10.)

After the transfer, the *fideicommissarius*, and not the *heres*, could sue the debtors of the deceased. (D. 36, 1, 40, pr.)

A slave forming part of the inheritance was stolen prior to the transfer and after the death of the testator. The *heres*, and not the *fideicommissarius*, can sue the thief. The same rule holds if any damage has been done to a slave. (*Hae enim actiones transeunt quae ex bonis defuncti pendent.*) (D. 36, 1, 66, 2.)

An heir lent money received from the testator, and accepted a pledge from the debtor. The *fideicommissarius* has no action in respect of the pledge. But if the debt was due to the testator, and a pledge was given to the heir, the heir must admit the *fideicommissarius* to the benefit of the security. (D. 36, 1, 73, pr.)

A testator having rights to the services of a freedman appoints his son heir, charg-

ing him to surrender the inheritance to a stranger. The son retains the right to the services of the freedman, to which he is entitled not as heir, but as son of the patron. (D. 36, 1, 55.)

The heir also retained his rights to the family burial-place. (D. 36, 1, 42, 1.)

If the whole inheritance is transferred, the *fideicommissarius* must pay all debts and legacies as if he were sole heir; if only a portion, the *fideicommissarius* is practically a co-heir, and must bear the burdens in proportion to his share. (C. 6, 49, 2.)

A testator has 400 *aurei*. He leaves 200 *aurei* as a legacy to Titius, and asks his heir to surrender one-half the inheritance to Sempronius. But the heir is entitled to his Falcidian fourth. Titius must therefore sue the heir for 100 *aurei*, and Sempronius for another 100. (D. 36, 1, 1, 20.)

A testator has 400 *aurei*, and bequeathing 300 *aurei*, asks the heir to give up the whole inheritance, deducting 100 *aurei*. In this case the heir gets 100 *aurei*, and the *fideicommissarius* must alone bear the burden of the legacy. (D. 36, 1, 1, 21.)

A testator has 400 *aurei*; he gives a legacy of 300, and asks the heir to give the inheritance to Seius, reserving 200 to himself. In this case the heir must give 100, and the legatee can only claim 200 from the *fideicommissarius*. (D. 36, 1, 1, 17.)

Legatees and *fideicommissarii* charged with legacies or trusts cannot claim a deduction of the Falcidian fourth (D. 35, 2, 47, 1); but if the charge is one that the *fideicommissarius* succeeds to only in default of the heirs, as where the heir refused to enter, he may, as the heir would have done, retain a fourth. (D. 36, 1, 55, 2.) If, however, the share of the *fideicommissarius* has been diminished by the Falcidian fourth, he may make a corresponding reduction in the legacies charged upon him (D. 35, 1, 43, 3; D. 35, 2, 32, 4.)

Titius is asked to give an inheritance to Maevius, and Maevius to pay Seius a certain sum. Titius retains his fourth. Maevius pays a quarter less. (D. 36, 1, 63, 12.)

An heir was charged to surrender the inheritance to testator's wife; and he did so, reserving his fourth. His wife was charged to restore a quarter of the inheritance at once, and after a time the residue to another. She must restore a quarter of what she gets, and the residue afterwards, not the whole as left by her husband. (D. 36, 1, 78, 11.)

3. From Vespasian to Justinian (A.D. 70 to A.D. 527).—*Senatus Consultum Pegasianum.*

The *Senatus Consultum Trebellianum* was drawn on the right lines; it made the *fideicommissarius* a true universal successor, who could sue or be sued as heir. A *fideicommissum* thus became an investitive fact of an inheritance. It had, however, one serious flaw. It did not compel the heir appointed to enter *pro forma* and transfer the inheritance. If the heir entered, the *Senatus Consultum* was effectual, but the heir need not enter,

and would not do so unless it were worth his trouble. In a mature law of trusts, it is an elementary maxim that a trust shall not fail from want of a trustee; but in this early stage of their growth, the maxim was that no trust should be enforced unless there was a trustee. But a step in advance was soon taken. It consisted in offering a Falcidian fourth to the heir as a bribe to enter; and if he alleged that the inheritance was insolvent, he was compelled to enter *pro forma* in order to transfer the inheritance, in which case the whole burden and benefit of the inheritance attached to the *fideicommissarius*. (D. 36, 1, 27, 2; D. 36, 1, 14, 4.)

But the heirs appointed, when they were asked, as they often were, to give up either the whole inheritance or almost the whole, used to refuse to enter on the inheritance for the sake of a gain that was no gain at all or very trifling, and thus trusts were extinguished. Afterwards, therefore, when Pegasus and Pusio were consuls, the Senate came to a resolution that a man asked to give up an inheritance might lawfully keep back a fourth part of it, just as under the *lex Falcidia* there is a right to keep back a fourth in the case of legacies. Even in the case of single things left in trust the same keeping back is allowed. After this *Senatus Consultum* the heir himself used to sustain the burdens of the inheritance; whereas he that under the trust received a part of the inheritance was in the position of the legatee of a share (*partiarius*)—a legatee, that is, to whom a share of the goods was left. This form of legacy was called *partitio*, because with the heir the legatee shared the inheritance. Hence the stipulations usually interposed between the heir and the legatee of a share, were likewise interposed between him that received the inheritance under the trust and the heir; that is, in order that both gain and loss from the inheritance should fall to them in common, in proportion to their shares. (J. 2, 23, 5; G. 2, 254.)

Therefore, if the heir appointed was asked to give up not more than three-fourths of the inheritance, then under the *Senatus Consultum Trebellianum* the inheritance was given up, and against both the actions pertaining to the inheritance were given in proportion to their shares. They were given against the heirs by the *jus civile;* against him that received the inheritance under the *Senatus Consultum Trebellianum* as if he were heir. [The heir, however, remains heir even for the part he has given up; and by him and against him actions may be brought for the whole. But he is not burdened further, nor are actions given him further, than the advantage of the inheritance remains with him.][1] But if he was asked to give up more than three-fourths or even the whole inheritance, there was room for the *Senatus Consultum Pegasianum;* and the heir that had once entered on the inheritance, if only he entered by his own wish, whether he kept back a fourth part or refused to keep it back, himself sustained the entire burdens of the inherit-

[1] The meaning is that although the Senatus Consult did not divest the heir of his status, and therefore his liability under the civil law remained, yet that in virtue of the Senatus Consult he could not be sued or sue except for his own share.

ance. If, however, he kept back the fourth, then stipulations, as if of a share and in proportion to a share (*quasi partis et pro parte*), were interposed, as between the legatee of a share and the heir; but if he restored the whole inheritance, the stipulations appropriate to the sale and purchase of an inheritance were interposed. If, further, the heir appointed refuses to enter on the inheritance, pleading that he suspects it as likely to cause him loss, the *Senatus Consultum Pegasianum* provides that at the desire of the man to whom he is asked to give it up, the heir shall, by the Prætor's orders, enter and give up the inheritance; and in that case the actions are to be given to and against him that receives the inheritance, just as if in law it came under the *Senatus Consultum Trebellianum*. In this case no stipulations are needed, because at one and the same time he that gives up the inheritance is secured, and the actions pertaining to the inheritance are transferred to and against him that receives it; for both the *Senatus Consulta* in such a case meet. (J. 2, 23, 6; G. 2, 255-258.)

Partis, a share of the assets; *pro parte*, a proportion of the burdens.

4. Justinian's Legislation.

But the stipulations that came down under the *Senatus Consultum Pegasianum* were displeasing even to antiquity itself; and in some cases Papinian, that man of lofty intellect, calls them captious; whereas we approve of simplicity rather than of difficulty in statutes. After having, therefore, had all the points both of likeness and of difference in both *Senatus Consulta* laid before us, we have determined to be done with the *Senatus Consultum Pegasianum*, which came on at a later time, and to lend all our authority to the *Senatus Consultum Trebellianum*. Under it, therefore, trust inheritances are to be given up, whether the heir has by the testator's wishes a fourth, or more, or less, or nothing at all, so that when nothing or less than a fourth remains with him, he may lawfully keep back either the fourth, or what is wanting, by our authority, or demand it back if already paid. At the same time, as if under the *Senatus Consultum Trebellianum*, actions in proportion to their shares may be brought both against the heir and against him that takes under the trust (*fideicommissarius*). But if he of his own accord restores the whole inheritance, all the actions pertaining to the inheritance may be brought by or against him that takes under the trust. As regards also the chief point of the *Senatus Consultum Pegasianum*, that when the heir named in the will refused to enter on the inheritance given him, the necessity should be laid upon him of giving up the whole inheritance to him that took under the trust, if he wished this, and thus making all the actions pass to him and against him—this also we have transferred to the *Senatus Consultum Trebellianum*. Under it alone, therefore, is this necessity also laid upon the heir, if, when he is not willing to enter, the man that takes under the trust desires the inheritance to be given up to him, while neither loss nor advantage remains with the heir. (J. 2, 23, 7.)

The constitution is as follows: Sancimus itaque ut sive per contumaciam abfuerit is cui restitutio imposita est, sive morte praeventus nullo relicto successore fuerit, sive a primo fideicommissario in secundum translatio celebrari jussa est, *ipso iure* utiles actiones transferantur. (C. 6, 49, 7, 1.)

SPECIAL CASE.—If an heir is asked to deduct or pick out first (*praecipere*) some one thing that includes his fourth—a farm, for instance, or anything else—and then to give up the inheritance, the surrender must be made under the *Senatus Consultum Trebellianum*, exactly as if he had been asked to keep back a fourth part, and to give up the rest of the inheritance. But there is this difference: In the one case—that is, when something is deducted or picked out first, and then the inheritance given up—the actions under that *Senatus Consultum* are transferred as one whole, and the thing that remains with the heir, remains with him free from any burden pertaining to the inheritance, just as if he had acquired it under a legacy. But in the other case—that is when, after keeping back the fourth part, the heir is asked to give up the inheritance—the actions are split up; for three-fourths they are transferred to him that takes under the trust; for the one-fourth they remain with the heir. Nay, even although the one thing that is deducted or picked out first, before a man is asked to give up the inheritance, contains the largest part of the inheritance; all the same the actions are transferred as one whole, and the man to whom the inheritance is being given up ought to consider well whether such a surrender is any good to him. The same rules come in if two or more things are to be deducted or picked out before he is asked to give up the inheritance. Indeed, even if it is a fixed sum that is to be deducted or picked out first before a man is asked to give up the inheritance, and it contains the fourth, or even the largest part of the inheritance, the rule of law is the same. All we have said about him that is appointed heir to the whole (*ex asse*), we apply to him also that is appointed heir to a part. (J. 2, 23, 9.)

III. *FIDEICOMMISSA* AS ENLARGING THE POWER OF SUBSTITUTION.

By direct substitution a testator could provide for the failure of an heir; but if the heir appointed once entered, the substitution never could take effect. In pupillary substitution an advance was made. A father was allowed to substitute to his child, even if the child entered, if it died under the age of puberty; but beyond that no one could go. These restrictions were not imposed upon trusts, which in fact formed a contrast to substitutions, for a trust could have no effect unless the heir entered; a substitution had no effect if he did enter.

Again, although we cannot make an appointment to take effect after the death of the man that becomes our heir of another heir in his room, yet we can ask the heir to give up at his death the inheritance to another in whole or in part. Further, since a trust can be given to take effect even after the death of an heir, we can bring about the same result if we write as follows:—"When Titius, my heir, shall be dead, I wish the inheritance to belong to Publius Maevius." In both ways, in the latter as well as in the former, the testator leaves his heir bound to give up the trust. (G. 2, 277.)

A *heres* might be required to give up the whole or a part of the inheritance at a given future time, or at his death; or conditionally, as in the event of his dying without children.

The man to whom anything is given up, the testator can ask to give it up in turn to another either in whole or in part, or even to give up something else. (J. 2, 23, 11.)

The following examples of valid trusts illustrate the variety of provisions that could be made through the flexible instrumentality of *fideicommissa*:—

A husband is left sole heir, and charged to surrender, *on his death*, ten-twelfths to his son, and two-twelfths to a grandson. (D. 35, 2, 95, pr.)

An heir is charged to surrender at once one-half of the inheritance to Publius Maevius, and on his death the other half to the same person. (D. 36, 1, 27, 16.)

Several children are appointed heirs, and charged, if any of them die without children, to surrender their share to the rest; and if all but one die without children, the survivor should have the whole. (Paul, Sent. 4, 1, 13; D. 36, 1, 3, 4; D. 36, 1, 32; D. 36, 1, 22, 4.)

A father appointed his two sons heirs on trust, that if one died without children, his share should go to the surviving brother; and if both died without children, the whole should go to a granddaughter, Claudia. (D. 36, 1, 57, 1.)

Maevia appointed her son heir for five-twelfths, her daughter Titia for three-twelfths, and another son, Septicius, for four-twelfths. Septicius was charged, if he died before his twentieth year without children, to give up his share to the others. (D. 36, 1, 78, 5.)

Seius Saturninus appointed Valerius Maximus heir on trust to surrender the inheritance to testator's son, Seius Oceanus, when he was sixteen. (D. 36, 1, 46.)

A testator appointed several heirs, including three of his freedmen, for three-quarters of his property. He also gave them lands as a pre-legacy, and charged them not to alienate the land, and that the whole should go to the survivor. On one of the three, Otacilius, he imposed a trust to give up all that he got to Titius, reserving only twenty *aurei*. (D. 36, 1, 78, 13.)

A testator appointed his son heir for nine-twelfths, and his wife for three-twelfths—to the son in trust for the wife; and he charged the wife to take care of the son, to allow him 10 *aurei* a month until he attained his twenty-fifth year, and then to surrender to him one-half of the inheritance. (D. 33, 1, 21, 2.)

Power of Appointment.—A husband made his wife heir, and charged her on her death to give his property to his children, or any one of them, or to whichever of his grandchildren she pleased, or to whichever of his blood relations she pleased. This was held not to give any election as regards the children, but to give an election among the grandchildren: and if there were none of these, then among the cognates. (D. 36, 1, 57, 2.)

Trust upon a Trust.—Gaius is appointed heir, and charged to manumit Stichus; also to give up the inheritance to Titius; who, again, is charged to give it to Stichus. Stichus, but not Titius, could under the compulsory clause of the *Senatus Consultum Pegasianum* force Gaius to enter *pro forma*, and surrender the inheritance. (D. 36, 1, 16, 16.)

Gaius is appointed heir on trust for Titius; and Sempronius is substituted for Gaius, on trust for Maevius. Under the same *Senatus Consultum* Gaius is compellable to enter at the instance of Titius. (D. 36, 1, 63, 13.)

Claudius and Sempronius are appointed heirs and substituted reciprocally, and both, or whichever enters, are charged to restore half the inheritance to Gaius after five years. (D. 36, 1, 16, 7.)

Antistia appointed Titius heir, and manumitted Albina in her will, at the same time bequeathing Albina's own daughter to her on trust to manumit her.

Antistia also charged Titius to surrender the inheritance to the manumitted daughter of Albina. (D. 36, 1, 11, 2.)

A testator appointed his son sole heir. He made *codicilli*, which were not to be opened until after the son's death, charging his son, if he died without children, to give the inheritance to his sister. The son necessarily did not know the contents of the *codicilli*, but still they were binding. (D. 36, 1, 25, 2.)

A testator, in *codicilli* confirmed by will, bequeathed a farm to his freedmen, forbidding them to alienate it, and desiring it to go to their sons and grandsons. He added a clause that the freedmen should, out of the rents of the farm, pay to his heir Titius 10 *aurei* a year for thirty-five years from his (testator's) death. Unless the freedmen can prove that the testator meant to confine the annuity to Titius, it is due to the heirs of Titius until the end of the thirty-five years. (D. 33, 1, 18, pr.)

IV.—*Fideicommissa* as Removing Testamentary Incapacity.

As regards the capacity of the testator, *fideicommissa* had no effect. No one could make a *fideicommissum*, unless he could make a will. (D. 29, 7, 6, 3; D. 29, 7, 8, 2; D. 29, 7, 2, 3.) But *fideicommissa* might be made in favour of persons that could not take as *heredes*.

1. Again, although a *Senatus Consultum* forbids us to make a slave of our own under thirty a freeman and our heir, yet most are of opinion that we can order him to be free on reaching the age of thirty, and that we can ask that the inheritance shall then be given up to him. (G. 2, 276.)

This was under the *lex Ælia Sentia*, and the provision was repealed by Justinian.

2. There were also other differences that do not exist now. Aliens, for instance, could take trusts; and indeed this was, on the whole, the origin of trusts. But afterwards that was forbidden; and now, in consequence of a speech by the late Emperor Hadrian, a *Senatus Consultum* was made that such trust should be claimed for the *Fiscus*. (G. 2, 284-285.)

About eighty years afterwards, under Caracalla, citizenship was extended to all Roman subjects, and this exception ceased to have any importance.

3. Latins too, who are forbidden to take inheritances and legacies directly at law under the *lex Junia*, can take them under a trust. (G. 2, 275.)

Dedititii could not take even by way of trust.

4. A woman, again, who by the *lex Voconia* cannot take from a man rated in the census at one hundred thousand *asses* by being appointed his heir, can take by a trust the inheritance left her. (G. 2, 274.)

The *lex Voconia* was obsolete in the time of Justinian.

5. The unmarried, who by the *lex Julia* are forbidden to take inheritances and legacies, were in old times thought fit to take trusts. The childless, too, who by the *lex Papia*, because they have not children, lose half of all inheritances and legacies, were in old times thought fit to take trusts entire. But afterwards the *Senatus Consultum Pegasianum* forbade them to take trusts also (beyond a half), as well as legacies and inheritances. The trusts were transferred to those named in the will that had children, or if it were to turn out that none had children, to the People,—as is the law with regard to legacies and inheritances. (G. 2, 286.)

This provision of the *lex Papia* was repealed by Constantine.

6. An "uncertain person" could receive a trust, but in the time of Justinian also directly by will.

Although, from the same reason, or from a like one, in old times, bequests could be made to an indeterminate person, or to a strange posthumous child by a trust, and that though he could neither be appointed heir nor have a legacy left him, by a *Senatus Consultum* passed at the instance of the late Emperor Hadrian the same rule was settled for trusts as for legacies and inheritances. (G. 2, 287.)

In one respect *fideicommissum* was narrower than direct bequests, because no *tutor* could be appointed by *fideicommissum*. There was no motive whatever to introduce trusts for such a purpose.

But although in many parts of the law trusts are more wide-reaching than direct bequests, and in some are equally effective, yet a *tutor* cannot be appointed by will otherwise than directly; as in this way, "To my children let Titius be *tutor*;" or thus, "To my children I appoint (*do*) Titius *tutor*." By a trust he cannot be appointed. (G. 2, 289.)

B. The Instruments Creating *Fideicommissa*.

I. A will. Although it was by means of *codicilli* that *fideicommissa* were introduced, yet once introduced, they were permitted equally in wills.

II. By letter, or even by mere spoken words in the presence of witnesses, a trust could be imposed. This is stated to have been undoubted law by Diocletian and Maximian (A.D. 293). (C. 6, 42, 22.) Both Paul and Ulpian (Ulp. Frag. 25, 3) say that a trust might be constituted even without words, by a mere nod (*nutu*), provided the person had a capacity for making a will. (D. 32, 1, 21, pr.) Regard was had to the intention of a testator, and not to the manner in which his intention was signified.

III. *Codicilli.*—*Codicilli* and *fideicommissa* drew their first breath at the same time, and they were closely connected in their history. *Codicilli* may, in fact, be regarded after the establishment of the *fideicommissaria hereditas* as the informal will of the Roman law. This will appear from a comparison with the *testamentum*.

I. Comparison of *codicilli* and *testamentum*.

Before Augustus' time, it is agreed, there were no *codicilli* in law; but Lucius Lentulus, who also began trusts, brought them in. For when he was on his deathbed in Africa, he wrote *codicilli*, confirmed by will, in which he

begged Augustus by a trust to do something. The late Emperor Augustus fulfilled his wishes; others thereafter followed his authority, and made good their trusts; and Lentulus' daughter paid legacies she did not owe at law. Augustus, it is said, then called together the men learned in the law, and among them Trebatius, at that time the greatest authority, and asked them whether this could be received, or whether the use of *codicilli* was out of harmony with the principles of law. Trebatius, it is said, advised Augustus what to say,—that this was most useful and needful to the citizens, because of the great and long journeys there were among the ancients; on these, if a man could not make a will, he might yet make *codicilli*. After this, when even Labeo made *codicilli*, no one any longer doubted that *codicilli* would be admitted as thoroughly good at law. (J. 2, 25, pr.)

1. Form of codicils.

Of *codicilli* a man may make more than one, and they need no formalities in drawing them up. (J. 2, 25, 3.)

This was the main fact. There could be only one valid will —a formal document; there might be many *codicilli*, and they required no solemnities of form. At first any writing seems to have been admitted as *codicilli*, if it showed an intention on the part of the maker to distribute his property on his death. But letters that merely *promised* to leave one's inheritance, or simply showed an inclination to do so, did not constitute *codicilli*. There must be a present intention actually to bequeath. (D. 29, 7, 17.) Even when the testator had in his will confirmed by anticipation only such *codicilli* as should be made under his own hand and seal, and the *codicilli* were neither written by him nor sealed, they were, nevertheless, quite valid. (D. 29, 7, 6, 1.)

Constantine first made the presence of witnesses necessary, but only when the *codicilli* imposed trusts on the heir *ab intestato*. (C. Th. 4, 4, 1.) Afterwards Theodosius (A.D. 424) required the presence of five witnesses, either invited for the purpose or meeting by accident, all to be present together, and to sign as witnesses if the *codicilli* were in writing; and if the *codicilli* were not in writing, then to prove the wishes of the testator. (C. 6, 36, 8, 3.) Justinian relaxed this rule.

Trusts in their early infancy depend entirely on the faith of the heirs. To this they owe not only their substance, but their name. The late Emperor Augustus, therefore, dragged them down to the bonds of law; and we too lately, striving to outdo that Emperor, and on the occasion of a case brought before us by that illustrious man Tribonian, Quaestor of our sacred palace, have made a constitution, in which we have arranged as follows:—If a testator has entrusted to the honour of his heir the surrender either of an inheritance or of some special thing, and the fact cannot be plainly shown either by

writing or by five witnesses (the statutory number recognised in trusts), but either fewer than five or no witness at all came in; then whether it is the heir's father, or whoever else it may be that chose the heir's faith, and wished something to be given up by him, if the heir, in the grip of bad faith, refuses to fulfil what his faith is pledged to, and denies that affairs took this course, and if he that takes under the trust puts the heir to his oath after first taking the oath *de calumnia* (that he brings no trumped-up charge) himself,—then he must needs come under the oath that he heard nothing of the kind from the testator; or else, if he refuses, he will be compelled to discharge the trust, whether general or special, that so the last wishes of the testator entrusted to the heir's faith may not utterly perish. These same rules, we have resolved, are to be observed when something is left in like manner to be given up by a legatee, or by one that takes under a trust. If, then, he through whom something has been left admits indeed that it has been left through him, but has recourse to legal subtleties, he is to be compelled in any case to discharge the trust. (J. 2, 23, 12.)

2. *Disherison.*—No person could be properly disinherited by *codicilli.*

3. *Legitim.*—No *codicilli* were void by reason of their not providing legitim.

4. By *codicilli*, again, no one can be appointed heir nor disinherited, even although they are confirmed by will. But he that is appointed heir by will can be asked by *codicilli* to give up the inheritance to another in whole or in part; and this although the *codicilli* are not confirmed by will. (G. 2, 273.)

By *codicilli*, again, an inheritance can neither be given nor taken away, lest the law of wills and of *codicilli* should be confounded. A disinheritance, too, cannot therefore be made by *codicilli.* But though directly an inheritance cannot be thus given or taken away, yet by a trust it can be lawfully left in *codicilli.* By *codicilli* no condition can be added to the appointment of an heir, and no substitute can be named directly. (J. 2, 25, 2.)

This is the cardinal difference between a will and *codicilli.* A will was an instrument for the appointment of an heir. That was its essential function; all else was unessential and collateral. *Codicilli* had no validity unless, either by will or *ab intestato*, an heir was in possession. It is true that indirectly, by *fideicommissum*, an heir could practically be appointed, superseding even the heir named in the will, and as time rolled on, the distinctions between the *heres* and the *fideicommissarius* were gradually obliterated; nevertheless the development of the law of inheritance, and the principle of its growth, are not intelligible without comprehending the radical difference in function between *codicilli* and wills. Hence the intimate relation between *codicilli* and *fideicommissa.* The latter could be made by will, but a will was not essential to them; whereas *codicilli* were useless for the purpose of appointing an heir except through the medium of *fideicommissa.*

5. As regards testamentary capacity. No one could make *codicilli* who could not make a will. (D. 29, 7, 6. 3.)

II. *Codicilli* as dependent on wills.

1. *Codicilli*, when there is no will, impose a trust on the heirs *ab intestato*. They are not mere appendices to wills, but may be quite independent of them, and indeed in a sense rivals.

Besides, a man that has made no will may, when at the point of death, ask him to whom he has understood his goods will belong either by statute or by the *jus honorarium*, to give up to some one his inheritance in whole or in part, or to give some thing, as a farm or a slave. But otherwise legacies (*legata*), unless under a will, do not take effect. (J. 2, 23, 10.)

2. When there is a will, *codicilli* may be confirmed or not by the will.

(1.) Do *codicilli* made prior to the will require to be confirmed in the will?

Not only after his will is made can a man make *codicilli*, but even if he is dying intestate he can create a trust by *codicilli*. But when *codicilli* were made before the will was made, Papinian says they could have no force unless confirmed afterwards by the testator's special wishes. The late Emperors Severus and Antoninus, however, declared by a rescript that, under *codicilli* preceding a will, a thing left in trust may be demanded, if it is plain that the man that afterwards made the will had not drawn back from the wishes he expressed in the *codicilli*. (J. 2, 25, 1.)

(2.) Whether made before or after the will, *codicilli* are regarded as a charge on the testamentary heirs alone, so that if for any reason the heirs named in the will do not take the inheritance, the *codicilli* fail. (D. 29, 7, 3, 2.) Hence, although *codicilli* were not affected by the subsequent agnation of a *suus heres* (D. 29, 7, 19), yet if by that means the will was broken, the *codicilli* shared its fate. (C. 6, 36, 1.)

When there was a will, the *codicilli* were treated as part of it, and therefore were held to speak from the date of the will.

A slave belonging to the testator at the time of making his will, but afterwards sold by him, cannot be directly manumitted by *codicilli*: if the slave does not belong to the testator at the time of making the will, but does at the time of making the *codicilli*, the slave can recover his freedom by *fideicommissum*. (D. 29, 7, 2, 2.)

A person makes a will, and afterwards is arrogated. During this time he makes *codicilli*. He is emancipated, and dies. The will is valid, but are the *codicilli* made at a time when the testamentary capacity of the testator was suspended? Yes, because the *codicilli* are read as part of the will. (D. 29, 7, 8, 3.)

A testator makes a will confirming all *codicilli*, and afterwards in captivity *codicilli*. He recovers his liberty and dies. The *codicilli* are not valid. (D. 29, 7, 7, pr.)

On a question of the solvency of the testator, when slaves are alleged to have been manumitted in fraud of creditors (D. 29, 7, 4 ; D. 40, 9, 7, pr.), or when bequests are made to persons born after the making of the will, the *codicilli* are held to speak from the time when they were made. (D. 29, 7, 2, pr.)

III. Wills construed as *codicilli—Clausula Codicillaris.*

The existence of rival kinds of testamentary disposition, and rival forms of bequest, could not permanently endure. It is the nature of all such innovations as Augustus made, either to be obliterated or to change the established usage. The triumph was destined to be on the side of the newer form ; and the most complete vindication of the necessity and wisdom of the reform of Augustus, was when the will itself was content to gain vitality by being upheld as *codicilli.* It became usual with testators, in making a will, to say that if for any reason the instrument failed as a will, it should be regarded as *codicilli* (*pro codicillis etiam id valere*). (C. 6, 36, 8, pr.) In the absence of such a provision, however, an informal or imperfect will was not supported as *codicilli.* (D. 29, 7, 1.)

The exact effect of such a clause was to enable the heirs named in the will to make an election, whether they would stand upon the will or sue as *fideicommissarii,* treating the testator as dying intestate. Once they had elected, they could not alter their choice. (C. 6, 36, 8, 1.) This somewhat narrow construction was relaxed by Theodosius (A.D. 424) in the case where a parent of either sex appointed a descendant within the fourth degree of agnation or third of cognation. In this case, if the heirs sued on the will and were defeated, they were allowed to fall back on the codicillary clause, and sue the heirs *ab intestato* as *fideicommissarii heredes.* (C. 6, 36, 8, 2.)

"This will I wish to be valid in any way it can," was held to bind the heirs *ab intestato,* by way of trust. (D. 28, 1, 29, 1.)

"I wish this also to take effect in the room of *codicilli.*" This was held to be binding by a rescript of Marcus Antoninus. (D. 29, 1, 3.)

"I, Lucius Titius, have written this my will without the help of any one skilled in the law. I have rather followed what my mind held rational, than striven after an excessive and wretched nicety. If then I have done anything irregularly, or not as a skilled man would have done it, the wish of a man of sound mind ought to be held as good as a strict observance of legal forms." No one took as heir under this will. It was held to bind the *bonorum possessores ab intestato* by way of trust. (D. 31, 88, 17.)

A testator appointed his daughter his sole heir, and if she failed to take as heir, appointed his grandson : he added, "If neither my daughter nor grandson be heirs, I wish my share, one-half of a farm, to belong to my freedmen." Neither the daughter nor grandson took under the will. No others were appointed heirs by the will ; either, then, the gift to the freedmen was void, or it must be construed as a trust binding on the heirs *ab intestato.* In this case, owing to the language of the bequest

the latter alternative was adopted. This is an instance of implied *codicillaris clausula.* (D. 31, 88, 9.)

A son appointed his mother heir, and charged her to take an oath to perform certain trusts. The will happened to be void, but the mother took as heir *ab intestato.* It was inferred from the fact that an oath was required, that the testator desired to bind his mother by the trusts in any event, whether the will was valid or not. Accordingly, the will for this purpose took effect as *codicilli.* (D. 31, 77, 23.)

A testator bequeathed to a foster-daughter her freedom and certain legacies. The will was void, and the testator's children succeeded *ab intestato.* There was no *clausula codicillaris* in the will. It was held, nevertheless, that the children were bound to manumit the foster-child, and give her the legacies mentioned in the defective will, because it was presumed, from the affection entertained for her by the testator, that he meant his bequests to her to take effect even if his will proved incomplete or defective. (D. 40, 5, 38.)

CHAPTER II.

INTESTATE SUCCESSION.

First.—Succession to Freeborn Persons.

Preliminary.

Names and Degrees of Relationship.

At this point it is necessary to set forth how the degrees of kinship are reckoned. In this we must first of all observe that they are reckoned in three ways, by going up, by going down, and by going sideways (*ex transverso, ex latere*) or collaterally, as it is called. The kinship going up is that of ascendants; the kinship coming down is that of descendants; and the kinship reckoned sideways is that of brothers and sisters and their issue, and agreeably thereto of uncles and aunts, either on the father's side or the mother's side. The kinships going up and coming down begin at the first degree; the kinship that is reckoned sideways at the second. (J. 3, 6, pr.)

In reckoning degrees of relationship in the Roman law, there is no difference whether we regard persons as related through blood (*cognati*), or as related through subjection to the *potestas* of a common parent or ancestor (*agnati*). (J. 3, 6, 8.)

In the line of ascendants or descendants each generation counts one degree; from father to son is one degree, from grandfather to grandson two degrees, and so on. Collaterals are descendants of a common ancestor, and the degree of propinquity between two collaterals is obtained by adding together the number of degrees between each and the common ancestor. Thus brothers are in the second degree, each being one degree from the common parent; first cousins are in the

fourth degree, because each is the grandchild of a common grandfather or grandmother. (D. 38, 10, 10, 9.)

The degrees of relationship are, of course, indefinite, but the Roman law provided no special names for persons in a degree beyond the sixth.

It will be enough to have shown thus far how the degrees of kinship are reckoned; for from these we can plainly understand how we ought to reckon the degrees beyond as well. Each new generation adds always one degree, so that it is far easier to answer in what degree each is, than to mark out each by a name appropriate to his kinship. (J. 3, 6, 7.)

In the first degree there are—going up, a father, a mother; coming down, a son, a daughter. (J. 3, 6, 1.)

In the second degree there are—going up, a grandfather, a grandmother; coming down, a grandson, a granddaughter; going sideways, a brother, a sister. (J. 3, 6, 2.)

In the third degree there are—going up, a great-grandfather, a great-grandmother; coming down, a great-grandson, a great-granddaughter; going sideways, a brother's or sister's son or daughter, and agreeably thereto an uncle or aunt, either on the father's side or the mother's side (*patruus, amita; avunculus, matertera*). *Patruus* is a father's brother, called in Greek πάτρως. *Avunculus* is a mother's brother; his specific name among the Greeks is μήτρως; but he is called by the common name θεῖος. *Amita* is a father's sister; *matertera* a mother's sister: both are called θεῖα, or, among some people, τηθίς. (J. 3, 6, 3.)

In the fourth degree there are—going up, a great-great-grandfather, a great-great-grandmother; coming down, a great-great-grandson, a great-great-granddaughter; going sideways, a brother's or sister's grandson or granddaughter, and agreeably thereto a great uncle or great aunt on the father's side (that is, a grandfather's brother or sister); and again, a great-uncle or great-aunt on the mother's side (that is, a grandmother's brother or sister); and a first cousin (*consobrinus*), male or female (that is, the issue of brothers or sisters). Some, indeed, think that they alone are properly called *consobrini* that are the issue of two sisters (*sorores*, as if the term were *consororini*, and that the issue of two brothers are properly called *fratres patrueles* (or if the offspring of the two brothers are daughters, *sorores patrueles* is the name); whereas the children of a brother and a sister are properly called *amitini*, and the children of your aunt on the father's side (*amita*) call you *consobrinus*, while you call them *amitini*. (J. 3, 6, 4.)

In the fifth degree there are—going up, a great-great-great-grandfather, a great-great-great-grandmother; coming down, a great-great-great-grandson, a great-great-great-granddaughter; going sideways, a brother's or sister's great-grandson or great-granddaughter, and agreeably thereto, a great-grand-uncle or aunt, either on the father's side (that is, a great-grandfather's brother or sister), or on the mother's side (that is, a great-grandmother's brother or sister); and again, a son or daughter of the brother or sister of an uncle on the father's side, of a first cousin (male or female), or of the child (male or female) of an aunt on the father's side; as also one nearer than a second

cousin (*propior sobrino*) (male or female),—these are a son and daughter of a great-aunt or uncle on the father's side, or on the mother's side. (J. 3, 6, 5.)

In the sixth degree there are—going up, a great-great-great-great-grandfather, a great-great-great-great-grandmother; coming down, a great-great-great-great-grandson, a great-great-great-great-granddaughter; going sideways, a brother's or sister's great-great-grandson or great-great-granddaughter, and agreeably thereto, a great-great-granduncle and aunt on the father's side (that is, a great-great-grandfather's brother and sister), or on the mother's side (that is, a great-great-grandmother's brother and sister); and again, a son or daughter of a granduncle or aunt on the father's side or mother's side; and again, a grandson or granddaughter of the brother or sister of an uncle on the father's side of a first cousin (male or female), or of the child (male or female) of an aunt on the father's side; as also second cousins (male or female), the children, that is, of the brother or sister of an uncle on the father's side, or of first cousins, or of the children of an aunt on the father's side. (J. 3, 6, 6.)

But since truth is fixed in men's minds by the faith that comes through seeing more than through hearing, we have thought it needful, after recounting the degrees, to have them written out in a book at one view, that by this means youths may be able not only to use their ears, but to look closely with their eyes, and so to gain a most perfect knowledge of the degrees. (J. 3, 6, 9.) (See Table appended, taken from Theophilus.)

Paul (Sent. 4, 11, 7) observes that in the ascending or descending line the reckoning stops at the sixth degree, but in the collateral line relationship is reckoned to the seventh degree.

Arrangement of the Subject.

A man dies intestate if he has not made a will at all, or if he has made it wrongly, or if the will he had made has been broken or become null, or if no one is heir under it. (J. 3, 1, pr.)

Taking the earliest and the latest rules of intestate succession, we find that they possessed extreme simplicity, but were founded upon a diametrically opposite theory of relationship. In both the property went to the family, but the word "family" meant a very different thing in each case. In the earliest times the family was based upon the *potestas* in the most rigorous fashion, so that even father and son, in the absence of the *potestas*, bore no relation to each other in law for the purpose of succession. By the latest rules, which were promulgated by Justinian after the Institutes, the family was recognised as formed by the tie of blood, and although the old idea was not wholly extirpated, it remained as a mere insignificant vestige, attesting in its shrunken proportions an ancient and obsolete system. The earliest rules date from the

XII Tables: from that period, and the establishment of the Prætorian jurisdiction, down to the publication of the Institutes of Justinian, there is a vast interval, covering the entire historic period, during which successive inroads were made on the primitive law, all tending in the direction of Justinian's final reform. It is, therefore, necessary to consider the law of intestate succession in three periods.

I. Period of the XII Tables.

II. From the establishment of the Prætor to the Institutes of Justinian.

III. Final reforms of Justinian's Novels.

First Period.—The XII Tables.

By the XII Tables all persons capable of inheriting were arranged in three groups or classes, in such manner that no person belonging to the second class could succeed if there were any person existing in the first class; and no one in the third class, subject to a single exception, while there existed any in the first or second class. The classes were respectively known as *sui heredes*, *agnati*, and *gentiles*.

I.—Succession of *Sui Heredes*.

1. A *suus heres* is any one that lived under the *potestas* of the deceased, and was by his death released from the *potestas*.

The inheritances of intestates under the statute of the XII Tables belong first to the *sui heredes*. (J. 3, 1, 1; G. 3, 1, as restored.)

Sui heredes are held to be, as we have said above, persons in the *potestas* of the man that dies; a son or daughter, for instance, a grandson or granddaughter by a son, and a great-grandson or great-granddaughter by a grandson that was himself the offspring of a son. It makes no difference whether they are descendants by birth or by adoption. (J. 3, 1, 2; G. 3, 2, as restored.)

A grandson or granddaughter, however, and a great-grandson or great-granddaughter, are reckoned among the *sui heredes* only if the person before them has ceased to be in the *potestas* of the ascendant, whether it is by death that this has happened or in any other way, as by emancipation. For if during the time at which a man was dying his son was *in potestate*, a grandson by that son cannot be a *suus heres*. This must be understood to be said also of the rest of the descendants in order. (J. 3, 1, 2 B; G. 3, 2, as restored.)

Posthumous children, that, if they had been born in the ascendant's lifetime, would have been *in potestate*, are *sui heredes*. (J. 3, 1, 2 C; G. 3, 4, as restored.)

A child that is born after his grandfather's death, but conceived in his grandfather's lifetime, if his father dies, and afterwards his grandfather's will is abandoned, becomes *suus heres*. Evidently, however, if he were both conceived and born after his grandfather's death, then if his father dies and his grandfather's will is thereafter abandoned, he is not *suus heres* to his grandfather, because he never came into contact with his father's father by any right of kinship. In the same way also, among the grandfather's descendants, he that an emancipated son had adopted is never reckoned. Moreover, while those persons are not descendants as far as relates to the inheritance, neither can they seek *bonorum possessio* as next of kin. So much for *sui heredes*. (J. 3, 1, 8.)

The same rule of law applies to those on whose account a case under the *lex Ælia Sentia*, or under a *Senatus Consultum*, is made good after the father's death, because they too, if the case had been made good in the lifetime of the father, would have been in his *potestas*. (G. 3, 5, as restored.)

These cases are stated, p. 200.

The same must be understood of the son that after a first or second conveyance is manumitted after his father's death. (G. 3, 6.)

To release a *son* from the *potestas*, he must be mancipated three times. (See p. 212.)

With these must necessarily be reckoned those that, though not the issue of regular marriages, have yet been given to the *curiae* of their States, according to the tenor of the constitutions laid down to meet such cases by former Emperors, and thus obtain the rights of *sui heredes*. Those, further, must be added that are embraced in our constitutions, in which we have ordered that if a man unites himself with a woman to share his life, not, in the first instance, with the feelings of a husband, while yet she is a person he might marry, and has children by her that he has formally owned to be his, and afterwards, as his feelings go further, enters into a duly drawn-up marriage contract (*nuptialia instrumenta*) with her, and has sons or daughters,—then not only the children born after the dowry, it is settled, are lawful children, and in their father's *potestas*, but the earlier also, who have given the later offspring the chance of being accounted legitimate. We have resolved, also, that this shall hold good even although no issue is born after the contract for dowry is fully drawn up, or even though those already born are withdrawn from this light of day. (J. 3, 1, 2 A.)

For an account of these modes of acquiring the *potestas*, see p. 202.

2. When the question is raised, whether a man can be a *suus heres*, it must be asked of the time at which it is certain that one died without a will; and this happens also when no one is heir under a will. On this principle, if a son is disinherited, and an outside heir appointed, and after the son dies it is already certain that the heir appointed by the Will will not become heir, either because he would not, or because he could not, then the grandson will become his grandfather's heir. The reason is, that at the time when it is certain that the *paterfamilias* has died intestate, the grandson alone is found. This is certain. (J. 3, 1, 7.)

For the meaning of outside heir (*heres extraneus*), see *postea*.

EXCEPTIONS.—Sometimes, although at the time of the ascendant's death the heir was not *in potestate*, he yet becomes his *suus heres:* as when a man returns from the enemy after his father's death. The *jus postliminii* does this. (J. 3, 1, 4.) (See p. 216.)

On the contrary, it may happen that although a man is in the family of the deceased at the time of his death, he will not become *suus heres;* if, for instance, after his death his father is judged guilty of treason, and because of this his memory is condemned. For he cannot have a *suus heres*, since the Exchequer (*Fiscus*) is his successor. It may, however, be said that in strict law he is *suus heres*, but ceases to be so. (J. 3, 1, 5.)

A wife in the *manus* of her husband succeeds him as a daughter.

A wife, too, that is *in manu* of the man that dies, is a *sua heres;* because she is in the position of a daughter. A daughter-in-law, again, that is *in manu* of the son, will be a *sua heres*, because she is in the position of a granddaughter; but only if the son in whose *manus* she is when the father dies is not in his *potestas*. The same we shall say of her also that is in the *manus* of a grandson, and married to him; because she is in the position of a great-granddaughter. (G. 3, 3, as restored.)

3. Order of succession among *sui heredes*, and their respective shares.

When a son or daughter, and by another son a grandson or granddaughter are in existence, they are called alike to the inheritance; and the nearer in degree does not shut out the further off, for it seemed fair that grandsons and granddaughters should succeed to their father's place [and share]. By parity of reasoning also, if there is a grandson or granddaughter by a son, and by a grandson a great-grandson or great-granddaughter, they are all called at the same time to the inheritance. (J. 3, 1, 6; G. 3, 7.)

Since it is held that grandsons and granddaughters, and also great-grandsons and great-granddaughters, succeed to their parents' place, it seemed to agree with this that the inheritance should be portioned out by counting not heads but stocks (*non in capita sed in stirpes*). The result is that a son has half the inheritance, and the two or more grandsons by another son the other half. Again, if there are in existence grandsons by two sons, by the one son one perhaps or two, and by the other three perhaps or four, then to the one or the two one-half belongs, and to the three or the four the other half. (J. 3, 1, 6; G. 3, 8.)

II.—SUCCESSION OF *AGNATI.*

If no *suus heres*, and none of those the Prætor or the constitutions call among the *sui heredes*, is in existence, or in any way seeks to gain the inheritance, then under the statute of the XII Tables the inheritance belongs to the next agnate. (J. 3, 2, pr.; G. 3, 9.)

The words of the XII Tables are—"If a man dies intestate and has no *suus heres*, let the nearest *agnatus* have his *familia*." [1] (Ulp. Frag. 26, 1.)

[1] *Si intestato moritur cui suus heres nec escit agnatus proximus familiam habeto.*

1. Who are agnates (*agnati*).

They are called agnates that are allied by statutory kinship. Statutory kinship (*legitima cognatio*) is alliance through persons of the male sex. (G. 3, 10.)

Agnates are, as we have declared in the first Book, kinsfolk allied in kinship through males, as if kinsfolk through one father. (J. 3, 2, 1.)

Brothers, therefore, born of the same father, are agnates to one another; they are also called men of the same blood (*consanguinei*); and it is not required that they should have had the same mother also. An uncle on the father's side, again, is an agnate of his brother's son, and that son in turn of his uncle. In the same number are first cousins (*fratres patrueles*), persons begotten, that is, by two brothers; they are also called *consobrini*. In this way we shall be able to reach many degrees of agnation. (J. 3, 2, 1; G. 3, 10.)

To adoption also the legal relation of agnates owes its being. It exists, for instance, between sons by birth and those their father has adopted; and there is no doubt these may properly be called of the same blood. If, again, one of the rest of your agnates—a brother, for instance, or uncle, on the father's side, or even one in a remoter degree—adopts somebody, then, no doubt, between you there is the relationship of agnates. (J. 3, 2, 2.)

The definitions in the text are incomplete. It is true that *agnati* are persons related through males (not through females), but it must be added that such persons must not have suffered a *capitis deminutio*. (G. 3, 21.) This addition, however, makes the definition very clumsy. It is, therefore, better to define *agnati* as all persons that, if their common ancestor had been alive, would have been living together under his *potestas* at the time of his decease. The descendants of a common ancestor through females are excluded, because the children of a female are under the *potestas* of her husband, and not of her father. Her children belong to her husband's family, and not to her father's. Hence a *capitis deminutio* is fatal, because it extinguishes the *potestas*. (See also p. 193.)

The *agnati*, like the *sui heredes*, are thus connected through subjection (actual or possible) to the *potestas* of the same person; they have both, so to speak, the same centre, but they have a different circumference. The *sui heredes* are the nearest to the deceased; they are those that have been really or in contemplation of law under the *potestas* of the deceased; the *agnati* (if not also *sui heredes*) have never actually been under the *potestas* of one man, because the common ancestor has not been alive together with them.

2. It is not, therefore, who is nearest at the time of death that we ask after, but who is nearest at the time at which it is certain that a man has died intestate. If, however, a man makes a will before he dies, it seems better to ask who of the agnates is nearest at the time at which it is certain that no one will become heir under that will. (G. 3, 13.)

The nearest agnate that is asked after, if a man has made no will before he dies, is the nearest at the time when he whose inheritance is in question died. But if he has made a will before he dies, the nearest that is asked after is the nearest at the time at which it first became certain that no one

would become heir under the will. For it is then only that a man can properly be understood to have died intestate. Sometimes this is a long time in coming to light, and in this space of time it often happens that by the death of a still nearer, an agnate comes to be nearest that at the death of the testator was not nearest. (J. 3, 2, 6.)

3. Order of succession among the agnates.

It is not, however, to all the agnates at once that the statute gives the inheritance, but to those only that are in the nearest degree at the time when it first became certain that a man has died intestate. (J. 3, 2, 1; G. 3, 11.)

In such a right there is no succession. If, therefore, the nearest agnate passes the inheritance by, or dies before entering on it, then those that follow can avail themselves of no right under the statute. (G. 3, 12.)

The rule was considered harsh, and was altered by the Prætor. (J. 3 2, 7.)

If there are more degrees of agnates than one, it is clearly the nearest that the statute of the XII Tables calls in. If, therefore, for instance, there is a brother of the deceased, and another brother's son or uncle on the father's side, the brother is preferred. Although, too, the statute uses the singular number in calling in the nearest, there is no doubt that if there are more than one of the same degree all are to be admitted. Indeed "nearest," too, is properly understood of more degrees than one; and yet there is no doubt that, although there may be only one degree of agnates, the inheritance will belong to them. (J. 3, 1, 5.)

4. The agnates that succeed take equal shares.

If the deceased has a brother and a brother's son, as may be understood from the above, the brother is first, because he comes first in degree. But in the case of *sui heredes* the law has been differently interpreted. (G. 3, 15.)

If, however, the deceased has no brother alive, but has brothers' children, the inheritance belongs to them all. But a question has been raised, whether in case the children chance to be unequal in number—as by one brother one or two, and by the other three or four—the inheritance is to be portioned out by counting stocks (as is the rule of law among *sui heredes*), or rather by counting heads. It has, however, long been the received opinion that it must be divided by counting heads. The inheritance will therefore be divided into as many parts as there are persons on both sides, so that each may take one part. (G. 3, 16.)

III.—Succession of *Gentiles*.

If there is no agnate, the same statute of the XII Tables calls the men of the *gens* to the inheritance. Who they are we have related in the first book of our Commentaries; and since we have there called attention to the fact that the whole law relating to them has become obsolete, it is superfluous here, too, to handle the subject more nicely. (G. 3, 17.)

This succession had fallen into disuse in the time of Ulpian. (Mos. et Rom. Leg. Collat. 16, 4, 2, 1.)[1]

[1] "*Si agnatus nec escit, gentiles familiam habento.*" (Ulp. Frag. 26, 1.) If there is no agnate, let the men of the *gens* have the *familia*.

What is a *gens?* Who are *gentiles?* These are questions upon which Gaius probably threw light, but of which we are deprived by an unfortunate lacuna in the MS. Cicero (Top 6) gives the following marks of "*gentiles.*" They are persons bearing a common name (as the *gens* Claudia, the *gens* Cornelia), sons of freeborn men, descendants of men whose blood was never tainted with slavery, and who have never suffered a loss of status. This definition is purely negative except in one point, and that the point upon which least information was necessary ; namely, that the members of a *gens* bore a common name. According to Cicero, two classes could not be members of a *gens ;* (1) descendants of freedmen, and (2) those that had suffered a *capitis deminutio.* This last point equally characterises agnates and *sui heredes.* Does it suggest that there is a relation between *agnati* and *gentiles,* like that between *agnati* and *sui heredes?* May we hold that just as *sui heredes,* descendants of a living parent, are to *agnati,* descendants of a common deceased ancestor, so these in turn are to *gentiles,* descendants of a common mythical ancestor?

One fact must weigh heavily. The fact that *gentiles* inherited, proves that in the society in which the *gens* was a living unit, there was a deep organic connection between it and that patriarchal constitution of the family upon which the rights of *sui heredes* and *agnati* were based. The right of inheritance is the last to be capriciously disposed of, and the manner of its disposition is one of the safest indications of social structure. Doubtless in its development a nation may outgrow an earlier law of intestate succession, and of this the whole history of Roman law is one prolonged illustration ; but originally the law must have been in harmony with the strongest forces in the social organisation. No explanation of the *gens,* therefore, can be regarded as satisfactory, which sees in the *gens* only an artificially-formed political body.

In the time of Gaius, although apparently not in the age of Cicero (De Orat. 1, 39), the claims of the *gens* were extinct, and our information regarding it is accordingly very meagre. With our present information it is not possible to construct upon evidence an entirely satisfactory account of the Roman *gens :* but the institution of the *gens* was not peculiar to Rome ; it is found in the Greek States, and in various parts of the world. One thing appears quite certain : the *gens* was not a fortuitous or artificial concourse of individuals ; it had a certain

organic unity and life. It had a common worship, and the object of the worship was the deified founder of the *gens;* it had also, in some instances at least, a common tomb. It would seem also that the *gens* was answerable for the debts of one of its members, and bound to ransom any member that fell into captivity. (Livy, 5, 32 ; Dion. Hal. 13, 5.) Each *gens* also had its chief, who was at the same time judge, priest, and military leader. (Dion. Hal. 2, 7 ; 9, 5.) It was the assembly of the *gentes* (*Comitia Curiata*) that sanctioned arrogation and the early form of wills. Lastly, the very name (*gens gignere genitor*) implies the theory at least of a common descent, which theory is strengthened by the members continuing to bear a common name.

Keeping these facts in view, we may accept as not altogether improbable the theory advanced by M. De Coulanges (La Cité Antique). He argues with much plausibility that the *gens* is simply the patriarchal family in a state of decay. The earliest records of Roman law are distinguished by the absence of primogeniture, and the equal division of property among the *sui heredes;* but, according to M. De Coulanges, the fact was exactly the reverse in those earlier ages when the family was the only body politic. The patriarchal family was based on primogeniture, and the eldest son succeeded to the power of the father and ruled the younger. When, however, the younger sons, on the growth of the City, achieved their independence, they naturally split up into different families, retaining a connection only through common worship and sacrifices under a chief. According to this view, the members of a branch family were *agnati*, while the members of the several branches were *gentiles* to each other. If this be the correct account, the succession of the *gentiles* is founded on the same principle as the succession of the *sui heredes* and *agnati*. It is based on the *potestas* removed one degree further off. In that case, the intestate succession of the XII Tables may be described as consisting of three concentric but clearly distinguished circles round one centre—the *potestas*. A *paterfamilias* dies. The first entitled to succeed are those that actually were under his *potestas* (*sui heredes*). The next are those that are descended from a common (historical) ancestor through males (*agnati*). If there are none of these, we take a larger sweep. Those succeed who, through bearing a common name, worshipping a common object (a deity sacrificed to by the *gens* alone),

and owing to each other mutual help, may plausibly claim to be descendants of a common ancestor, who also might have exercised *potestas* over them all. If this be so, it was natural that rights founded on the *potestas* by so remote a connection should first give way, centuries before the rights of the agnates. This, at all events, was the march of events.

Second Period.—From B.C. 366 to A.D. 543.

The principle of the Roman family was the absolute supremacy of its head. He alone had legal rights. But the tendency of Roman law, from the first time we get a glimpse of it, was to break down the family autonomy, and bring all its members under the direct and immediate control of the State. The sovereignty of the State superseded and swallowed up the sovereignty of the head of the family. This movement implied a steady process of emancipation of the subordinate members of the family; but that had proceeded a considerable way before it effected any changes in the rules of intestate succession. The old law stood inflexibly on the family as constituted by the *potestas*, and sternly disregarded the closest ties of blood. The history of intestate succession is a history of the successive steps, generally forward, rarely backward, in the direction of recognising the family as founded on the tie of blood. The work was undertaken, in the first instance, by the Prætors; and the instrument he employed was the *bonorum possessio*.

Bonorum Possessio.

So far as the rights and duties of a universal successor to a deceased person are concerned, there was, as we have seen (p. 744), no difference in substance between *hereditas* and *bonorum possessio*. A person who obtained such a universal succession by the Prætorian Interdict, and not by a *petitio hereditatis*, was a *bonorum possessor*, whether his title was derived solely from the edict of the Prætor, or whether it was good also by the *jus civile*. *Bonorum possessio* means equitable or Prætorian inheritance; the *bonorum possessor* is an equitable or Prætorian heir, as the *heres* is a legal heir. Every *heres* was entitled to ask for and rely upon the equitable or Prætorian title, if he thought fit; but, in the later stages of the edict, at all events, it often happened that the equitable excluded the legal heir.

Bonorum possessio is composed of two words, which, in this conjunction, are used in a sense different from the meaning of the words taken separately. *Bona* in the law of property means corporeal things on the way to become property by the operation of *usucapio* (p. 263); but in this connection means a universal succession to a deceased person. "Bona . . . universitatis cujusque successionem, qua succeditur in jus demortui, suscipiturque ejus rei commodum et incommodum; nam sive solvendo sunt bona, sive non sunt, sive damnum habent, sive lucrum, sive in corporibus sunt, sive in actionibus." (D. 37, 1, 3, pr.) Again, *possessio* is not to be understood in the sense it bears in the law of Property; for it means possession of a right, and not of a corporeal object—[*est enim juris magis, quam corporis, possessio* (D. 37, 1, 3, 1)]—the exact antithesis of *possessio* as understood in the law of Property (p. 392). There is, nevertheless, a certain propriety in the phrase *bonorum possessio;* for it indicates the identity of method by which the Prætor reformed the law of Property and the law of Inheritance. Attention has been already drawn (p. 372) to the similarity of objects and method of the Prætor in amending those departments of law.[1]

Those that the Prætor alone calls to the inheritance do not become heirs at strict law, for the Prætor cannot make an heir; that can be done only by a statute (*lex*), or a like means of settling the law (*juris constitutio*)—a *Senatus Consultum*, for instance, and the imperial constitutions. But when the

[1] In altering the law of Ownership, the Prætor had two main objects in view—(1) To remedy the inconvenience of too strict an attachment to formal conveyances; and (2) to extend the enjoyment of property to persons that could not be owners by the civil law. The Prætor pursued analogous objects in the case of Inheritance; partly he admitted a less formal mode of executing a will, and partly he gave inheritances to persons that could not succeed according to the old law of Rome. The mode of the Prætor's action is also similar. A Prætor could not make a *heres* as he could not give the *dominium ex jure Quiritium;* but just as he bestowed the practical enjoyment of property under the name of *possessio*, so he in effect made heirs under the name of *bonorum possessores.*

But while these points sufficiently attest an identity of aim and method in the Prætor's action, there is one notable point of difference. The *interest* of a Prætorian owner (*possessor*) and of a Prætorian heir (*bonorum possessor*) has the same juridical character; but the investitive facts creating the interest are entirely different. A chief element in the title to Prætorian ownership is physical occupation, and therefore the remedies were either to *retain* or to *recover* possession. (See p. 357.) Practically, *traditio* was the transvestitive fact of Prætorian, as *mancipatio* was of Quiritarian ownership. But from the nature of the case, "delivery," as a mode of acquisition, was inapplicable to Inheritance. Thus the idea of "physical occupation," which bulks so largely in the law of Ownership, has no place in the law of Inheritance; on the

Prætor gives them *bonorum possessio*, they are settled in the position of the heirs, and are called *bonorum possessores*. In addition, there are also many other degrees the Prætor has made in giving *bonorum possessio*, his aim being that no one should die without a successor. For the right of coming to take inheritances which the statute of the XII Tables settled within very narrow bounds, has been broadened greatly by the Prætor on the grounds of goodness and fairness (*ex bono et aequo*). (J. 3, 9, 2; G. 3, 32.)

A *bonorum possessor* recovered the property belonging to the person whom he succeeded by the Interdict *Quorum Bonorum;* and he could sue the debtors, and be sued by the creditors of the deceased by *utiles actiones*, in which it was feigned that he was heir. (D. 43, 2, 2; Ulp. Frag. 28, 12; G. 3, 81.)

To gain possession, an interdict called after its first words, *quorum bonorum*, is granted to the *bonorum possessor*. Its force and effect are this: When *bonorum possessio* has been given to a man, then this interdict binds any actual possessor (whether as heir or as possessor) of goods so given to restore them to the *bonorum possessor*. A man possesses as heir when he believes himself to be the heir. He possesses as possessor when with no right at all he is in possession of property belonging to the inheritance, or even of the whole inheritance, though he knows it does not belong to him. This interdict is called for gaining possession (*adipiscendae possessionis*), because it is of use to him only that now for the first time tries to gain possession of property. If, therefore, a man gains possession and then loses it, this interdict is of no use to him. (J. 4, 15, 3; G. 4, 144.)

The terms of the Interdict were as follow:—"Quorum Bonorum ex edicto meo illi possessio data est quod de his bonis pro herede aut pro possessore possides possidere-sve, si nihil usucaptum esset: quod quidem dolo malo fecisti uti desineres possidere id illi restituas." (D. 43, 2, 1, pr.)

---

contrary, the object of the Interdict *Quorum Bonorum* is to *acquire* possession. The investitive facts of the Prætorian Inheritance are either an informal will of a testator complying with the requirements of the edict (*secundum tabulas*), or a place in the Prætorian scheme of intestate succession, and that in two ways—either in the absence of a will, or by Prætorian invalidation of a will (*contra tabulas*). In each of the three departments, Property, Contract, and Inheritance—and to these will presently be added Procedure—the Prætor had to deal with similar evils, and he applied similar remedies. It is only in the case of Ownership that the idea of physical occupation emerges; and that may be said, in a sense, to be accidental. The Prætor, it may without extravagance be supposed, while establishing equitable ownership, might have adopted some other transvestitive fact than "delivery;" he might, for instance, have taken a sealed writing as his mode of conveyance. No doubt there were in the circumstances under which his jurisdiction was developed reasons for preferring "delivery;" but it is completely to invert the order of ideas to suggest that it was out of any supposed moral claim attached to physical occupation that the scheme of Interdict-Possession took its rise. That theory is shaken to its foundation by the fact that we find in the case of Inheritance a complete system of Prætorian rights and remedies, exactly as in ownership, but to which the idea of physical occupation is wholly irrelevant.

To a *bonorum possessor* property does not pass with full rights; it becomes the petitioner's only *in bonis*. His *ex jure Quiritium* it can become only after it is acquired by *usucapio*. (G. 3, 80.)

We still have fictions of the other sort in certain formulas. For instance: when a man has sought *bonorum possessio* under the edict, he proceeds on the fiction that he is heir. Now, it is by the Prætorian law, not the statutory, that he comes into the place of the deceased. He has not, therefore, his direct actions, and cannot declare in his *intentio* (statement of claim) either that what was the deceased's is his, or that what was due to the deceased ought to be given him. By the fiction that he is heir, therefore, he frames his *intentio* after this fashion; for example:—"Let there be a *judex*. If Aulus Agerius," the plaintiff himself, that is, "were heir to Lucius Titius, if then it appears that the farm in dispute ought to be his *ex jure Quiritium*," etc.: or if the action is against a person, a like fiction is set out first, and then the *intentio* goes on: "If, then, it appears that Numerius Negidius ought to give Aulus Agerius ten thousand sesterces." (G. 4, 34.)

Some writers assign a more limited scope to the interdict *Quorum Bonorum*, and consider that its sole object was to give provisional possession to the claimant, leaving the question of right to be determined by a *petitio hereditatis*. There is, indeed, one passage (C. 8, 2, 3) that seems to bear such an interpretation (*secunda actione proprietatis non exclusa*). But, on the other hand, it is very clearly laid down that no one could obtain the benefit of the interdict, who did not prove that he had a good title according to the civil law or the Prætorian edict. (C. 8, 2, 1.) If that be so, the interdict must have been a definitive, and not merely a provisional, remedy.

The Digest mentions another remedy open to *bonorum possessores*, namely, a *possessoria hereditatis petitio*. (D. 5, 5, 1.) By that *petitio* the *bonorum possessor* could recover exactly what a *heres* could recover by the *petitio hereditatis*. (D. 5, 5, 2.) What the heir recovered was the *ownership* of the objects sued for; and it would seem a reasonable inference that the only purpose that could be served by giving a *petitio hereditatis* to a Prætorian heir (*bonorum possessor*) was to enable him at once to obtain the ownership of the property, instead of proceeding by the interdict and waiting for *usucapio*.

Agnitio. In order to establish a claim as a *bonorum possessor*, it was not enough that a person had a right under the Prætor's edict; he must show an intention to assert his right. He must do something equivalent to the *aditio* of a *heres*. At first, there was required a formal application (*ex parte*) to the Prætor. "Da mihi hanc *bonorum possessionem*." (Theoph. ad J. 3, 9, 12.) But in the time of Justinian any signification of an intention to

claim as *bonorum possessor* was enough. After this, and not before, the claimant could proceed upon the interdict *Quorum Bonorum.*

Former emperors have well provided for this case too, that no one might be anxious about demanding *bonorum possessio;* but that if in any way whatever, within the appointed times, he has shown some token of claiming it, he may have the full benefit thereof. (J. 3, 9, 12.)

Since, therefore, the Prætor had brought in many forms of successions and had arranged them in order, and since in each form of succession often several persons appear in different degrees, that creditors' actions might not be put off, but that they might have persons to summon, and that they might not lightly be put in possession of the goods of the deceased, and in that way look after themselves, the Prætor appointed beforehand a fixed time for demanding *bonorum possessio.* To descendants, therefore, and ascendants, both by birth and by adoption, he gave to demand *bonorum possessio* the space of a year, to all others a hundred days. (J. 3, 9, 9.)

If within this time no one demands *bonorum possessio*, his right accrues to persons in the same degree; or if there is no one in that degree, then to the rest in the order in which the Prætor promises them *bonorum possessio* under the edict on succession, exactly as if he that went before had not been in that number. If, however, any one rejects the *bonorum possessio* so bestowed on him, the Prætor does not wait until the time he appoints beforehand has run out, but at once admits the rest under the same edict. (J. 3, 9, 10.)

In demanding *bonorum possessio*, days he might use (*utiles*) are alone considered. (J. 3, 9, 11.)

Tempus utile, Tempus continuum.

Tempus continuum is time measured in the ordinary way, including every day between the two dates in question.

Tempus utile is when, for some special reason, all the days between two given dates are not reckoned, but some of them are excluded from the calculation. Thus, an ascendant claiming *bonorum possessio* must apply within a year; but, as he could not apply on days when the Prætor did not sit, he was entitled to 365 days of the days on which the Prætor did sit, thus extending the time to a year and a-half or more. In like manner, it may happen that one of the parties is temporarily unable to appear in applications that cannot be heard *ex parte* (*i.e.*, in the absence of the other side), as if he is a prisoner of war or absent on the service of the State, or in prison, or detained by stress of weather or other cause, and he cannot appoint an agent; in these cases, *utile tempus* is reckoned, *i.e.*, only the times when the application could be made. (D. 44, 3, 1.)

The cases in which *bonorum possessio* was allowed include both testaments and intestacy. In cases of testament, the Prætor granted possession *contra tabulas*, superseding the legal *heres*, or *secundum tabulas*, to the legal *heres;* or, in the absence of a will, to the successors as arranged in the Prætorian edict.

The right of *bonorum possessio* was brought in by the Prætor to amend

the old law. Not only in regard to the inheritances of the intestate did the Prætor in that way amend the old law, but in the case of those also that made a will before they died. (J. 3, 9, pr.)

Sometimes, however, it is neither to amend nor to impugn the old law, but rather to confirm it, that he promises *bonorum possessio*. For he gives it in accordance with the terms of the will to those also that have been appointed heirs by a will rightly made [if only the will has been sealed with the seals of not less than seven witnesses]. Again, in case of intestacy, he calls *heredes sui* and agnates to the *bonorum possessio*. [In these cases his boon seems in this one point only to be of any use, that he that thus demands *bonorum possessio* can use the interdict beginning "QUORUM BONORUM," an interdict whose usefulness we shall set forth in its own place.] But in any case, even though *bonorum possessio* were removed, the inheritance belongs to them by the *jus civile*. (J. 3, 9, 1; G. 3, 34.)

A seventh kind of possession has followed, which the Prætors, with the best of reasons, introduced. Last of all, the edict promises *bonorum possessio* to those also whose right to the grant is included in the provisions of any statute, *Senatus Consultum*, or constitution. This the Prætor has not numbered with the *bonorum possessiones* that come in case of intestacy, nor with those under wills, by any fixed law. But regarding it as a last extraordinary aid, he grants it, according to the requirements of the case, to those that come in under statutes, *Senatus Consulta*, or constitutions of the Emperors, in virtue of some novel right; and this whether under a will or in case of intestacy. (J. 3, 9, 8.)

Possession, *sine re* and *cum re*.

But often certain persons have *bonorum possessio* granted them in such a way that he to whom it is granted cannot hold the inheritance. This is called *bonorum possessio sine re* (in name, but not in fact). If, for instance, a will is rightly made, and the heir that is appointed decides to take the inheritance, but refuses to ask *bonorum possessio* according to the terms of the will, and remains content with being heir by the *jus civile*, then none the less those that if no will is made are called to the goods of the intestate can ask *bonorum possessio*. But it is only in name, not in fact, that the inheritance belongs to them, because the heir named in the will can make himself master of the inheritance. The rule of law is the same, if, when an intestate dies, the *suus heres* refuses to ask *bonorum possessio*, and remains content with his statutory right. For to an agnate the *bonorum possessio* is open, but not in fact, since the *suus heres* may make himself master of the inheritance. Agreeably to this also, if it is to the agnate the inheritance belongs by the *jus civile*, and he enters on the inheritance, but refuses to ask *bonorum possessio*, and accordingly one of the nearest kinsfolk asks it, he will have it, but not in fact, for the same reason. There are also certain other like cases, some of which we have related in an earlier part of our commentaries. (G. 3, 35-38.)

But those that receive *bonorum possessio* according to the terms of a will that either was not rightly made to start with, or, if rightly made, was afterwards broken or became null, if they can in that way obtain the inheritance

will have the *bonorum possessio* (*cum re*) both in name and in fact. If, however, the inheritance can be called away from them, they will have it in name but not in fact (*sine re*). (G. 2, 148.)

For if an heir has been appointed according to the *jus civile*, either under the first or under a later will, or if there is an heir by legal right in case of intestacy, he can call the inheritance away from them. But if there is no other heir according to the *jus civile*, they can themselves keep the inheritance if they are in possession; and if not, they have against those that are in possession of the goods an interdict to gain possession thereof. Sometimes, however, although there is an heir appointed in the will according to the *jus civile*, or determined by statute, the heirs appointed in the will are preferred. This is the case, for instance, when the will is not rightly made merely because the *familia* was not sold, or because the testator did not speak the declaratory words (*nuncupatio*). In this case they can defend themselves against the heir by the *exceptio doli mali*. (G. 2, 149.)

Origin of *Bonorum Possessio*.

Is *bonorum possessio* to be traced, like the law of possession, to the needs of *peregrini?* Is the law of inheritance an illustration of, or an exception to, the rule that every department of Roman law was profoundly affected by the presence of a large alien population in Rome? In the first edition of this work, no attempt was made to connect the origin of *bonorum possessio* with the requirements of *peregrini*. Two facts seemed to discourage any such suggestion. On the one hand, as *bonorum possessio* was the means by which the Prætor modified the law of testaments and of intestate succession for Roman citizens, there appeared to be, without going outside the *jus civile*, a sufficient *vera causa* to account for the introduction of *bonorum possessio*. On the other hand, although *bonorum possessio* is the only means known to us whereby the Prætor could deal with the property of deceased aliens, yet there is no reference, so far as known to the author, in the whole *corpus juris* connecting *peregrini* in any way with *bonorum possessio*.

But further consideration leads to the belief that these arguments are stronger in appearance than in reality. A good reason can be given why, even supposing that *bonorum possessio* was constantly employed by aliens, no mention should be made of the fact in the *corpus juris*. That work is a collection of rules of law; but questions affecting the succession to a *peregrinus*, whether he died with or without a will, were questions of fact and not of law. The disposition of the property of a deceased alien was governed by the law of the State to which he belonged (Ulp. Frag. 20, 14), and was therefore a question of foreign law—that is, so far as the Roman lawyers were concerned, a question of fact. The silence of the jurists with regard to the succession of *peregrini* is thus intelligible, and is quite consistent with the supposition that it was a matter of daily occurrence to grant *bonorum possessio* to the heirs of deceased aliens.

The argument that the wants of Roman citizens were sufficient to explain the introduction of *bonorum possessio* is not conclusive; for the facts would be consistent with the supposition that *bonorum possessio* was brought in first for *peregrini* and afterwards extended to citizens. This indeed appears to have been actually what happened. It is the opinion of several writers that in the time of Cicero (see in Verrem II. lib. i. 44-46, quoted by Moyle, p. 457), *bonorum possessio* was granted, in the case of citizens, only to *heredes*, having a title by the *jus civile;* and that it was considerably later before the Prætor ventured to use *bonorum possessio* as a means of ousting the legal in favour of the equitable heir. If this view be correct, it almost

proves that *bonorum possessio* was not introduced for citizens, inasmuch as the *heres* had a complete remedy by the *petitio hereditatis*. It would be inconsistent with the tradition of Prætorian reform to suppose that he would have introduced an Interdict (*quorum bonorum*) to give effect to *bonorum possessio*, for the sake of those who, without being *bonorum possessores*, had ample means of enforcing their rights.[1]

This consideration is strengthened by the fact that it was not the grant of *bonorum possessio* by which the Prætor dispossessed the legal heir. That grant had no such effect. From the passages given above, it appears that *bonorum possessio* might carry nothing with it (*sine re*). The legal heir was not defeated by such a grant, but by the denial of his *petitio hereditatis*. It was only when the Prætor boldly permitted a *bonorum possessor* to set up the plea of bad faith (*exceptio doli mali*) against the legal heir, that the latter was deprived of his legal rights.

Two centuries before Cicero, the Prætor Peregrinus was appointed, and must have had constant occasion to settle disputes in which the succession to a *peregrinus* was in question. The probability, therefore, is that long before the Prætor ventured to alter the laws of inheritance, the grant of *bonorum possessio* in the case of aliens was of common occurrence; and, inasmuch as the Prætorian remedies were generally more convenient than the old procedure, we can have no difficulty in believing that even heirs-at-law would resort to the newer and more beneficial remedy. Gaius (3, 34) says that frequently the *heres* asked for *bonorum possessio* for the purpose of availing himself of the interdict *Quorum Bonorum*, and he promises to state at a later stage the reasons for his preference. Unluckily he does not redeem his promise, but the fact remains that, as might be expected, *heredes* did sometimes take out a Prætorian title, although they had, as *heredes*, a complete remedy by the *jus civile*.

If the introduction of *bonorum possessio* is to be ascribed to the necessities of the *peregrini*, we can more readily understand the toleration that was shown to the Prætor's interference with the laws of succession. Such interference was certainly an extraordinary stretch of equitable jurisdiction, though Niebuhr goes too far in asserting its impossibility. "That any magistrate should have been entitled to introduce rules of succession tending to undermine those which were established by law, is a thing so monstrous, that no man of sense can deem it possible, if he will only attempt to conceive it in practice." The supposition would be monstrous, if we supposed that the edict was introduced all at once in the shape in which we find it in the time of Hadrian; but the final result was reached by small and almost imperceptible steps. When the Prætor first granted *bonorum possessio* of the property of a *peregrinus*, he had no thought of interfering with the civil law. Presently legal heirs asked the benefit of the same procedure, and there was no reason why it should be refused. By-and-by the Prætor granted this *bonorum possessio* to *cognati*, without any intention of depriving the legal heirs, who retained at first an unqualified right to oust the *bonorum possessor*. By degrees, in accordance with the urgent requirements of the general sentiment, the Prætor refused in certain cases to allow the legal heir to oust the *bonorum possessor*. We see the process exemplified in the history of testaments. A Roman will required to be made by *mancipatio*. A case occurred in which a will was made, but through some trifling informality, the *mancipatio* was not effective. The Prætor granted *bonorum possessio* to the heirs named in the will. Then the heirs *ab intestato* sued on the ground that the deceased died intestate. The Prætor did not at first venture to deprive them of their rights, unless they were persons distantly related to the deceased. From this modest beginning, what ultimately became the written will of the Roman law took its rise. If this view be correct, *bonorum possessio* can

[1] This reasoning is not conclusive with those who hold that *bonorum possessio* was originally nothing more than the interim possession given to one of two hostile claimants in a suit for an inheritance; but this suggestion appears weak and ill-supported.

hardly be explained in a satisfactory manner by confining our attention to the requirements of citizens. For them it was superfluous. But if we look to the circumstances of the *peregrini*, a satisfactory account can be given both of the origin and development of *bonorum possessio* in reference to citizens; and an additional illustration is afforded of the manner in which the Roman law was improved owing to the presence throughout Roman history of a large alien population in Rome.

Defects in the law of the XII Tables.

Here end the rules for the inheritances of freeborn persons that die intestate under the statute of the XII Tables. How strict that law was, may be clearly understood. (G. 3, 18.)

The moment they are emancipated, descendants have no right to an ascendant's inheritance under that statute, because they have ceased to be *sui heredes*. (G. 3, 19.)

The rule of law is the same if children are not in the *potestas* of their father, because although they as well as he have been presented with Roman citizenship, yet they have not been brought by the Emperor under their father's *potestas*. (G. 3, 20.)

Agnates, again, that have undergone *capitis deminutio*, are not admitted under that statute to the inheritance; because the name of agnation is destroyed by such a change of status. (G. 3, 21.)

Again, if the nearest agnate does not enter on the inheritance, the following is not admitted any the more by the statutory rules of law. (G. 3, 22.)

All female agnates, again, that are outside the degree of persons of the same blood (*consanguinei*), have no right under the statute. (G. 3, 23.)

And similarly, kinsfolk are not admitted that are allied only by a relationship through persons of the female sex. So far does this go, that not even between a mother and her son or daughter is any right to take an inheritance either way open; except, indeed, when by an *in manum conventio* the rights of persons of the same blood have been established between them. (G. 3, 24.)

But these unfairnesses in the law have been amended by the Prætor's edict. (G. 3, 25.)

These defects (excepting that regarding women agnates, which was introduced after the *lex Voconia*) may be considered as merely examples of one defect—namely, that the law of the XII Tables did not recognise the tie of blood. The edict of the Prætor partly altered the classes as arranged by the XII Tables, and partly added to them.

By the XII Tables.		By the Prætorian Edict.
1. *Sui heredes*	correspond to	1. Children (*unde liberi*).
2. *Agnati*	„	2. Statutory heirs (*unde legitimi*).
3. *Gentiles*	„	3. Cognates (*unde cognati*).
		4. Husband and Wife (*unde vir et uxor*).

According to the edict, no person in groups 2, 3 or 4 could succeed while there were any in group 1; none in group 3 or 4 while there were any in 1 or 2; none in 4 while there were any

in 1, 2 or 3. It will be expedient to keep this in mind in tracing *seriatim* the cases in which *cognation*, or the tie of blood, was admitted as a title to succession.

The order in which the several cases will be examined is as follows:—

A. Fathers and Children.
  I. When the children have been emancipated.
    1. Succession of child to father.
    2. „ father to child.
  II. When the children have been given in adoption.
    1. Succession of child to natural father.
    2. „ natural father to child.
  III. Succession of father to children under his *potestas* in the latter part of the Empire.

B. Grandfathers and Grandchildren, when the father of the children has been emancipated or given in adoption.
  1. Succession of grandfather to grandchildren.
  2. „ grandchildren to grandfather.

C. Mothers and Children.
  1. Succession of mothers to children.
  2. „ children to mothers.

D. Succession of Agnates.

E. The Succession of Collateral Cognates.

F. Affinity—Husband and Wife.

A.—Fathers and Children.

I.—1. Succession of emancipated children to fathers.

Emancipated descendants have by the *jus civile* no rights of succession. They are not *sui heredes*, since they have ceased to be in the *potestas* of the ascendant, and there is no other right in which they are called by the statute of the XII Tables. But the Prætor, stirred up by a sense of what is naturally fair, gives them *bonorum possessio* "*unde liberi*" (for descendants), just as if they had been in the ascendant's *potestas* at the time of his death; and this whether they are alone, or whether they come in along with *sui heredes*. If, therefore, two descendants are in being, one emancipated and the other *in potestate* at the time of the death, undoubtedly the one *in potestate* is sole heir by the *jus civile;* that is, he alone is *suus heres*. But since the emancipated descendant is by the Prætor's boon admitted to a share, the *suus heres* turns out to be heir of one share only. (J. 3, 1, 9.)

All descendants lacking in statutory rights he calls to the inheritance just as if they had been in *potestas* of their ascendants at the time of death; and that whether they are alone, or whether *sui heredes* (those, that is, that were in the *potestas* of the father) come in along with them. (G. 3, 26.)

Collatio Bonorum.—The right of emancipated children was conditional on their bringing into hotchpot (*collatio bonorum*) their property, which was reckoned as part of the inheritance, for the purpose of dividing it between them and their brothers and sisters living under their father's *potestas*. This was demanded by justice, for the property that the children living under the *potestas* would have enjoyed if they had been emancipated was necessarily reckoned as part of the inheritance. (D. 37, 6, 1 pr.;

C. 6, 20, 9.) The emancipated children were not required to bring into hotchpot what they would have had as separate property, even if they had continued under the *potestas;* as, *e.g.*, the *peculium castrense* and *quasi-castrense.* Justinian enacted that whatever could be reckoned for the purpose of legitim (*quarta legitima*) should be brought into hotchpot. (C. 6, 20, 20, pr.) In like manner daughters were required to bring into hotchpot their dowries. (C. 6, 20, 3.)

2. Succession of fathers to emancipated children.

Papinian observes that the succession of parents to children stands on quite a different footing from the succession of children to parents. The claims of parents rest upon a sort of pity, whereas it was the natural right of children to succeed to their parents. (D. 38, 6, 7, 1.) This idea is easily explained. By the law of the XII Tables an inheritance could not go to a father or ascendant, because a father never could be in the *potestas* of his son, and still less could a grandfather be in the *potestas* of his grandson.

To understand how a father came to be recognised as an heir to his emancipated son, it is necessary to bear in mind the ancient ceremony of emancipation by the triple sale and subsequent manumission. That manumission was almost identical in effect with the manumission of a slave. The father became the *patronus* of his own son. After the analogy of the law that gave a patron the succession to his freedman dying intestate without children, the father of an emancipated son was allowed to succeed him in default of children. Such were the rights of a father, who had taken care by a contract of trust to secure to himself the remancipation of the son after the third sale, and thereby the manumission. (See p. 213.)

If the fictitious purchaser, whose aid, we have seen, was necessary to effect the formal emancipation, had himself released the son, he became his patron, and on the death of the son intestate, without children, had the right of succession to the son, in preference even to the natural father. To prevent this result, a contract (*contractus fiduciae*) was usually made, under which the fictitious purchaser was compelled to remancipate the son to his father. If this were not done, the manumitter succeeded as *patronus;* but to him the Prætor preferred any cognate within the second degree (whether ascendant, descendant, or collateral). These were the ten persons (*decem personae*) whose place in the edict of the Prætor came immediately after the agnate. (Mos. et Rom. Leg. Collat. 16, 9, 2.)

To the statutory succession, none the less, the ascendant too is called, that after making a contract of *fiducia* emancipates a son or daughter, a grand-

son or granddaughter, and so on. This, under our constitution, follows in any case; and so emancipations of descendants are always presumed to be made with a contract of *fiducia*. But among the ancients this was not so, unless the contract was specially made before the ascendant manumitted. (J. 3, 2, 8.)

These were brought in by the Prætor's jurisdiction. We, however, who pass by nothing without watchful care, but correct everything by our constitutions, have admitted the *bonorum possessiones* contrary to the terms of the will, and according to the terms of the will as necessary arrangements, and also those in case of intestacy called "*unde liberi*" (for descendants), and "*unde legitimi*" (for statutory successors). (J. 3, 9, 4.)

The one put in the fifth place by the Prætor's edict, the "*unde decem personae*" (for ten persons), we have shown, with dutiful aim and in compendious words, to be superfluous. The *bonorum possessio* aforesaid put ten persons before an outside manumitter. Our constitution on the emancipation of descendants has granted all ascendants (who are at the same time the manumitters) the right to manumit under a contract of *fiducia;* and so the very manumission involves this privilege, and the *bonorum possessio* just spoken of becomes superfluous. We have taken away, therefore, the fifth *bonorum possessio* aforesaid, and have reduced to its rank the sixth (as it was formerly), making it the fifth—that which the Prætor promises the nearest kinsfolk. (J. 3, 9, 5.)

Under Justinian the succession to an emancipated son was as follows (C. 6, 56, 2):—

(1.) Children of deceased.

(2.) Brothers and sisters of deceased.

(3.) The father.

II. Children given in adoption.

1. Succession of children given in adoption to their natural father.

Descendants, too, that are in the family of their adoption are called in this same degree to the inheritance of their ascendants by birth. (J. 3, 5, 3; G. 3, 31.)

The grade here referred to is the third—namely, the *cognati*—after the *legitimi* and *liberi*. They have been changed to a new family, and there subsists nothing to connect them with the old except the bond of cognation.

But those that, when emancipated by an ascendant, have given themselves in adoption, are not admitted to the goods of their father by birth, as if descendants; provided, that is, they were, when he died, in the family of their adoption. If, however, in his lifetime they are emancipated by the father that adopted them, they are admitted to the goods of their father by birth, as if he had himself emancipated them, and they had never been in the family of their adoption. Agreeably to this also they come to be, so far as regards their father by adoption, in the position of outsiders. But if, after the death of their father by birth, they are emancipated by the father that adopted them, then so far as regards the latter they are in the position of outsiders as before; and so far as regards the goods of their ascendant by birth, they do not any the more obtain the degree of descend-

ants. The reason why this is held is, that it was unfair for a father by adoption to have it in his power to say to whom the goods of a father by birth should belong, whether to his descendants or to his agnates. (J. 3, 1, 10.)

Sons by adoption have therefore less rights than sons by birth. Sons by birth, if emancipated, retain, by the Prætor's boon, the degree of descendants, although they lose it by the *jus civile*. But adopted sons, if emancipated, both lose the degree of descendants by the *jus civile*, and are not aided by the Prætor. And rightly; for the principles of the *jus civile* cannot destroy natural rights; and they cannot, because they cease to be *sui heredes*, cease also to be sons or daughters, grandsons or granddaughters. But adopted children, when emancipated, come to be in the position of outsiders, because the rights and names of son or daughter they have gained by adoption, they lose in another way, under the same *jus civile;* that is, by emancipation. (J. 3, 1, 11.)

These same rules are observed in the *bonorum possessio*, that contrary to the terms of the will the Prætor promises to the descendants the ascendant has passed over, by neither appointing them heirs, that is, nor (as he ought) disinheriting them. Those, indeed, that were in the ascendant's *potestas* at the time of death, and those that were emancipated, the Prætor calls to this *bonorum possessio;* but those that were in a family of their adoption during the time at which the ascendant by birth died, he repels. Adopted children, again, that have been emancipated by their adopted father, even by way of intestacy, much more when contrary to the terms of the will, the Prætor refuses to admit to his goods because they cease to be in the number of his children. (J. 3, 1, 12.)

We must, however, be warned that those that are in a family of their adoption, or that, after the death of an ascendant by birth, have been emancipated by an adopted father, if the ascendant by birth dies intestate, although they cannot be admitted by the part of the edict by which descendants are called to the *bonorum possessio*, may yet be called by another part—that, namely, by which the kinsman of the deceased are called. Under that part they are admitted only if no descendants that are *sui heredes*, or emancipated, stand in the way, and if there is no agnate to come between them. For the Prætor first calls the descendants, both *sui heredes* and emancipated, next the statutory heirs, and next the nearest kinsman. (J. 3, 1, 13.)

All these were the views adopted in old times; but they have received some amendment from our constitution laid down in regard to persons given in adoption to others by the fathers to whom they were born. Some cases, indeed, we have found, in which sons lost the right of succeeding to their ascendants by birth, by reason of their adoption; and then, as the adoption was easily undone by emancipation, were called to succeed to neither father. This, as usual, we have corrected by writing a constitution, in which we have determined, that when an ascendant by birth gives his son to another to be adopted, all the son's rights are to be preserved unimpaired, just as if he had still remained in the *potestas* of his father by birth, and no adoption at all had followed. To this there is, in one event, an exception—he can, in case of intestacy, come to succeed his adopted father. But if he makes a will, then, neither by the *jus civile* nor by the Prætorian law can the adopted son follow up anything from his inheritance, either

by claiming *bonorum possessio* contrary to the terms of the will, or by starting a complaint against the will as undutiful. For no necessity is laid on the father by adoption, either to appoint him heir or to disinherit him, inasmuch as there is no tie of birth to couple them. Even if a man has been adopted under the *Senatus Consultum Sabinianum* from among three sons, he has no rights ; for in a case of this sort no fourth share is preserved to him, and no action is open to him to follow it up. But by our constitution an exception is made in the case of a person that an ascendant by birth has taken up to be adopted ; for since both rights, by birth as well as by statute, meet in such a person, we have preserved the early rights for such an adoption, just as if a *paterfamilias* has given himself to be adopted by *arrogatio*. All this specially, and in detail, can be gathered from the tenor of the aforesaid constitution. (J. 3, 1, 14.)

The *Senatus Consultum Sabinianum* is supposed to have been passed in the reign of Marcus Aurelius. It provided that when a man had adopted one of three sons living under the *potestas* of their father, he must leave to that adopted son one-fourth of his goods. If he did not, the son so adopted (*ex tribus maribus*) could recover this fourth against the heirs appointed by will. (Theoph. J. 3, 1, 14.) Why this was confined to a son adopted from among three males, we are not told. The *Senatus Consultum* was repealed in favour of the provisions introduced by Justinian.

2. Succession of father to children given in adoption.

In this case the father was not a manumitter, therefore not a patron. The probability, then, is that he succeeded only as a cognate in the third class, instead of coming immediately after the children of the adopted son. But by Justinian's constitution, adoption ceased to deprive the natural father of the *potestas*.

III. Succession of father to children under *potestas*.

When children under *potestas* were allowed to hold separate property (*peculium castrense* and *quasi castrense*), the order of succession was as follows :—(1) The children of deceased ; (2) the brothers; and (3) the father by virtue of his *potestas*. (J. 2, 12, pr.)

As we have seen, the next property over which children acquired some power, was that which they obtained through their mother or her family (*bona materna*), when the rights of the *paterfamilias* were confined to a mere usufruct. His rights of succession were similarly restricted by Valentinian, Leo, and Anthemius, and Justinian. (C. 6, 61, 3 ; C. 6, 61, 4 ; C. 6, 59, 11.) The order was as follows:—(1) Children and descendants of deceased son ; (2) brothers and sisters of the same or different fathers; and (3) the father or other male ascendant. Finally, when Justinian extended the rule at first confined to *bona materna* to all property over which he gave the father only a usufruct, he enacted that the same order of succession should be observed. (C. 6, 61, 6, 1.)

B.—Grandfathers and Grandchildren.

I. Succession of grandchildren to grandfathers.

1. When the grandson is under the *potestas* of his grandfather, and his own father is emancipated, no question arises; children born to the emancipated son after the emancipation have a right to succeed their grandfather. (D. 38, 6, 5, 1.) Thus there is no difficulty in regard to descendants through males, whether they or their fathers were actually under the *potestas* of the ancestor, or were released from it.

2. Grandchildren through females were at first admitted simply as cognates in the third degree.

Antiquity, in its greater liking for those born from males, used to call grandsons or granddaughters descended from the male sex only to succeed as *sui heredes*, and preferred them to the rights of agnates. But grandsons born from daughters, and great-grandsons born from granddaughters, it reckoned as mere kinsmen; and after the line of agnates used to call them to succeed to a grandfather or great-grandfather on the mother's side, or to a grandmother or great-grandmother on either the father's side or the mother's side. But the former emperors could not bear to leave such a wrong against nature without satisfactory amendment. The name, they said, of grandson or great-grandson is common to both—to the descendants of females as well as of males; they gave them, therefore, the same degree and order of succession. But that there may be something more for those that are fortified by the vote not only of nature, but of the old law, the share of the grandsons or granddaughters and so on, of whom we have spoken above, must, they have held, be lessened a little. They receive, therefore, a third less than their mother or grandmother would have received, or than their father or grandfather on either the father's or the mother's side would have received, when it is a woman that is dead, and whose inheritance is in question. Further, if those enter, although they are alone, the Emperors in no case called in the agnates. Again, as the statute of the XII Tables, when a son is dead, calls the grandsons or granddaughters, or the great-grandsons and great-granddaughters, in room of their father, to succeed their grandfather, so the imperial arrangements call them in room of their mother or grandmother, but with their share lessened by a third, as has already been remarked. (J. 3, 1, 15.)

Some doubt, however, still remained as to the respective rights of the agnates and the grandsons of whom we have spoken, as the agnates claimed for themselves a fourth of the substance of the deceased by authority of a certain constitution. We, therefore, have set aside the constitution of which we speak from our Code, and have not allowed it to be inserted in our Code from that of Theodosius. By a constitution we have published, moreover, we have withdrawn from it all its legal effect, and have enacted that when such grandsons by a daughter, or great-grandsons by a granddaughter, and so on, survive, the agnates can claim for themselves no share in the succession to the dead. For we would not have those that come in collaterally preferred to descendants in the direct line of rights. This constitution, too,

of ours, is by its own strength to hold both in former times and now, so we enact. As, however, in regard to the respective rights of sons and grandsons by a son, antiquity determined that the inheritance should be portioned out by counting stocks not heads; so in like manner we order the distribution to be made between sons and grandsons by a daughter, or between all grandsons and granddaughters and other persons successively. The result is, that both offsprings obtain the portion of their mother or father or of their grandmother or grandfather without any lessening. If, perchance, on the one side, there are one or two, on the other three or four, then the one or two will have one-half, and the other three or four the other half of the inheritance. (J. 3, 1, 16.)

II. Succession by grandfather. If a grandfather emancipated his grandchild, he succeeded as quasi-patron; if not, and the child were given in adoption, his rights, according to the laws of Justinian, were unimpaired. If the child died under the *potestas*, the grandfather succeeded to the *peculium castrense* as owner of it, and to all the other property, in the new law of Justinian after the child's father.

C.—Mothers and Children.

I. Succession of mothers.

There are, further, some degrees besides that the Prætor makes in giving *bonorum possessio*, his aim being that no one should die without a successor. Of these we did not treat in these Commentaries, and that on purpose; because we have unfolded the whole law on this subject in special commentaries. (G. 3, 33, as restored.)

This only, therefore, it is enough to call attention to, that although in statutory inheritances kinship alone, by the statute of the XII Tables, helped no one to take an inheritance, so that even a mother would under the statute have no right at all in the goods of her children, unless by passing *in manum* she had obtained the rights due to one of the same blood . . . . after her he calls the sister of the deceased, if of the same blood, and the wife that had passed into his *manus*. (G. 3, 33 A, as restored.)

The statute of the XII Tables used law so strict, and went so far in preferring those born from males and in driving off those allied to them by a relationship through the female sex, that not even in the case of a mother on the one hand, and her son or daughter on the other, had either any right to take an inheritance from the other. But the Prætors, on the ground of their nearness as kinsfolk, used to call those persons to the succession by the *bonorum possessio* they gave them, called *unde cognati* (for kinsfolk). (J. 3, 3, pr.)

This narrowness of the law was afterwards amended. The late Emperor Claudius was the first to bestow on a mother, to comfort her for the children she had lost, their statutory inheritance. (J. 3, 3, 1.)

This was done apparently only in a single instance.

Afterwards, by the *Senatus Consultum Tertullianum* (A.D. 158), passed in the time of the late Emperor Hadrian, very full provision was made about

the mother's sad succession, but no such succession was bestowed on the grandmother. The result is, that a freeborn mother, having the special rights granted to the mother of three children (*jus trium liberorum*), or a freedwoman that has the same rights because of her four children, is to be admitted to the goods of sons or daughters that have died intestate, and that although they are in the *potestas* of an ascendant, provided, of course, that when she is subject to legal rights on the part of another, that other orders her to enter. (J. 3, 3, 2.)

But we, by a constitution placed in the Code adorned with our name, have thought right to come to the mother's aid; looking to what nature demands, and to the child-bearing and the risk, and to the death that often comes on mothers in such a case. We have held it, therefore, a wrong to natural affection that a chance mishap should be admitted to their hurt. If a freeborn woman had not born three children, or a freedwoman four, she did not deserve to be defrauded of the succession to her children. What sin has she done in not bearing many children, but only a few? We have, therefore, given full statutory rights to mothers, whether freeborn or freedwomen, although they have not been in labour with three or four, but with him only or with her that has been cut off by death; and so they are to be called to the statutory succession to their children. (J. 3, 3, 4.)

But as we have looked out for the mothers, so they ought to take thought for their offspring. They are to know, therefore, that if they have neglected to ask, within a year, for *tutores* to their children, either at first or in the room of one that has been removed or excused, they shall be repelled deservedly from succeeding to their children under puberty at their death. (J. 3, 3, 6.)

Although it is uncertain who is the father of a son or daughter, its mother can be admitted to its goods under the *Senatus Consultum Tertullianum.* (J. 3, 3, 7.)

This does not apply to a child born in slavery and manumitted. (D. 38, 17, 2, 2.)

The order of succession.

To the deceased's mother his descendants are preferred if they are *sui heredes*, or in the position of such, whether they are in the first degree or in one more remote. Nay, even when it is her own daughter that is dead, her son or daughter is opposed, under the constitutions, to the mother of the deceased; that is, the grandmother. The father, too, of both, but not the grandfather or great-grandfather also, is put before the mother, when (that is) it is between them alone that the inheritance is in dispute. A brother also of the same blood, whether a son's child or a daughter's, shuts out the mother; but a sister of the same blood was admitted equally with the mother. If, however, the brother and sister were of the same blood, and the mother honoured by having children, then the brother shuts out the mother; but the inheritance was shared equally by the brother and sister. (J. 3, 3, 3.)

Changes by Justinian.

The earlier constitutions that searched out the statutory rights of succession in part aided the mother, in part weighed her down. To the entire inheritance they did not call her, but in certain cases took away from her a

third, and gave it to certain statutory persons, while in others they did just the contrary. We therefore thought it best to take the straightforward and simple way, to prefer the mother to all statutory persons, and to allow her to receive the succession to her sons without any deduction. The persons of the brother and sister are, however, excepted, whether they are of the same blood or have the rights of kinsfolk only. As, therefore, we have put the mother before the whole of the rest of the order settled by statute, so, too, we call all brothers and sisters, whether statutory or not, to take inheritances at once. Provided always that if there survive sisters alone (kinswomen or agnates), and the mother of the deceased man or woman, then the mother is to have half, and all the sisters the other half; but if there survive the mother and a brother, or brothers either alone or with sisters as well, and whether they have statutory rights or those of kinsfolk only, when a man or woman dies intestate, then the inheritance is to be portioned out by counting heads (*in capita*). (J. 3, 3, 5.)

II. Succession of children to mothers. (*Senatus Consultum Orphitianum*, A.D. 178.)

On the contrary, again, the admission of children to the goods of their intestate mothers was brought about by the *Senatus Consultum Orphitianum*, passed in the consulship of Orphitus and Rufus, in the time of the late Emperor Marcus. By it the statutory inheritance was given both to the son and to the daughter, even although subjected to the power of another; and they are preferred both to those of the same blood and to the agnates of their deceased mother. (J. 3, 4, pr.)

Last of all, we must know that even children begotten of a mother that is a public woman are admitted to the mother's inheritance under this *Senatus Consultum*. (J. 3, 4, 3.)

We must know, too, that successions of this sort bestowed by the *Senatus Consulta Tertullianum* and *Orphitianum* are not destroyed by *capitis deminutio*. The rule is that new statutory inheritances are not ruined by *capitis deminutio*, but those only that are bestowed under the statute of the XII Tables. (J. 3, 4, 2.)

Capitis deminutio affects agnation only. The statute, therefore, ranks the heirs with cognates, while giving them a preference to certain agnates.

III. Succession of grandchildren to grandmother.

Under this *Senatus Consultum* grandsons were not called to succeed to a grandmother by statutory right. Afterwards this was amended by the imperial constitutions, so that, like sons and daughters, grandsons and granddaughters too should be called. (J. 3, 4, 1.)

D.—The Succession of Agnates.

Gaius points out several defects in the law of the XII Tables in regard to the succession of the *agnati*.

Agnates that have undergone *capitis deminutio* the Prætor calls—not in the second degree after *sui heredes;* not, that is, in the degree in which by statute they would be called if they had not undergone *capitis deminutio;*—but in the third degree, on the ground that they are near relations. Their statutory rights, indeed, they have lost by their *capitis deminutio*, but those

of kinship (*cognatio*) they retain. If, therefore, there is any other that has his rights as an agnate unimpaired, he will be preferred, although he is in a degree further off. (G. 3, 27.)

In this part kinship by birth is looked to. Agnates that have undergone *capitis deminutio*, and their offspring, are under the statute of the XII Tables held not to be among the statutory successors, but are called in by the Prætor in the third degree. (J. 3, 5, 1.)

1. Emancipated brothers or sisters were exempted from the above rule.

To this there is one exception only. A brother and sister that have been emancipated, but not their descendants, are by the *lex Anastasiana* called, along with brothers whose rights are fully established as unimpaired, to the statutory inheritance of a brother or a sister. They do not, however, take equal shares; but there is a certain deduction, as may be easily gathered from the words of the constitution itself. But to other agnates of a lower degree, although these have not undergone *capitis deminutio*, they are preferred, and beyond a doubt to kinsfolk. (J. 3, 5, 1.)

This law was passed A.D. 503, and applied both to those out of the *potestas* succeeding those under it, and to those in the *potestas* succeeding those out of it, and it required emancipated brothers succeeding with those in *potestas* to bring their separate property into hotchpot. (C. 6, 58, 11.) Justinian (A.D. 532) observes that a doubt had arisen as to the rival claims of brothers and sisters and the father of the deceased, which doubt he resolved by enacting that the father should have a usufruct, and the brothers and sisters the *corpus*, of the property of the deceased. (C. 6, 58, 13.)

2. Disabilities of women agnates.

So far as women are concerned in this branch of the law, one view is held with regard to taking their inheritances, another with regard to their taking others' inheritances. Women's inheritances come back to us by the right of agnation, just as do men's; but our inheritances do not belong to women outside the degree of persons of the same blood (*consanguinei*). A sister, therefore, is statutory heir to a brother or sister; but an aunt on the father's side, and a brother's daughter, cannot be statutory heirs. A mother, too, or stepmother, that by passing *in manum* has gained at our father's hands a daughter's rights, stands to us in the position of a sister. (G. 3, 14.)

This disability was not imposed by the XII Tables, but was established by the jurisconsults, who thought that inasmuch as the *lex Voconia* imposed a limit to the appointment of women as heirs, there ought to be similar restrictions on their succession to persons dying intestate. (Paul, Sent. 4, 8, 22.)

Female agnates that are outside the degree of persons of the same blood are called in the third degree; that is, if there is neither a *suus heres* nor any agnate. (G. 3, 29.)

But among males, by the right of agnation, an inheritance may be taken either by those or from those even in the most remote degree. As for women, however, it was held that they could take an inheritance only by the right of sameness of blood, and therefore if they were sisters, but not if they were further off: while males would be admitted to the inheritances of women even if they were in the most remote degree. On this ground the inherit-

nce of your brother's daughter, or of the daughter of your uncle or aunt on
ıe father's side, belonged to you ; but yours did not belong to them. This
as so settled because it seemed more advantageous that rights should be
o settled as that inheritances should for the most part meet and flow to
ıales. (J. 3, 2, 3.)

Undoubtedly it was unfair that they should be altogether repelled as
outsiders. The Prætor, therefore, used to admit them to *bonorum pos-
ssio* by the part of his edict in which he promises this on account of near
elationship. Under this they are admitted, however, only if there is no
gnate and no nearer kinsman to come in before them. (J. 3, 2, 3.)

This the statute of the XII tables did not in any way bring in. It
mbraced simplicity, which the statutes love, and called in like manner all
gnates, whether men or women, of whatever degree, just like *sui heredes*,
o succeed to one another. But the jurisprudence of an intermediate time,
ater than the statute of the XII Tables yet earlier than the imperial
rrangements, with a certain curious subtlety brought in the distinction
foresaid, and repelled women altogether from succeeding to agnates, while
very other form of succession was unknown. But afterwards the Prætors,
tep by step setting right the harshness of the *jus civile*, or filling up what
as wanting with a humane design, added another degree to their edicts, and
rought in the line of kinsfolk on account of their near relationship. Thus
hey aided women by the *bonorum possessio*, and promised them that form
f it called *unde cognati* (for kinsfolk). (J. 3, 2, 3 A.)

We, however, follow the statute of the XII Tables, and preserve its traces
n this respect. We praise the Prætors, indeed, for their humanity ; but
ve do not find that their remedy fully meets the case. Why, indeed, when
hey meet in one and the same degree by birth, and when the titles by
gnation are settled with impartial balance alike for males and for females,
vere males allowed to come in and succeed to all agnates, while of the female
gnates to none at all except to a sister only was a way open to enter upon
he succession to agnates? Everything, therefore, we have brought back in
ull, and have made precisely the same arrangements as were laid down by the
XII Tables. By our constitution, then, we have enacted that all statutory
ieirs—descendants, that is, through males, whether men or women—are to
e called in like manner to the rights of statutory succession in case of in-
estacy, according to the privilege of their degree ; and that women are not
o be shut out because they have not, like sisters, the rights due to same-
ness of blood. (J. 3, 2, 3 B.)

This addition, too, we have thought fit to make to our constitution ; one
legree only we have transferred from the right of kinship to statutory
succession. Not only, therefore, a brother's son and daughter, according to
vhat we have just determined, are to be called to succeed to their uncle on
he father's side, but the son and daughter also of a sister of the same blood,
or of a sister by the same mother—alone, however, and not accompanied by
he persons that follow next—are to come to the rights of their uncle on the
nother's side. If, then, a man dies that is uncle on the father's side to his
rother's sons, and uncle on the mother's side to his sister's children, on
oth sides alike they will succeed to him just as if all were descended from
nales, and came by statutory right. It is taken for granted, of course, that
he brother and sister are not still alive. If they come first and accept the

succession, the other degrees remain altogether set aside, since the inheritance is to be divided not by stocks but by counting heads. (J. 3, 2, 4.)

3. Consanguineous relatives—*i.e.*, brothers and sisters of the same father, whether of the same mother or not (Ulp. Frag. 26, 1)—were preferred to other agnates of equal proximity to the deceased. (D. 38, 16, 1, 9.) This is, however, only a preference (to grandfathers, and) uterine brothers and sisters, *i.e.*, those having the same mother, but not the same father.

4. Peculiarity as to succession of *agnati*.

The rule of law is the same, as some think, in the case of the agnate that, when the nearest agnate passes by the inheritance, is none the more admitted by statutory right. There are others, however, that think he is called in the same degree by the Prætor in which by statute the inheritance is given to the agnates. (G. 3, 28.)

It was held, moreover, that in that way of taking inheritances there was no succession; that is, that although the nearest agnate, who, according to what we have said, is called to the inheritance, either despises the inheritance or before entry dies, those that come next are none the more admitted by statutory right. This again the Prætors corrected, but their law was incomplete. They did not leave them entirely without a help, but they called them in their order as kinsmen, taking for granted their rights as agnates were wholly shut off from them. But we, in our desire that nothing should be wanting to make the law as complete as possible, by our constitution that at the promptings of humanity we have put forth on the rights of patrons, have enacted that the succession to the inheritances of agnates must not be denied them. It was, indeed, sufficiently absurd that what was opened to kinsfolk by the Prætor should remain shut to agnates, especially since in regard to the burden of acting as *tutores*, when the first degree failed, the next came in; and what held good in the case of a burden, was not allowed in the case of gain. (J. 3, 2, 7.)

V.—Collateral Cognates.

1. Position of the blood relatives of the deceased.

The cases of *bonorum possessio* that arise under a will are these:—First, that which is given the children that are passed over; this is called *contra tabulas* (contrary to the terms of the will). Second, that which the Prætor promises to all legally-appointed heirs; it is called, therefore, *secundum tabulas* (according to the terms of the will). After he spoke first about wills he passed on to cases of intestacy.

(1.) He gives to *sui heredes*, and those that under the Prætor's edict are reckoned along with these, *bonorum possessio;* this is called *unde liberi* (for descendants).

(2.) To statutory heirs (*Unde legitimi*).

(3.) To the ten persons he preferred to an outside manumitter (*Unde decem personae*), namely these:—The father, the mother, the grandfather, the grandmother, both on the father's side and on the mother's side; the son also, the daughter, the grandson, the granddaughter, both by a son and

by a daughter ; the brother, the sister, whether of the same blood or by the same mother.

(4.) To the nearest kinsfolk (*Unde cognati*).

(5.) To some one as belonging to that household (*Tum quem ex familia*).

(6.) To the patron (male or female), and their descendants and ascendants (*Unde liberi patroni patronaeque et parentes eorum*).

(7.) To the husband and wife (*Unde vir et uxor*).

(8.) To the manumitter's kinsfolk (*Unde cognati manumissoris*). (J. 3, 9, 3.)

In this Table, Nos. 5, 6, 8 belong solely to the succession of freedmen, and No. 3 has been already explained. Hence the cognates take the third rank.

After the *sui heredes* and those that the Prætor and the constitutions call among them, and after the statutory heirs (among whom are reckoned the agnates and those raised up to their position both by the *Senatus Consulta* above named, and by our constitution), the Prætor calls the nearest kinsmen. (J. 3, 5, pr.)

In the same degree are called also those persons that are united through females. (G. 3, 30.)

Those kinsmen, too, that are allied through females collaterally, the Prætor calls to the succession in the third degree, on account of near relationship. (J. 3, 5, 2.)

Preference of agnates.

If the *sui heredes* are out of the way, and those that we have said are called among them, an agnate that has his right as such unimpaired, although in a very remote degree, is for the most part preferred to a nearer kinsman. Thus the grandson or great-grandson of an uncle on the father's side is preferred to an uncle or aunt on the mother's side. Whenever, therefore, we say either that he is preferred that holds the nearer degree of kinship, or that those are called equally that are kinsmen, it must always be understood that in these cases there is no one to be preferred, either by the rights of *sui heredes* and those that come among them, or by the rights of agnates, according to what we have laid down. A brother and sister that have been emancipated are, however, exceptions ; for they are called to succeed to brothers or sisters ; and even although they have undergone *capitis deminutio*, they are yet preferred to the other agnates of a degree further off. (J. 3, 6, 12.)

In its strict use, the term *consanguinitas* is applied only to children that had the same father. (D. 38, 16, 1, 10.) But it is sometimes used for persons simply related by blood.

Persons adopted into a family were considered to be of the same blood (*consanguinei*) as those under the *potestas* of the deceased, or his posthumous children. (C. 38, 16, 1, 11.)

2. The tie of cognation is not dependent on the legal character of the union by which it has been formed.

Children begotten by a mother that is a public woman have no agnate. This is plain, for agnation turns on the father, kinship on the mother, and such children are understood to have no father. On the same principle, it

appears that they cannot even be of the same blood as one another; for sameness of blood (*consanguinitas*) is a form of agnation. They are therefore only kinsfolk to one another, just as they are to their mother's kinsfolk. All such persons may avail themselves of *bonorum possessio* under that part of the edict in which kinsfolk are called on account of their near relationship. (J. 3, 5, 4.)

This is certain, that to kinship between slaves, that part of the edict in which *bonorum possessio* on account of near relationship is promised, does not apply, for no ancient law took such kinship into account. But by a constitution of ours, made on behalf of the rights of patrons (a branch of law, even up to our time, dark enough, and full of clouds, and on every hand confused), we, prompted by humanity, have made this concession :—If a man settled in such a union as a slave can form (*servile consortium*) has a child or children, either by a freewoman or by a woman in the position of a slave; or if, on the contrary, a slavewoman has by a freeman, or by a slave, children of whichever sex; and if now the parents come to be free, and the children that are born of a slave's womb have earned their freedom, or in case the women were free, and the men while in slavery had them, and they afterwards came to be free,—then all the children are to succeed to their father or mother, and the rights of patrons in this respect are to lie dormant. These children, indeed, we have called to succeed not only to their ascendants, but also each to the other. And under that statute we call them specially, so that whether these alone are to be found that have been born in slavery, and have afterwards been manumitted, or whether they come in along with others that have been conceived after their parents were free, or whether or not they are by the same mother or the same father, or by another marriage, they are to succeed like those that have been begotten in lawful marriage. (J. 3, 6, 10.)

3. Order of succession among cognates.

To recall, therefore, all we have now laid down, it is evident that those that hold an equal degree of kinship are not always equally called; and more than that, it is evident that even the nearer kinsman is not always preferred. *Sui heredes* come first, and those we have enumerated among them. Now it is evident that a great-grandson or great-great-grandson of the deceased is preferred to the deceased's brother or father or mother; although in all other respects, as we have laid down above, the father and mother hold the first degree of kinship, the brother the second, while the great-grandson is a kinsman in the third degree, and the great-great-grandson in the fourth. It makes no difference, too, whether he was in the power of the person that dies or not, or that he was either emancipated or the offspring of an emancipated person or of a female. (J. 3, 6, 11.)

4. Limits of cognation.

Here, too, we must necessarily be reminded that by the rights of agnation anyone may be admitted to the inheritance even if he is in the tenth degree; and this whether we ask about the statute of the XII Tables or about the edict in which the Prætor promises that he will give the statutory heirs *bonorum possessio*. But *bonorum possessio* on the ground of near relationship the Prætor promises only up to the sixth degree of kinship, or in the seventh to the son or daughter of a second cousin. (J. 3, 5, 5.)

F.—Husband and Wife.

When the wife was subject to the *manus* of her husband, she succeeded along with the children of the marriage as her husband's daughter. Her husband could not be her successor, for the sufficient reason that in her lifetime he was the sole owner of all the property accruing to her, and she had therefore nothing to leave. It is significant of the wide gulf separating marriage without *manus* from marriage with *manus*, that in the first the wife succeeded only after every species of heir was exhausted; in the latter, she took her share in the front rank. If not *in manu*, she takes in preference only to the Exchequer (*Fiscus*). (C. 6, 18, 1.)

The other case of *bonorum possessio* called *unde vir et uxor* (for husband and wife), which in the old order was put ninth, we have preserved in all its vigour, and have put in a higher place—namely, the sixth. The tenth in the old order, the *unde cognati manumissoris* (for the manumitter's kin), for the reasons fully stated, has been taken away. There remain, therefore, only six ordinary cases of *bonorum possessio* in full vigour and strength. (J. 3, 9, 7.)

The relation of husband and wife was the only instance of affinity recognised by the Roman law as a reason for intestate succession.

A constitution, whose author is unknown, but which was abrogated by Theodosius and Valentinian (C. Th. 5, 1, 9), gave to a spouse the succession to a spouse dying intestate, even when there were relatives (*cognati*).

By Nov. 53, 6, a wife without a dowry succeeded her husband, even when there were children, to the extent of one-fourth; but whatever she received as a gift was to reckon as part of the fourth. A needy husband was allowed to succeed to his wife in the same manner. This was modified slightly by Nov. 117, 5, which provided that when there were more than three children the wife should get an equal share with them, instead of a fourth; and, moreover, that she should have only a usufruct, the ownership remaining in the children; but if there were no children, she should have her fourth in full ownership.

Third Period.—The Novels 118 and 127.

Justinian observes with truth, in his introduction to the celebrated 118th Novel, that the law of intestate succession was complicated and perplexing. It was not based consistently either upon agnation or cognation; it was not accommodated either to the artificial or to the natural family; and the long series of changes introduced by Prætors or Emperors, while serving to bring the law more and more into harmony with the feelings of later times, added to the complexity and confusion of the subject. The title of Justinian's Novel, "*De Agnatorum Jure Sublato*," is the keynote of the reform. Persons that are at the same time agnates and cognates shall succeed as cog-

nates simply. (Nov. 118, 4.) Indeed, there was only one case in which, after the reforms of Justinian, a person could be an agnate who was not also a cognate ; and that was in the case of arrogation, in which the ancient incidents were expressly reserved (p. 209). It can hardly be supposed that the general language of Chap. IV. (of 118th Nov.) was meant to deprive persons who were arrogated of their rights of succession, or adopted children of that simple right of succession *ab intestato*, which (after Justinian's reform) was the sole effect of adoption.

It is to be observed also, that none were to enjoy the benefits of the constitution except those that held the Catholic faith. (Nov. 118, 6.)

With these qualifications, Justinian recognises no title to succession, except the tie of blood. He abrogates the whole of the existing law, such as we find it in the Institutes (Nov. 118, pr.), and recognises succession according to the following classes—ascendants, descendants, and collaterals.

I. Descendants are preferred to ascendants and collaterals.

They are preferred to ascendants even when the deceased is under *potestas*, in respect of the inheritable property left by deceased.

1. The children of the deceased, whether sons or daughters, take equal shares *per capita*.

2. Grandchildren take equally the portion that their parent would have taken if alive. So the grandchildren of a son or daughter take equally the share of that son or daughter. This succession is called *per stirpes*. (Nov. 118, 1.)

II. If there are no descendants, the ascendants exclude all collaterals, except brothers or sisters of the whole blood. (Nov. 118, 2.)

1. If there are several ascendants, the nearer exclude the more remote, whether they are male or female, on the father's side or on the mother's.

2. If there are two or more ascendants of the same degree, they divide the inheritance equally, but so that the ancestors on the father's side shall have one-half of the inheritance, and the ancestors on the mother's side the other half, irrespective of their numbers.

3. If there are sisters or brothers of the whole blood, they succeed along with the ascendants nearest in degree.

If the ascendants are the father or mother of the deceased,

the inheritance is to be divided among the brothers and sisters, father and mother, *per capita*, so that each shall have an equal share; and in this case the parents shall not be entitled to the usufruct of the share obtained by the brothers or sisters.

4. If there are children of any sister or brother of the full blood, they take the brother's or sister's share. (Nov. 127, 1.)

III. If there are no descendants or ascendants, the collaterals take in the following order (Nov. 118, 4):—

1. Brothers and sisters of the whole blood—*i.e.*, having the same father and mother—exclude all other collaterals.

The children of any such brother or sister (deceased) obtain the share of such brother or sister, and are preferred, like their parent, to all other collaterals.

2. If there is no brother or sister of the whole blood, or child of such brother or sister, then the brothers and sisters of the half-blood (*i.e.*, having the same father but not the same mother, or the same mother and not the same father) are preferred to all other collaterals.

The children of a brother or sister (deceased) of the half-blood are entitled to the share of such brother or sister.

3. If there are no brothers or sisters, either of the whole or half blood, the other cognates succeed, the nearer in degree excluding the more remote, and those of the same degree taking equal shares.

The children of such a deceased cognate do not take that cognate's share.

Gaia marries Titius, and has two sons, Maevius and Sempronius. By her second marriage with Aurelius, Gaia has a son Paulus. By a third marriage with Proculus, Gaia has a son Plautus. Sempronius dies intestate, and without descendants or ascendants. Who is his heir? Maevius excludes Paulus and Plautus. Suppose Maevius is dead; then Paulus and Plautus divide the inheritance of Sempronius equally between them.

Titius and Gaius are uterine brothers. Titius and Sempronius are full brothers. Sempronius and Titius die, Sempronius leaving a son Plautus. If Titius has no ascendant or descendant, Plautus succeeds to the exclusion of Gaius.

The Exchequer as Heir (*Bona vacantia*).

By the *lex Julia et Papia Poppaea* it was enacted that if no one applied for the *bonorum possessio*, the property of the deceased should go to the nation. (Ulp. Frag. 28, 7.)

In some cases the municipality—as Nice—enjoyed the right of succession in preference to the *Fiscus*. (Pliny, Epist. 10, 88.)

So the soldiers of a legion succeeded in preference to the

Fiscus to the property of a deceased comrade. (D. 28, 3, 6, 7; D. 40, 5, 4, 17; C. 6, 62, 2.)

The Curia had a like privilege in respect of the property of *decuriones*. (C. Th. 5, 2, 1; C. 6, 62, 4.)

Certain corporations also, as the food merchants (*naviculariі*) and smiths, had the privilege of succeeding to their members in preference to the Exchequer. (C. 6, 62, 1; C. 6, 62, 5; Nov. 85.)

So the goods of a monk or a priest went to the monastery or church in preference to the State. (C. 1, 3, 20.)

The case is different with those that, when no heir appears, without the Prætor's authority have taken possession of goods. Even these possessors, however, in old times, used to obtain the property before the *lex Julia*. But this statute makes the goods escheats (*caduca*), and ordains that they shall become the People's, if the deceased has no heir and no *bonorum possessor*. (G. 2, 150.)

Second.—Succession to Freedmen.

The succession to freedmen is hardly of sufficient interest to require a minute study, and it will be enough to consider the succession of patrons as presented to us by Gaius, and afterwards by Justinian.

I.—Succession to Freedmen (Roman Citizens).

(I.) Succession to Freedmen in the time of Gaius.

I. Male patron (*patronus*) to freedman (*libertus*).

Let us now see about the goods of freedmen. In old times a freedman was allowed with impunity to pass his patron over in his will. The statute of the XII Tables called a patron to the freedman's inheritance only if the freedman died intestate and left no *suus heres*. If, therefore, the freedman died intestate, but left a *suus heres*, the patron had no right over his goods. If, indeed, the *suus heres* he left was one of his children by birth, there seemed to be nothing to complain of; but if the *suus heres* was an adopted son [or daughter, or wife *in manu*], it was manifestly unfair that the patron should have no right over and above. (J. 3, 7, pr.; G. 3, 39-40.)

For this reason, therefore, the Prætor's edict afterwards amended this unfairness of the law. By it, if the freedman made a will, he was ordered to make it so as to leave his patron half of his goods; and if he left him either nothing or less than half, then the patron was given *bonorum possessio* of half, contrary to the terms of the will. If, again, the freedman died intestate leaving as *suus heres* an adopted son [or a wife in his *manus*, or a daughter-in-law that had been in his son's *manus*], the patron was given equally in opposition to them *bonorum possessio* of half. The only help the freedman usually could avail himself of to shut out his patron was from his children by birth; not only from those he had in his *potestas* at the time of his death, but also from those that were emancipated and given in adoption; provided only that they were appointed heirs of some share, or that if

passed over, they had claimed under the edict *bonorum possessio* contrary to the terms of the will; for if disinherited, they in no way repelled the patron (J. 3, 7, 1; G. 3, 41.)

Afterwards the *lex Papia* increased the rights of patrons that had very wealthy freedmen. It provided that out of the goods of a freedman that left a patrimony of a hundred thousand sesterces (or more), and had less than three children, whether he made a will or whether he died intestate, one equal share should be due to the patron. If, therefore, a freedman left one son or daughter his heir, half was due to the patron, just as if he had died without any son or daughter. If he left two heirs, male or female, a third was due to the patron. If he left three, the patron was repelled. (J. 3, 7. 2; G. 3, 42.)

II. Male patron (*patronus*) to freedwoman (*liberta*).

In the case of freedwomen's goods under the old law, patrons suffered no wrong. For since they were in the statutory *tutela* of their patrons, they could not make a will unless the patron authorised it. If, then, he authorised the making of a will, and had not as much left him as he wished, it was of himself he ought to complain, because he could have obtained it from the freedwoman. If, again, he did not authorise it, he with still greater safety took the inheritance at her death; since a freedwoman could leave no *sui heres* who might repel the patron from laying claim to her goods. (G. 3, 43, as restored.)

By the old law, all women were subject to the *perpetua tutela mulierum*, p. 727.

But afterwards the *lex Papia* gave freedwomen, in right of having four children, freedom from their patron's *tutela*, and so enabled them without the authority of a patron *tutor* to make a will. It provided, accordingly, that in proportion to the number of children the freedwoman had still alive, a share the same as each of them had should be due to the patron of her goods, contrary to the terms of the will. All her goods, too, he receives by legal interpretation, since he comes in the place of children when she leaves no children. And if she dies intestate, her whole inheritance always belongs to the patron. (G. 3, 44.)

III. Succession of children of male patron (*patronus*) to freedmen and freedwomen.

All we have said of a patron we are to understand of a patron's son also; and of his grandson by a son, and of his great-grandson born to a grandson by a son. (G. 3, 45.)

A patron's daughter, as also his granddaughter by a son, and his great-granddaughter born to a grandson by a son, have the same rights as those given to the patron by the statute of the XII Tables. The Prætor, however, calls the patron's male descendants only. But the daughter, contrary to the terms of the freedman's will, or if he dies intestate, can claim *bonorum possessio* of half in opposition to an adopted son, or a wife, or a daughter-in-law, if only she gains this privilege in right of having three children under the *lex Papia*; otherwise she has not this right. (G. 3, 46.)

But that out of the goods of her freedwoman that has four children the share of one child should be due her, is a privilege she does not obtain, as some think, in right of having children. If, however, the freedwoman dies

intestate, the words of the *lex Papia* make such a share due to her. If, again, the freedwoman makes a will before she dies, such rights are given the patron's daughter as have been given a patroness honoured by having children, so that she will have rights quite the same as those a patron and his descendants have contrary to the terms of a freedman's will. That part of the statute, however, seems too heedlessly written. (G. 3, 47.)

IV. Succession of female patron (*patrona*) to freedman (*libertus*).

Patronesses of old, before the *lex Papia*, had this right only over the goods of freedmen, a right given to patrons too under the statute of the XII Tables. To them, indeed, the Prætor refused to grant as to male patrons and their descendents, *bonorum possessio* of half, contrary to the terms of the will in which they were passed over ; or in case of intestacy, in opposition to an adopted son, a wife, or a daughter-in-law. (G. 3, 49.)

But afterwards the *lex Papia* gave a freeborn patroness honoured by having two children, or a freedwoman that had three, very much the same rights that patrons have under the Prætor's edict. To a freeborn patroness honoured in right of having three children it gave those rights that by the same statute have been given a patron ; but on a patroness that was a freedwoman he did not confer the same rights. (G. 3, 50.)

V. Succession of female patron (*patrona*) to freedwoman (*liberta*).

So far as relates to the goods of freedwomen if they die intestate, no new privilege is given the patroness honoured by having children under the *lex Papia*. If, therefore, neither the patroness herself nor the freedwoman has undergone *capitis deminutio* under the statute of the XII Tables, the inheritance belongs to her, and the freedwoman's descendants are shut out. This is the law also, even if the patroness is not honoured by having children ; for never, as we have said above, can women have a *suus heres*. But if a *capitis deminutio* of either one or the other comes in, then, again, the freedwoman's descendants shut out the patroness. The reason is, that when the statutory right is cut off by the *capitis deminutio*, the result is that the freedwoman's descendants are preferred by the right of kinship. (G. 3, 51.)

When, again, a freedwoman dies after making a will, a patroness not honoured by having children has no rights contrary to the freedwoman's will. But a patroness that is honoured by having children has given her by the *lex Papia* the very same rights that a patron has under the edict, contrary to the terms of the will. (G. 3, 52.)

VI. Children of female patron (*patrona*).

The same statute that gave rights to a patroness, gave them also to her daughter if honoured by having children, and to a patron's son. But in this case the right of even one son or daughter is enough. (G. 3, 53.)

Thus far have we touched on all these rights, but only so as to point them out, as it were, with the finger. Elsewhere a more diligent interpretation of them has been set forth in a commentary on this special subject. (G. 3, 54.)

VII. More remote heirs of patrons.

From all this it is plain that outside heirs of patrons are far removed from all those rights of inheritance that are open to the patron, either over the goods of the intestate or contrary to the terms of the will. (G. 3, 48.)

To a certain extent, however, the edict of the Prætor extended the area of succession. The relatives of the patron succeeded in the following order (Theoph. J. 3, 9, 1):—

1. When a freedman or freedwoman died intestate and childless after the death of the patron, then the agnates of the patron succeeded (*tum quem ex familia*).

2. In default of these came the children or parents of a patron (*patronus, patrona*). Theophilus explains this case as follows:—If the children or parents neglected to take as such after the children of the freedman (*unde legitimi*), and the time for asking the *bonorum possessio* had passed, and they had not asked under the immediately preceding head (*tum quem ex familia*), then either the patrons or their children or parents could come in under this second description—*unde liberi patroni patronaeque et parentes eorum.*

3. In default of all these, the cognates of the patron took, the nearer excluding the more remote.

(II.) Simplification of the law by Justinian.

But our constitution, which, that all may know it, we have drawn up in the Greek tongue, handling the subject compendiously, has defined the cases of this sort as follows :—If a freedman or freedwoman is worth less than one hundred *aurei* (*minores centenariis sint*), if their substance, that is, is less than this amount in value—for such is the interpretation we put on the sum in the *lex Papia*, counting one *aureus* equal to a thousand *sestertii*—then the patron is to have no place in succession to them, provided they have made a will. But if they die intestate and leave no descendant, then the rights of the patron, as they were under the statute of the XII Tables, our constitution preserves entire. If, however, they are worth more, and have as heirs or *bonorum possessores* descendants, whether one or more, of whatever sex or degree, on these descendants we have devolved the succession to the ascendants, and have set aside all patrons and their offspring along with them. But if they die without descendants, and are further intestate, we have called the patrons and patronesses to the whole inheritance; while if they have made a will and have passed by their patrons and patronesses, although they had no children, or had disinherited them if they had, or if it is a mother or grandfather on the mother's side that has passed them over, so that their wills cannot be attacked as undutiful;—then under our constitution, contrary to the terms of the will, they are to obtain not half, as formerly, but a third of the freedman's goods. If they have anything short of this, then under our constitution it is to be made up, if at any time a freedman or freedwoman has left them less than a third of their goods; provided always that it shall be free from any burden, so that not even to the freed-

man's or freedwoman's descendants shall any legacies or trusts be made good from that part, but that all this burden shall fall upon the co-heirs. Many other cases, too, we have gathered up in the aforesaid constitution, that we saw clearly were necessary to the arrangement of such a branch of law. Under it, not only patrons and patronesses, but their descendants, and those, moreover, that come in collaterally up to the fifth degree, are called to succeed to freedmen, as may be understood from that constitution. Again, if the same patron or patroness, or two patrons or patronesses or more, have descendants, then the nearest is to be called to succeed to the freedman or freedwoman, and the succession is to be portioned out by counting heads not stocks, precisely in the same way as in the case of those that come in collaterally. Indeed, the rights of freeborn persons and of freed persons in successions we have made almost in unison. (J. 3, 7, 3.)

Although formerly the seventh place was held by the *bonorum possessio*, called *tum quem ex familia* (for one of the household), and the eighth by the *unde liberi patroni patronaeque et parentes eorum* (for patrons' and patronesses' descendants and ascendants), yet both of those by our constitution on the rights of patrons we have altogether repealed. After the likeness of the successions to the freeborn we have appointed the successions to freedmen, narrowing them in, however, to the fifth degree only, that there may be some distinction between the freeborn and freedmen. They have therefore enough means in the *bonorum possessio* contrary to the terms of the will, and in that for statutory successors and for kinsfolk, of vindicating their rights; and so all the niceties and intricate wanderings peculiar to the two first-named forms of *bonorum possessio* have been done away with. (J. 3, 9, 6.)

Table of Succession according to Justinian (C. 6, 4, 4, 8-12) :—

1. Descendants of the freedmen and freedwomen, including those born in slavery and afterwards manumitted.
2. The patron and his descendants.
3. The collateral cognates of the patron to the fifth degree.

If the freedman has children, he can bequeath his whole property; if he has not, he must, if worth 100 *aurei*, leave a certain portion to the patron, as stated in the text.

These rules were modified by a power given to a patron of assigning the rights of patronage, including those of inheritance, to one of his children.

Lastly, as regards the goods of freedmen, we must be reminded that the Senate has resolved that, although to all the patron's descendants of the same degree the goods of freedmen belong equally, it would be lawful for the ascendant to assign a freedman to one of the descendants, so that after his death that descendant alone to whom the freedman had been assigned should be held to be patron; and that the rest of the descendants that would themselves, too, be admitted equally to the same goods if no assignment came in, would have no right over those goods. But in one case they recover their first rights, and in one only; if, namely, the descendant to whom the freedman is assigned, dies and leaves no children. (J. 3, 8, pr.)

It makes no difference whether it is by will a patron assigns, or without a will. Any words, too, whatever the patron may use to do this, under the

very *Senatus Consultum* (A.D. 45) that was made in the time of Claudius when Suillus Rufus and Ostorius Scapula were consuls. (J. 3, 8, 3.)

Not only a freedman, but a freedwoman too, one is allowed to assign; and not only to a son or grandson, but also to a daughter or granddaughter. (J. 3, 8, 1.)

This power of assignment is given to a man that has two or more descendants in his *potestas*, that so he may to those he has in his *potestas* assign a freedman or a freedwoman. Hence the question was raised, whether if he afterwards emancipated the man to whom he had assigned some one, the assignment would not disappear? It has been held that it would disappear, as was the view of Julian and of most others. (J. 3, 8, 2.)

II.—Succession to Junian Latins (*Latini Juniani*).

Next we must look narrowly to the case of the goods of Latin freedmen. To make this part of the law plainer, we must be reminded of what we have said elsewhere, that the persons now called *Latini Juniani* were of old slaves *ex jure Quiritium*, but were by the Prætor's aid usually preserved in a form of freedom. Hence their very property used to belong to their patrons by the master's right to the *peculium*. But afterwards by the *lex Junia* all those the Prætor protected in their freedom came for the first time to be freemen, and were called *Latini Juniani*. They were called *Latini*, because the statute aimed at making them free, just as if they were freeborn Roman citizens that had been led out from the city of Rome to Latin colonies, who then came to be Latin colonists. They were called *Juniani*, because by that *lex Junia* they became freemen, although not Roman citizens. Now the lawgiver that passed the *lex Junia* understood that it would come to pass that by reason of that fiction the property of deceased Latins would no more belong to their patrons; for they neither died as slaves, that so their property might belong to their patrons by the master's right to the *peculium*, nor could the goods of a Latin freedman belong to the patrons by the right of manumission. He thought it necessary, therefore, lest the boon given them should be turned into a wrong to their patrons, to provide that the goods of such freedmen should belong to their manumitters, just as if the statute had not been passed. By a sort of master's right over the *peculium*, therefore, the goods of Latins belong to their manumitters. (G. 3, 55-56.)

In the case of freedmen (Roman citizens), the patrons succeed under the special rules applicable to patronage; but in the case of the *Latini Juniani* the patrons succeed simply as owners.

The result is that there are many differences between the rights that are established over the goods of Latins under the *lex Junia*, and those that are observed in regard to the inheritance of Roman citizens that are freedmen. (G. 3, 57.)

(1.) The inheritance of a Roman citizen that is a freedman belongs in no way to his patron's outside heirs (*extranei heredes*). But to his patron's sons, and grandsons by a son, and great-grandsons born of a grandson that is a son's son, it belongs in any case, even although they have been disinherited by their ascendant. But Latins' goods, like slaves' *peculia*, belong even to outside heirs, and do not belong to the manumitter's descendants if disinherited. (G. 3, 58.)

This difference, like the others that follow, arises from the fact that the succession to *Latini* is governed by the same rules as the succession to property.

(2.) Again, the inheritance of a Roman citizen that is a freedman belongs equally to his patrons if there are two or more, although the shares they had as owners of the slave were unequal. But the goods of Latins belong to the patrons in the shares in which each was owner. (G. 3, 59.)

(3.) Again, in the inheritance of a Roman citizen that is a freedman, one patron shuts out the other patron's son, and the son of one patron repels the grandson of another. But the goods of Latins belong at the same time to a patron in person, and to the heir of the other patron, in proportion to the share in which they would belong to the manumitter in person. (G. 3, 60.)

(4.) Again, if there are of one patron say three descendants, and of the other one, the inheritance of a Roman citizen that is a freedman is divided by counting heads; that is, the three brothers carry off three shares, and the fourth one share. But the goods of Latins belong to the successors in the same shares in which they would belong to the manumitter in person. (G. 3, 61.)

(5.) Again, if one of the patrons despises his share in the inheritance of a Roman citizen that is a freedman, or dies before deciding whether to take it, the whole inheritance belongs to the other. But the goods of Latins, so far as regards the share of the patron that fails to take, become escheats and belong to the People. (G. 3, 62.)

Senatus Consultum Largianum, A.D. 42.

Afterwards, when Lupus and Largus were consuls, the Senate resolved that the goods of Latins should belong first to him that set them free; next to their descendants not disinherited by name, as each was nearest; and that then by the ancient law they should belong to the heirs of those that had freed them. (G. 3, 63.)

This *Senatus Consultum*, as some think, has done this; it makes us use the same law with regard to the goods of Latins that we use in the case of the inheritance of Roman citizens that are freedmen. Such was the opinion notably of Pegasus. But this opinion is manifestly false. The inheritance of a Roman citizen that is a freedman never belongs to the outside heirs of his patron. But the goods of Latins, even under this very *Senatus Consultum*, if the manumitter's descendants do not stand in the way, belong even to outside heirs. Again, in the case of the inheritance of a Roman citizen that is a freedman, no disinheriting harms the manumitter's descendants. But in the case of the goods of Latins, that a disinheriting by name does harm them, is clear from the very terms of this *Senatus Consultum*. It is truer, therefore, to say that this only has been done by that *Senatus Consultum*—it has made the manumitter's descendants, that have not been disinherited by name, be preferred to outside heirs. (G. 3, 64.)

The emancipated son of a patron, therefore, that has been passed over, although he may not have claimed *bonorum possessio* contrary to the terms of his parent's will, is yet preferred to outside heirs in the case of the goods of Latins. (G. 3, 65.)

Again, a daughter and the others that one may lawfully disinherit under the *jus civile* by using the words "and all others," although that is enough to remove them from all inheritance of their father's, will yet in the case of

the goods of Latins, unless they have been disinherited by their ascendant by name, be preferred to outside heirs. (G. 3, 66.)

Again, to descendants that have held back from an ascendant's inheritance, the goods of Latins belong, although they are held to be estranged from their father's inheritance; because they can in no way be said to be disinherited any more than those passed over in silence by the will. (G. 3, 67.)

From all this, it is evident enough that if a man makes a Latin . . . . (G. 3, 68.)

Again, if no outside heir comes in, and the descendants become heirs in unequal shares, the goods of a Latin, it is rightly held, belong to them in proportion to their shares in the inheritance, not in equal parts; because if no outside heir comes in, there is no room for the *Senatus Consultum.* (G. 3, 69.)

If, along with his own descendants, the patron leaves an outside heir as well, then Caelius Sabinus says the whole goods belong in equal shares to the deceased's descendants; because when an outside heir comes in, the *lex Junia* has no place, but the *Senatus Consultum* has. But Javolenus says that the patron's descendants will have in equal shares under the *Senatus Consultum* that part only which the outside heirs would have had before the *Senatus Consultum* by the *lex Junia;* but that the remaining parts belong to them in proportion to their shares in the inheritance. (G. 3, 70.)

Again, it is asked whether the *Senatus Consultum* refers to those descendants of a patron that are sprung from a daughter or granddaughter—that is, whether my grandson by a daughter would be preferred in the case of the goods of my Latin freedman to an outside heir. It is asked further, whether this *Senatus Consultum* refers to a mother's Latin freedmen; that is, whether in the case of the goods of a mother's Latin freedman the patroness's son would be preferred to her outside heir? It was Cassius' opinion, that in both cases there was room for the *Senatus Consultum.* But of this opinion of his most disapprove, because the Senate had not in view the descendants of patrons that were to follow another household. This is evident from the fact that it sets aside those that are disinherited by name; for it seems to have in view those that are usually disinherited by an ascendant if they are not appointed heirs. But it is not necessary either for a mother to disinherit a son or daughter, or for a grandfather on the mother's side to disinherit a grandson or granddaughter, if he or she is not appointed heir. This is so whether we ask about the *jus civile* or about the Prætor's edict, in which he promises the descendants that are passed over *bonorum possessio* contrary to the terms of the will. (G. 3, 71.)

Sometimes, however, a Roman citizen that is a freedman dies as if a Latin; as, for instance, a Latin that, without impairing his patron's rights, has obtained from the Emperor the *jus Quiritium;* and again, as settled by the late Emperor Trajan, a Latin that, when his patron is unwilling, or does not know of it, has obtained from the Emperor the *jus Quiritium.* In these cases, while such a freedman is alive, he is like all other Roman citizens that are freedmen, and the children he begets are lawful; but he dies with rights of a Latin, and not even his children can be his heirs. So far only has he the *testamenti factio,* that he can appoint his patron heir, and can name a substitute to him if he refuses to be heir. (G. 3, 72.)

The effect of this constitution seemed to be that such men could never die as Roman citizens, although they afterwards came to enjoy such rights as to make them Roman citizens under the *lex Ælia Sentia*, or under a *Senatus Consultum*. At the instance of the late Emperor Hadrian, therefore, who was moved by the unfairness of the case, a *Senatus Consultum* was passed, that those that, when their patron knew it not or refused, obtained from the Emperor the *jus Quiritium*, if they afterwards came to enjoy such rights as under the *lex Ælia Sentia* or under a *Senatus Consultum*, would, if they had remained Latins, have obtained for them Roman citizenship, were to be regarded as if under the *lex Ælia Sentia*, or under a *Senatus Consultum*, they had come to the Roman citizenship. (G. 3, 73.)

Abolition of the class of *Latini Juniani*.

But all this must in our day be said of those freedmen that have come into Roman citizenship. There are, indeed, no others, for the *dedititii* and the Latins have both been taken away. To the Latins there were no statutory successions at all; for although they went through life as free, yet with their last breath they lost at once life and freedom; and as if they were slaves, their goods were detained by their manumitters under the *lex Junia*, as if by a sort of master's right to the *peculium*. But afterwards, by the *Senatus Consultum Largianum*, it was provided that the descendants of the manumitter, unless disinherited by name, should be preferred to their outside heirs in the case of the goods of Latins. Upon this followed also the edict of the late Emperor Trajan, that made the same man, if, when his patron was unwilling or knew not, he hastened by the Emperor's boon to come to the citizenship, in life indeed a Roman citizen, but on his death a Latin. But by our constitution, because of such shifting of conditions and other hardships, we have resolved that along with the Latins themselves the *lex Junia* also, and the *Senatus Consultum Largianum*, and the edict of the late Emperor Trajan, shall be for ever blotted out, that so all freedmen may enjoy the Roman citizenship. In a wonderful way, too, by making certain additions, we have transplanted the very ways that led to Latin rights to the taking of Roman citizenship. (J. 3, 7, 4.)

III.—Succession to *Dedititii*.

The goods of those that the *lex Ælia Sentia* ranks among the *dedititii* sometimes as if they were Roman citizens that were freedmen, sometimes as if they were Latins, belong to their patrons. The goods of those that, if they were not in some fault, would, when manumitted, have been Roman citizens, are given to their patrons, as if they were Roman citizens, by the same statute. These have not, however, the *testamenti factio* as well, as most have held, and not undeservedly; for it seemed incredible that the legislator should have wished to grant to men of the worst condition the right to make a will. But the goods of those that, if they were not in some fault, would, when manumitted, have been Latins, are given to their patrons, just as if they had died Latins. I am not, however, unmindful that the legislator has not expressed his wishes in that matter in words that are altogether satisfactory. (G. 3, 74-76.)

The class of *dedititii* was abolished by Justinian. (J. 3, 7, 4.)

CHAPTER III.

THE VESTING OF AN INHERITANCE.

(*Aditio Hereditatis.*)

As a general rule, something more than a will, or, in the case of intestacy, the death of the predecessor, was required in order to make a person an heir. In most cases the death of a testator, or of a person intestate, simply operated as an offer of the inheritance to the heir named; and it was for the latter to determine whether or not he would accept the offer, and thereby make himself heir. With reference to this subject, heirs are divided into three classes.

I. When a slave of a testator (*heres necessarius*) is named heir, the appointment becomes, on the death of the testator, an investitive fact, without the necessity of any acceptance by the slave.

Heirs are said to be either necessary, or *sui et necessarii*, or outsiders (*extranei*). (J. 2, 19, pr.; G. 2, 152.)

A necessary heir is a slave that is appointed heir [with his freedom as well]. He is so called because, whether he wishes it or not, in any case after the death of the testator he forthwith becomes free and a necessary heir. Hence, those that suspect their resources usually appoint a slave of theirs heir in the first or second, or even in a further-off degree; so that, if the creditors are not satisfied, this heir's goods, and not the testator's own, may be taken possession of by the creditors, or sold off, or divided among them. [In this way, then, the disgrace (*ignominia*) that results from a forced sale of goods attaches to this heir rather than to the testator himself; although Fufidius reports that Sabinus held he ought to be exempted from the disgrace, because it was not by his own fault, but by a necessity the law laid upon him, that he suffered a forced sale of his goods. But the law in use by us is different.] In return for such a disadvantage, however, he has this advantage afforded him, that all he acquires for himself after his patron's death [whether before the forced sale of his goods or afterwards] is set aside for him; and although the goods of the deceased are not enough for the creditors [but pay them only in part], there is no second sale on that ground [namely, because of the inheritance] of the property he has acquired for himself [unless indeed he has acquired something because of the inheritance, as if he has been enriched by the death of a Latin freedman]. But all others whose goods when sold pay only in part, if they acquire anything afterwards, usually have their goods sold even again and again. (J. 2, 19, 1; G. 2, 153-155.)

The rules applicable to Bankruptcy will be afterwards considered. (Book IV. Execution of Judgments.)

II. Persons under the *potestas*, *manus*, or *mancipium* of the

deceased (*sui et necessarii heredes*), whether dying testate or intestate, and who upon the death of the deceased become entitled to succeed as heirs, were by the civil law in the same position as slaves, but were allowed by the Prætor to refuse the inheritance (*beneficium abstinendi*). Unless, therefore, they elect to refuse, they become heirs without any express acceptance. The right of election was lost by any interference with the inheritance (*immixtio*).

Heirs *sui et necessarii* are such as a son, a daughter, a grandson, and granddaughter by a son, and the rest of the descendants in order, if only they were in the *potestas* of the man that dies. But to make a grandson or granddaughter *sui heredes* it is not enough that he or she was in the *potestas* of the grandfather at the time of his death ; his father also must needs have ceased to be *suus heres* in the lifetime of his father, and must therefore have been either cut off by death or in some other way freed from the *potestas*, for then the grandson or granddaughter succeeds, and steps into the father's place. *Sui heredes* they are called, because they are heirs at home, and even in the father's lifetime are thought to be in some sense owners. Hence, too, if a man dies intestate, the descendants come first in succession. *Necessarii* they are said to be, because in any case, whether they wish it or not, in cases of intestacy and under a will alike, they become heirs. But the Prætor allows them, if they wish, to hold back from the inheritance, that so the ascendants' goods rather than theirs in like manner may be taken possession of by the creditors [and sold]. (J. 2, 19, 2 ; G. 2, 156-158.)

The rule of law is the same in the case of a wife *in manu*, because she is in the position of a daughter, and in the case of a daughter-in-law that is in the son's *manus*, because she is in the position of a granddaughter. (G. 2, 159.)

Nay, even to a person *in mancipio*, a person conveyed to the deceased and appointed heir with his freedom as well, the Prætor gives a like power to hold back. Although a necessary heir, like a slave, he is not also a *suus heres*. (G. 2, 160.)

Sui heredes may become heirs, even though they know it not, and although they are mad. Indeed, in all the cases in which we can acquire anything without knowing it, we can acquire it even when mad. At once, on the ascendant's death, the ownership goes on as it were unbroken. There is therefore no need for the authority of a *tutor* in the case of *pupilli*, since *sui heredes*, even though they know it not, can acquire an inheritance. And it is not by his curator's consent that a madman acquires, but simply by the law itself. (J. 3, 1, 3.)

III. All other persons were called outsiders (*extranei*). The nomination of these as heirs operated merely as an offer (*delatio*) of the inheritance, which until accepted by them had no legal effect. (D. 29, 2, 21, 2.)

All other heirs not subject to the testator's power are called outside heirs (*extranei*). Our descendants, therefore, that are not in our power, but are

appointed heirs by us, are held to be outside heirs. For this reason heirs appointed by a mother are in the same number, because women have not their children in their *potestas*. A slave, too, that is appointed heir [and set free] by his master, and after the will is made is manumitted by him, is regarded as in the same number. (J. 2, 19, 3 ; G. 2, 161.)

Outside heirs have power to deliberate whether to enter on the inheritance or not. (J. 2, 19, 5 ; G. 2, 162.)

But if either a man that has power to hold back mixes himself up with the goods of the inheritance, or an outsider that may lawfully deliberate whether to enter on an inheritance, enters, he has after that no power to give up the inheritance, unless he is under twenty-five years of age. Men of this age, indeed, just as in every other case where they are deceived, if they rashly take up a ruinous inheritance, the Prætor hastens to aid. (J. 2, 19, 5 ; G. 2, 163.)

We must know, indeed, that the late Emperor Hadrian gave relief to a man over twenty-five, when, after he entered on the inheritance, a huge debt that at the time he entered on it was still hidden, had come to light. (J. 2, 19, 6 ; G. 2, 163.)

Jus deliberandi.

Outside heirs were allowed time by the Prætor to determine whether they would take the inheritance. (Ait Prætor ; si tempus ad deliberandum petet, dabo.) (D. 28, 8, 1, 1.) Generally the length of time was in the discretion of the judge (D. 28, 8, 1, 2), but was never less than 100 days. (D. 28, 8, 2.) The time might be extended by the Prætor for urgent reasons. (D. 28, 8, 3.) The parties had the right to inspect the accounts of the deceased, to enable them to determine whether they would take or refuse the inheritance. (D. 28, 8, 5, pr.)

During this delay the property of the inheritance must not be interfered with, except so far as was absolutely necessary ; thus, with the sanction of the Prætor, a son could maintain himself (D. 28, 8, 9), or repair buildings, cultivate lands, pay debts due under a penalty, and take the necessary steps to prevent pledges being sold. (D. 28, 8, 7, 3.)

The acceptance of an inheritance was in two ways: (1) a formal (*cretio*), confined to outsiders (*extranei heredes*) ; and (2) an informal expression or sign of intention to accept, which was the same for both children (*sui et necessarii*) and outsiders (*extranei*), although in the case of the former it was called *immixtio*, and in that of the latter *pro herede gerendo*. But the same acts and expressions that were in one case a sign of waiving the right of abstention (*beneficium abstinendi*), were in the other a sign of acceptance (*aditio hereditatis*.)

1. Formal Acceptance (*cretio*) by outsiders.

1°. What is *cretio?*

Outside heirs are usually allowed time to decide (*cretio*). An end, that is, to their deliberation is fixed, so that within a certain time either they must enter on the inheritance, or if they do not enter, they are at the end of the time set aside. This is called *cretio*, because the verb *cernere* means to decide, as it were, and settle. (G. 2, 164.)

2°. The form and effect of common *cretio* (*cretio vulgaris*).

Since, then, the appointment in the will runs thus, "Titius be heir," we ought to add, "and decide within the next hundred days after you come to know and can decide. If you do not so decide, then be disinherited."[1] (G. 2, 165.)

The heir so appointed, if he wishes to be heir, ought to decide within the day fixed for his decision; that is, to say these words, "Seeing Publius Maevius has by his will appointed me his heir, on that inheritance I enter, and decide to take it."[2] If he does not so decide, then at the end of the time for deciding he is shut out; and it is of no avail that he acted as heir, that is, used the property that formed the inheritance as if he were heir. (G. 2, 166.)

Just as an heir that is appointed with time to decide, unless he decides to take the inheritance, does not become heir, so he is shut out only if he has not decided within the time that puts an end to his power of choice. Although, therefore, before the time for decision, he has settled not to enter on the inheritance, yet, if he is moved by repentance while the day for deciding is not yet come, he can, by deciding to take it, be heir. (G. 2, 168.)

Every decision is tied down to a fixed time. For that, a hundred days seemed a bearable time. A longer or shorter time, however, can none the less be given by the *jus civile;* but a longer time the Prætor sometimes narrows down. (G. 2, 170.)

3°. *Cretio continua.*

Although every decision is tied down to fixed days, yet there is one form called common (*vulgaris*), another within fixed days (*certorum dierum*). Common is the one we have set forth above, that is, in which there are added these words, "within which he comes to know and can decide." Within fixed days is that in which these words are withheld, but all the rest written. Between these two there is a great difference. When the common time for decision is given, no days are taken into account, except those on which a man knows that he has been appointed heir and can decide. But when a time for decision within fixed days is given, then even though a man does not know he has been appointed heir, the days are reckoned in unbroken order. Even in the case of a man that on some ground is forbidden to decide, and still more in the case of a man that has been appointed heir under a condition, the time is reckoned. Hence it is better and more fitting to use the common form. The other is also called continuous (*continua*), because the days are reckoned in unbroken order. This form is, however, so hard that the other is more in use, and hence also is called common. (G. 2, 171-173.)

4°. Perfect and imperfect *cretio.*

The *cretio* is imperfect when these words are not added, "If you do not decide be disinherited" (*Si non creveris, exheres esto*). When this omission occurred, the heir named by an informal

[1] *Heres Titius esto,* adjicere debemus: *cernitoque in centum diebus proximis, quibus scies poterisque. Quodni ita creveris, exheres esto.*

[2] *Quod me Publius Maevius testamento suo heredem instituit, eam hereditatem adeo cernoque.*

acceptance acquired the inheritance. But a difficulty arose when a substitute was named. "If you do not decide, then let Maevius be heir" (*Si non creveris, tunc Maevius heres esto*).

It was held in this case, that if the heir named did not formally accept, but only informally (*pro herede gerendo*), he was admitted only to one-half, Maevius getting the other half. Marcus Antoninus, however, altered this rule, and gave the heir, although he made an informal acceptance, the whole of the inheritance. (Ulp. Frag. 22, 34.)

5°. Abolition of formal acceptance (*cretio*).

Constantine abolished this formality in favour of persons entering on the inheritance of cognates. (C. Th. 5, 1, 1, 2.) It was entirely abolished by Arcadius, Honorius, and Theodosius (A.D. 407; C. 6, 30, 17), and is not mentioned by Justinian.

2. Informal acceptance by outsiders (*pro herede gerendo*), or forfeiture of the right of abstention by children (*immixtio*).

A man that is appointed heir without a time to decide, or that in case of intestacy is called to the inheritance by statutory right, can become heir either by deciding or by acting as heir, or even by the bare intention to take up the inheritance. He is free also at whatever time he wishes to enter on the inheritance. The Prætor, however, usually, on a demand by the creditors of the inheritance, settles a time within which, if he wishes to, he may enter on the inheritance; and declares that if he does not it shall be lawful for the creditors to sell the goods of the deceased. (G. 2, 167.)

The man that without any time to decide in is appointed heir, or that in case of intestacy is called by statute, as by a bare intention he becomes heir, so also by a design to the contrary is at once repelled from the inheritance. (G. 2, 169.)

This refusal can only be made after the death of the testator, and after the heir named is in a position to accept. If it is not ripe for acceptance, he cannot refuse. (D. 29, 2, 94; D. 29, 2, 13, pr.) A person that refuses as an instituted heir is not precluded from accepting as a substituted heir. (D. 29, 2, 76, 1.)

What is an acceptance or interference such as to tie a person to an inheritance? (*pro herede gerendo, immixtio*).

It was a question of fact—did the person intend to be heir? If his intentions were expressed in clear language, no difficulty arose; the point that exercised the ingenuity of the jurisconsults was what acts showed an implied intention to accept. As the whole question turns on intention, it was held that when that was not exercised freely, but under coercion or intimidation, the acceptance would have no effect. (D. 29, 2, 6, 7; D. 29, 2, 85.)

An acceptance must be unconditional, thus :—"If the inheritance is solvent, I will accept it," is not an acceptance. (D. 29, 2, 51, 2.)

An outside heir, again, that is appointed by will, or that in case of intestacy is called to the legal inheritance, can, either by acting as heir or even by a bare intention to take up the inheritance, become the heir. A man acts as heir if he uses the property of the inheritance as if he were heir, either by selling it, or tilling the farms, or letting them, and, indeed, if in any way at all, either by acts or by words, he makes his intention to enter on the inheritance clear : provided only that he knows that the man with whose goods he is acting as heir has died, either with a will or without it, and that he is his heir. To act as heir is to act as owner ; the ancients, indeed, used the name heirs for owners. As further, by a bare intention an outsider becomes heir, so too by a design to the contrary he is at once repelled from the inheritance. A man, moreover, that is born deaf or dumb, or afterwards becomes so, there is nothing to hinder from acting as heir, and from acquiring for himself an inheritance, if he understands what he is about. (J. 2, 19, 7.)

To use any of the hereditary property is *prima facie* evidence of acceptance. (Ulp. Frag. 22, 26.) But if it is clearly proved that the heir named had resolved to abstain from the inheritance, and continued in the family mansion only as tenant, or to watch it, he is not made heir. (C. 6, 31, 1.)

The use of the family sepulchre is not conclusive evidence of acceptance. (D. 29, 2, 20, 3.)

To use a thing not part of the inheritance as owner, under the mistaken idea that it was part of the inheritance, is an acceptance, as being proof of the intention to act as heir. (D. 29, 2, 21, 1.)

Manumitting slaves of the inheritance is an acceptance, as being a clear exercise of the rights of ownership. (Ulp. Frag. 22, 26 ; D. 29, 2, 42, 2.)

Paying the debts due by the deceased is an acceptance. (C. 6, 30, 2.)

A son buries and performs funeral rites for his father. Is this an acceptance ? Or if he gives food to the slaves, or sells slaves, or lets or repairs a house ? All these things are evidence of intention, and therefore it was usual for a son, if he did not intend to accept, to act under protest, that he was prompted in his acts by a sense of filial duty, and not by a wish to take the inheritance. If the acts were urgently necessary for the benefit of the estate, this disclaimer effectually prevented the inheritance being fastened upon him. (D. 29, 2, 20, 1.)

Titius and his son were appointed heirs. By order of Titius, the son accepted the inheritance. That was held to be an acceptance by Titius of the share for which he himself was appointed. (D. 29, 2, 26.)

An inspection of the accounts of the deceased is necessary to enable a designated heir to know how he should act ; it cannot, therefore, be taken as an acceptance of the inheritance. (D. 29, 2, 29.)

In certain cases a person was fastened with an inheritance when it was not his intention to accept, but when, from his conduct, it ought to have been his intention. If the appointed heir concealed, purloined, or consumed any of the property of the deceased, or caused it to be concealed, purloined, or con-

sumed he could not refuse the inheritance. He is fixed with it, whether he desires it or not. (D. 29, 2, 71, 3.) But interference with property not known to be part of the inheritance, does not fix the appointed heir with the consequence attached only to a fraudulent design. (D. 29, 2, 71, 8.)

Fourth.—Transvestitive and Divestitive Facts.

Transvestitive Facts.

By the Roman law an inheritance was indivestible and untransferable.

An inheritance further admits of *in jure cessio* only. If the man to whom, in case of intestacy, the inheritance belongs by legal right, makes an *in jure cessio* of it to another before entry—that is, before he becomes heir—then he to whom he thus gives it up becomes heir, just as if he had himself been called by statute to the inheritance. But if it is after binding himself that he makes the *in jure cessio*, none the less he himself still remains heir, and on that account will be liable to the creditors. The debts, however, perish, and in that way the debtors to the inheritance make a gain. But the corporeal things that belong to the inheritance pass on to him to whom the *in jure cessio* of the inheritance is made, just as if each thing had been so given up to him singly. (G. 2, 34-35.)

Again, if the man to whom, in case of intestacy, the inheritance belongs by statutory right, makes an *in jure cessio* to some one else of that inheritance before deciding to take it, or acting as heir, then he to whom he so gives it up becomes heir with full rights, just as if he himself were called by statute to the inheritance. But if, after he is heir, he makes an *in jure cessio*, he still remains heir, and on that account will be personally liable to the creditors. Each thing, however, he will transfer bodily, just as if he had made an *in jure cessio* of each ; but the debts perish, and in that way the debtors to the inheritance make a gain. (G. 3, 85.)

An heir appointed by will, if before he enters on the inheritance he makes an *in jure cessio* of the inheritance to another, acts in vain ; but if he does this after entry, all happens as we have just said with regard to him to whom, in case of intestacy, the inheritance belongs by statutory right, if, after binding himself he makes an *in jure cessio*. (G. 2, 36.)

The rule of law is the same if an heir appointed by will, after becoming heir, makes an *in jure cessio* of the inheritance ; but if he does so before entering on the inheritance, he acts in vain. (G. 3, 86.)

The same view is taken with regard to necessary heirs by the authorities of the opposing school ; because it seems to make no difference whether a man becomes heir by entering on an inheritance, or is heir against his will. The nature of this case will appear in its own proper place. But the teachers of our school think that a necessary heir acts in vain when he makes an *in jure cessio* of the inheritance. (G. 2, 37.)

Whether a *heres suus et necessarius* acts to any purpose if he makes an

in jure cessio, is questioned. Our teachers think he acts in vain. But the authorities of the opposing school think he acts to the same purpose as all others after entering on an inheritance; for it makes no difference whether a man becomes heir by deciding or acting as heir, or by being tied down by necessity of law to the inheritance. (G. 3, 87.)

Sui heredes at first could not refuse the inheritance, and they could not alienate it. The *agnati* alone seem to have been able to convey the inheritance prior to acceptance; testamentary heirs were not allowed that privilege. After entering, the *agnati* had less power. The reason of these rules is not given by Gaius, and must now probably remain a matter of conjecture.

The so-called sale of an inheritance was not a complete transfer; it operated as a transfer only of the corporeal part. The debts due to the inheritance could be recovered by the heir, who alone was responsible to the creditors. The buyer did not become owner of the corporeal property even, until it was delivered. (D. 18, 4, 14, 1; C. 4, 39, 6.) But Marcus Aurelius allowed the buyer to sue the debtors in his own name (*utiles actiones*), so that if the debtors were sued by the heir, they could repel him by the plea of fraud. (D. 2, 14, 16, pr.) The heir, however, remained bound to the creditors, and could only save himself by calling upon the buyer, under his contract, to undertake the defence.

Divestitive Facts.

The rule of the Roman law was that an inheritance was indivestible (*semel heres semper heres*); but to this there was an exception when the inheritance was forfeited as a punishment on the heir. Generally, the forfeiture was to the Exchequer. (D. 34, 9, 5, 6.) The heir who forfeited lost all right in the inheritance, even to the Falcidian fourth (D. 34, 9, 5, 19); at the same time he was relieved from all the burdens (D. 34, 9, 18, 1), which now were transferred to the Exchequer (*Fiscus*). (D. 34, 9, 5, 4; D. 30, 50, 2.)

When is an inheritance or legacy taken away? (*de his quae ut indignis auferuntur*).

1. When a tutor marries his pupil against the law provided for that case (p. 687), she can inherit from him, but not he from her. (D. 30, 128.)

2. Similarly, when an official marries a woman in his province during his administration, he forfeits her property left to him. (D. 34, 9, 2, 1.)

3. When the testator has written that he wishes the heir to be deprived as unworthy. (D. 34, 9, 12.)

4. When the heir has been guilty of misconduct to the deceased, either in deceased's life, or in reference to his testamentary wishes.

(1.) When the deceased has lost his life through the fault or negligence of the heir. (D. 34. 9, 3.)

(2.) When the deceased has met a violent death, and the heir enters before the slaves of deceased are put to the torture and punished, according to the *Senatus Consulta Silanianum* and *Claudianum*. (D. 29, 5, 5, 2.)

(3.) If the heir disputes or denies the testamentary capacity of deceased, the property goes to the Exchequer; but if it is simply a deadly enmity that has sprung up, the will is held to be revoked, rather than the heir punished by forfeiture. (D. 34, 9, 9, pr.)

(4.) If the heir conceals, destroys, or obliterates the will of the deceased. (D. 48, 10, 4, 1.)

(5.) If the heir fraudulently conceals or abstracts property bequeathed to any legatee, he forfeits the Falcidian Fourth to the Fiscus. (D. 34, 9, 6.)

(6.) If a person fails in a *querela inofficiosi testamenti*. (D. 5, 2, 8, 14.)

(7.) If one refuses to comply with the injunctions of the will. (Paul, Sent. 3, 5, 13.) If a sum were left for funeral expenses or a tombstone, and were not so employed. (D. 50, 16, 202.) Justinian enacted that if the will was not obeyed within a year, the property should go to the person next entitled, and not be forfeited to the Exchequer. (Nov. 1, 1.)

When an inheritance was bequeathed by trust, the unworthiness of the person charged with the trust did not prejudice the beneficial heir, nor did his worthiness prevent the confiscation, if the heir beneficially entitled exposed the property to confiscation. (D. 34, 9, 5, 6.)

Fifth.—Remedies.

A. In Respect of Rights and Duties.

The rights of the heir as against those that have possession of anything belonging to his predecessor were enforced by the ordinary actions, as if he himself were the owner; and in like matter, in respect of the debts due to or by the deceased, the heir could sue or be sued, exactly as if he were the creditor or debtor himself. For these rights and duties the ordinary actions suffice.

The actions and remedies by which a legatee could enforce his rights, will be postponed until the subject of legacy is discussed.

There remain, under this head, only the reciprocal rights and duties of co-heirs, in which case the remedy was the *actio familiae erciscundae*. This was essentially an action for partition, although when brought for that purpose all incidental rights and duties were enforced. Hence, if there were no corporeal property, there could not be a partition; and there was no necessity for it, because the debts were divided by the operation of law among the heirs. (D. 10, 2, 25, 1.)

If proceedings are being taken in an *actio familiae erciscundae*, each single thing the *judex* ought to adjudge to a single heir. If this seems to make one outweigh the others, he ought to condemn him in turn to pay his co-heir a fixed sum of money, as has already been said. On another account, too, each ought to be condemned to make a payment to his co-heir, if, namely, he alone has gathered the fruits of a farm belonging to the

inheritance, or has spoiled or used up any property belonging to it. All these, in like manner, follow on the proceedings between more co-heirs than two. (J. 4, 17, 4.)

B. In Respect of the Investitive Facts.

I. Peculiar to *testamentum, codicilli.*

1. Action for production of will, codicils, etc. *Actio ad exhibendum.*

1°. The plaintiffs are all to whom in any way anything is left by will (D. 43, 5, 3, 10), and the defendants any person having the custody of the document (D. 43, 5, 3, 2); as, *e.g.*, the priest of the church (*aedituus*) in which the will is deposited, or the notary that drew it up. (D. 43, 5, 3, 3.)

2°. The damages for non-production are determined by the value of the inheritance, or of the portion in which the plaintiff is interested. (D. 43, 5, 3, 12.)

3°. The interdict may be claimed by a man's heirs and other successors. (D. 43, 5, 3, 17.)

4°. It is not extinguished by prescription for one year, like other Prætorian remedies. (D. 43, 5, 3, 16.)

2. Action to set aside a will. *Querela inofficiosi testamenti.*

There does not appear to have been any special action under the above name; but the person deprived of his *legitima portio* sued for the inheritance by the usual action, claiming as heir against those designated in the will.

1°. The plaintiff is the person deprived of his *legitim*, and the defendant the heir, whether direct or *fideicommissarius*, named in the will. (C. 3, 28, 1.)

A father could not, however, sue on behalf of his son against his wishes, for the dishonour, if any, was a personal affront to the son himself. (D. 5, 2, 8, pr.) The son could bring the action in his own name without his father's consent (D. 5, 2, 22, pr.), although, if he succeeded, the sole benefit accrued to his father.

If the legatees suspect collusion between the heirs appointed and the plaintiff, they may come in and defend the will. (D. 5, 2, 29, pr.)

If the title of the plaintiff is only Prætorian, he must first obtain the *bonorum possessio*, and then sue the written heirs who remain in possession until the will is upset. (C. 3, 28, 2.)

If the plaintiff succeeds, and the heir appeals, the plaintiff, if a *pupillus* and poor, is entitled to maintenance until the case is finally decided. (D. 5, 2, 27, 3.)

2°. The heir of the plaintiff is entitled to go on if the plaintiff went so far as to get recognition as *bonorum possessor* (*post agnitam bonorum possessionem*). (D. 5, 2, 6, 2.) Even giving notice of action was sufficient to perpetuate the right to the heir. (D. 5, 2, 7; C. 3, 28, 5.)

3°. The prescription was at first two years, and afterwards extended to five. (D. 5, 2, 8, 17; D. 5, 2, 9.) The time runs not from the death of the testator, but from the date of the *aditio hereditatis*. (C. 3, 28, 36, 2.)

II. Actions by *Heres.*

I. *Petitio Hereditatis.*

1. The question tried is the right of inheritance, and hence every one that sets up a claim of his own may be made defendant. If a debtor to the inheritance refuses payment on the ground that he is heir, he may be made a defendant; but if he only denied the title of the plaintiff without setting up a title of his own, the *petitio hereditatis* could not be brought. (D. 5, 3, 42.)

If a person possessed the inheritance, as a singular, not as a universal, successor, the *petitio* did not lie, but by an equitable extension of the principle of the action (*utilis petitio*) the same remedy was allowed. Thus a husband might accept an inheritance from his wife as a dowry (D. 5, 3, 13, 10), or one might buy an inheritance from the *Fiscus*. (D. 5, 3, 13, 9.)

In all other cases, when a person does not set up a hostile title, the person claiming as heir must resort to the usual actions available for an owner. (C. 3, 31, 7.)

2. Every person who was called *heres* as contrasted with *bonorum possessor* might be plaintiff in this action. (D. 5, 3, 1.) The defendants are any persons having any of the goods belonging to the inheritance, which they claim in the capacity either of heirs or of possessors (*pro herede, pro possessore*). (D. 5, 3, 9.) Under the latter designation are included a thief or robber (D. 5, 3, 13, pr.), a person selling things or collecting debts belonging to the inheritance (D. 5, 3, 16, 1), or one that has taken the crops of the estate. (D. 5, 3, 13, 7.)

3. As a general rule, pending this action, no other action could be brought that raised as an issue the right of inheritance. (D. 5, 3, 5, 2.)

Justinian explains the reason of this rule. Questions of inheritance were originally tried before the venerable centumviral court, whereas the ordinary actions went before a simple *judex*. In order to maintain the authority of that tribunal, the rule was adopted; but its inconvenience gave rise to various attempts to soften its operation, thus leading to uncertainty in the law. Hence Justinian enacted that the creditors of the deceased might sue either the possessor or the petitioner. If their claim is for things deposited, lent, pledged, or the like, their remedy is not to be suspended. If it is for money lent or any action *in personam*, either the possessor or petitioner may be sued. After the conclusion of the suit, if the petitioner is successful, he will not get the property without paying all debts discharged by the possessor; and similarly if the possessor is successful, the judge will order him to pay the petitioner. If the petitioner neglects this opportunity, he can afterwards sue the possessor, either by the *actio negotiorum gestorum* or by a *condictio ex lege*. (C. 3, 31, 12, 1.) Legatees may sue the heir or the possessor, giving security to return pecuniary legacies with interest at 3 per cent. (*ex quarta centesimae parte*), or land with the produce, or houses with their rents. Failing to give such security, they must wait the end of the suit. (C. 3, 31, 12, pr.) In the case of bequests of freedom, a year is to elapse from the death of the testator. If during that time the case is ended, the fate of the bequests will thereby be determined. After that time the direct bequests shall at once take effect, and so also those given on trust, provided the will is not found to be spurious (*falsum*).

4. The object of the suit is to enable the petitioner to enter as heir. The effect is fully to establish him in that position. But a question arises as to the produce of the inheritance (*fructus*) from the time of the death to the end of the petition. (D. 5, 3, 18, 2; D. 5, 3, 20, 3.)

Upon this important subject a distinction was drawn by a *Senatus Consultum* passed in the reign of Hadrian, between a *bona fide* and a *mala fide possessor*. (D. 5, 3, 20, 6.) This enactment, although in terms applicable only when the State was heir, was held to apply to every case, even when private individuals were heirs. (D. 5, 3, 20, 9.) According to the terms of the enactment, it is in favour of those persons that believe themselves to be heirs, or *bonorum possessores*, or otherwise entitled to the inheritance. (D. 5, 3, 20, 13.)

(1.) A *mala fide* possessor is one that has no title, and knows it. (D. 5, 3, 25, 3.) As the question is thus one of knowledge or belief, a person is none the less a *bona fide possessor* because his mistake arises from an error in law, and not of one in fact. (D. 5, 3, 25, 6.) The *bona fide possessor* is bound to restore only what is in his possession at the beginning of the suit, or is acquired subsequently. (D. 5, 3, 41, pr.; D. 5, 3, 18, 1.) The *mala fide possessor* must restore everything in the inheritance, except in so far as it was lost without his negligence or fraud. (D. 5, 3, 25, 2; D. 26, 7, 61.)

(2.) A *bona fide possessor* is not bound to pay interest on money that he received or ought to have received (D. 5, 3, 20, 15), but a *mala fide possessor* is, and also on account of the crops or other produce he has gathered. (D. 5, 3, 51, 1.)

(3.) The *bona fide possessor* must restore the price of things sold only in so far as

he has not spent the money. (D. 5, 3, 23, pr. ; D. 5, 3, 25, 11.) But the *mala fide possessor* must restore the whole.

The *bona fide* possessor may deduct the amounts he has paid for debts (C. 3, 31, 5) ; also what is due to himself. (D. 5, 3, 31, 1.) And so for funeral expenses, etc. (D. 5, 3, 50, 1.) But for beneficial expenditure (D. 5, 3, 36, 5), every possessor, even if he is *mala fide*, may claim compensation. (D. 5, 3, 37 ; D. 5, 3, 38, pr.) It would appear that a *bona fide possessor* could claim also for frescoes and purely ornamental expenditure ; but not a *mala fide possessor*, although he could carry his improvements away. (D. 5, 3, 39, 1.)

5. This action was not removed by the *prescriptio longi temporis*. (C. 3, 31, 7.)

II. *Petitio partis Hereditatis.*

The remedy (No. I.) was confined to a case where a person claimed as sole heir. This is the action when one claims only a share of the inheritance. (D. 5, 4, 1, pr.) It does not give partition, but only an undivided share. (D. 5, 4, 8.)

III. Carbonian Edict—*De Carboniano Edicto.*

Special provision was made when the alleged heir was under the age of puberty by Cn. Papirius-Carbo, who introduced a provision into the edict about 100 B.C. The terms of it are as follow :—*Si cui controversia fiet an inter liberos sit et impubes, sit ; causa cognita perinde possessio datur, ac si nulla de ea re controversia esset, et judicium in tempus pubertatis causa cognita differtur.* (D. 37, 10, 1, pr.)

The object was to give the child a maintenance. (D. 5, 2, 20.)

The edict applies only when there is a dispute regarding a father's inheritance, and also whether a child under puberty was under the *potestas* of the deceased. (D. 37, 10, 6, 3 ; D. 37, 10, 7, 2.) It does not apply where it is quite certain either that the child is heir or cannot be heir. (D. 37, 10, 11.)

All questions relating to legacies and trusts are also, according to a rescript of Antoninus Pius, postponed till the child reaches puberty. (D. 37, 10, 3, 1.)

Causa cognita.—The object of this inquiry was twofold : (1) to give the child clear possession, and (2) to determine whether the trial should be put off till the child reached puberty, or should be ordered at once. If it was quite clear that the child had no claim, the Prætor refused him possession. (D. 37, 10, 3, 4.) But if the matter was doubtful, he gave him the benefit of the doubt. It might, however, be expedient in the interest of the child that the question of its status should be determined at once ; for witnesses might die or be corrupted, and evidence, now forthcoming, might be lost (D. 37, 10, 3, 5), and then the Prætor exercised his discretion by appointing an agent to represent the child, and ordering the trial to proceed.

The child must find security ; if he does not, the adversary is put in possession, unless the adversary is in the same plight, in which case a curator was to be appointed for the administration of the property. (D. 37, 10, 5, 2.) In any case the child is allowed a maintenance, if it is poor, when the trial is deferred until it reaches puberty. (D. 37, 10, 6, 5.)

In the suit that follows, the child on giving security occupies the advantageous position of defendant. (D. 37, 10, 6, 6.)

IV.—The *Bonorum Possessio.*

The *bonorum possessor* could recover the property of which the inheritance consisted by the interdict *Quorum Bonorum ;* and he could sue the debtors of the deceased, or be sued by them by *utiles actiones*, in which it was feigned that the *bonorum possessor* was *heres*. (Ulp. Frag. 28, 12 ; G. 3, 81.)

The *Possessio Bonorum* was obtained either on summary application (*de plano*), or on hearing (*causa cognita*). Theophilus says (J. 3, 9, 12) that the position of a *bonorum possessor* could in early times be obtained only by special petition :—"*Da mihi hanc*

bonorum possessionem."—"Give me this *bonorum possessio.*" But in the time of Justinian this was unnecessary, and any act signifying an intention to be *bonorum possessor* was enough.

If the person who had made an *agnitio* had only a Prætorian title, his remedy was the *Interdict Quorum Bonorum.* This interdict was available only to recover a *universitas*, not individual things. It was a means of acquiring possession. (D. 43, 2, 1, 1.) The evidence it required was such as to make out a good title as *bonorum possessor.* (C. 8, 2, 1.)

It could be brought only against the possessor of corporeal property. (D. 43, 2, 2.)

V. When an inheritance has been restored according to the *Senatus Consultum Tertullianum*, but not otherwise, the heir in trust (*Fideicommissarius*) may use the *petitio hereditatis* just like any other action available to an heir. (D. 5, 6, 1.)

The heir appointed is compelled to surrender the inheritance.

The jurisdiction over trusts was in Rome assigned to a *Prætor Fideicommissarius*, to whom application must be made, and not by ordinary action (*per formulam.*) In the provinces the jurisdiction belonged to the President (*Praeses Provinciae*). (Ulp. Frag. 25, 13.)

Part FF.

LEGACY.

Order of Topics.

The history of the Roman Law of Legacy is divided into three periods. The first extends down to the close of the Republic, and may be summed up in the word *Legatum.* This period is characterised by strictness of form and narrowness of interpretation. The second period dates from Augustus, and closes with Justinian. It is characterised by the formation of a new body of law, having for its object to mitigate the strictness and technicality of the older law. This was done by means of *fideicommissa*, as in the case of *hereditas.* The third period was established by Justinian, and is marked by the fusion of *Fideicommissum* and *Legatum*, thus restoring the unity of the law as it existed during the Republic, but enlarged and improved by the superior elements of the *Fedeicommissum.*

First Period.—The Law of Bequest during the Republic (*Legatum*).

The Law of Bequest, founded on the text of the XII Tables, was built up on a single principle—namely, the intention of the testator. The rights of the legatee, the mode of acquiring the

legacy, and all the incidents connected with it, have no other origin than the will of the testator. The law of bequest is therefore simply the interpretation of legacies. But this perfect dependence of legacies on the wishes of testators was limited by two things, one permanent, the other local and temporary. In the first place, not in Rome only, but everywhere, the will of a testator must be circumscribed by the general laws of the country. A person cannot bequeath as property what the State refuses to recognise as property; nor to a person incapable by law of receiving legacies. According also to the political views current, the policy of the law, as it is called, imposes certain limits to the right of testation. These causes are always in operation, although the results are not everywhere the same. But in Rome the power of testation was for centuries restrained by a spirit of legal formality like that which we have found elsewhere to characterise the Roman law. The narrowness of interpretation that made the Roman jurists affirm vines to be one thing and trees another, so that a man that claimed a vine could not be said to claim a tree, was not confined to the *legis actiones*. It was the universal tendency of the Roman law, in its earlier stages, to prefer the form to the spirit; and although there appears to have been nothing in the XII Tables to narrow the forms of bequest, yet it came to be recognised that nothing could be a legacy unless made in one or other of certain precise, set forms. The testator's intention was the source of the legacy, but it had no effect unless made in the ways prescribed by custom and the jurists. We may consider the subject under the following heads:—

1. The Forms of Legacy.
2. The Interest taken by the Legatee.
3. The Restraints on each kind of Legacy arising from its Form.
4. Divestitive Facts.
5. Conjoint Legacies.

I. The Forms of Legacy.

Of legacies there are four kinds; for we may leave a legacy either *per vindicationem*, *per damnationem*, *sinendi modo*, or *per praeceptionem*. (G. 2, 192.)

1. *Per vindicationem.*

A legacy *per vindicationem* (by giving a claim to the thing) we leave in this way:—"To Lucius Titius," for instance, "I give and leave as a legacy the slave Stichus." Even if one of the two words is set down, as "I give the slave Stichus," it is a legacy *per vindicationem*. Indeed, if it is in

other words the legacy is left, as "Let him take," or "Let him have for himself," or "Let him pick," it is equally a legacy *per vindicationem*. (G. 2, 193.)

2. *Per damnationem.*

A legacy *per damnationem* (by condemning the heir to pay) we leave in this way :—"Let my heir be condemned (*damnas*) to give Stichus my slave to Lucius Titius." Even if the entry is, "Let him give," it is a legacy *per damnationem*. (G. 2, 201.)

"*Damnas*," is not altogether an equivalent for any English word. Some writers think that a *damnatus* could be proceeded against by *in manus injectio* without the necessity of a preliminary action.

3. *Sinendi modo.*

A legacy *sinendi modo* (by allowing the legatee to take) we leave thus :—"Let my heir be condemned to allow Lucius Titius to take and have for himself the slave Stichus." (G. 2, 209.)

4. *Per praeceptionem.*

A legacy *per praeceptionem* (by allowing the legatee to pick out first) we leave in this way :—"Let Lucius Titius pick out first the slave Stichus." (G. 2, 216.)

II. The Rights of the Legatee.

1. The legatee has a right *in rem* to the thing bequeathed if the legacy is in the first form.

The legacy *per vindicationem* is so called because after the inheritance is entered on the thing at once becomes the property of the legatee *ex jure Quiritium*. If, then, the legatee has to claim it from the heir, or from any one else that is in possession of it, he ought to do so by a *vindicatio*, to allege (that is) in the statement of claim that the thing is his *ex jure Quiritium*. (G. 2, 194.)

But on that point men learned in the law differ. Sabinus and Cassius and the rest of our teachers think that what is so left becomes at once after the inheritance is entered on the property of the legatee, even though he does not know it has been left him; but that after he once knows, and rejects it, then it is all the same as if it had never been left him. Nerva, on the other hand, and Proculus, and the rest of the authorities of that school, think the thing becomes the legatee's only if he is willing it should belong to him. In our day, under a constitution of the late Emperor Pius Antoninus, this view of Proculus rather is the law in use among us. For when a Latin was left as a legacy *per vindicationem* to a colony, that constitution says, "Let the *decuriones* (local senators) weigh well whether they wish him to belong to them, just as if he had been left as a legacy to one man." (G. 2, 195.)

The question is raised to whom a legacy left conditionally *per vindicationem* belongs while the condition is in suspense. Our teachers think to the heir, after the example of a slave left conditionally free (*statuliber*), of a

slave (that is) ordered by will to be free under some condition ; for he, it is agreed, is meanwhile the property of the heir. The authorities of the opposing school, however, think that meanwhile the thing is no one's ; and this, they say, is still more the case with a legacy left simply and unconditionally before the legatee accepts the legacy. (G. 2, 200.)

2. When the legacy is *per damnationem.*

A thing so left, after the inheritance is entered on, although it is left simply, is not like a thing *per vindicationem* forthwith acquired for the legatee, but none the less is the heir's. The legatee ought, therefore, to bring an action *in personam ;* that is, to put forth a statement of claim that the heir ought to give it him. Thereupon the heir, if it is a *res mancipi,* ought to give it by *mancipatio* or *in jure cessio,* and to deliver up possession ; if it is a *res nec mancipi,* it is enough to deliver it. If, indeed, he only delivers a *res mancipi,* and does not convey it by *mancipatio,* then by *usucapio* it at length becomes the legatee's in full right. Now *usucapio* is limited, as we have said above, to a year in the case of moveables, to two years in the case of things attached to the soil. (G. 2, 204.)

3. When a legacy is *sinendi modo.*

As a legacy left *per damnationem* does not at once, after the inheritance is entered on, become the legatee's, but remains the heir's, until the heir, by delivery or *mancipatio* or *in jure cessio,* makes it the legatee's, such is the law in the case of a legacy left *sinendi modo* also. The action on account of a legacy of this kind is therefore against a person (*in personam*), and is for "whatever the heir under the will ought to give or do." There are some, however, that think the heir is not bound under a legacy of this sort to convey the thing, or to give it up by *in jure cessio,* or to deliver it ; but that it is enough if he suffers the legatee to take it, because the testator gave him no further orders than to allow, that is, to suffer, the legatee to have the thing for himself. (G. 2, 213-214.)

4. In legacy *per praeceptionem.*

Our teachers think that a legacy cannot be left in that way to anyone that is not in some part of the will appointed heir. To pick out beforehand (*praecipere*) is to be foremost to take. This can take place only in the case of a man that is appointed heir of some part, because he over and above his share of the inheritance is to have the foremost legacy. If, therefore, a legacy is so left to an outsider, it is void : so much so, as Sabinus held, that not even under the *Senatus Consultum Neronianum* can it come to be valid. "That *Senatus Consultum,*" he says, "confirms those only that through some verbal defect are of no force by the *jus civile ;* not those that, because of the status (*persona*) of the legatee, are not due." Julian, following Sextus, however, held that even in this case the legacy is confirmed under the *Senatus Consultum,* because the reason why the legacy is void by the *jus civile* is in this case also verbal. This, they say, is plain from the fact that the same person may have a legacy rightly left him in other words, as *per vindicationem, per damnationem, sinendi modo ;* whereas, from a defect in the person's status the legacy is of no effect, when a legacy is left a man that can in no way have it left him—an alien, for instance, with whom there

is no *testamenti factio.* In this case plainly there is no room for the *Senatus Consultum.* Our teachers, again, think that a legacy so left the legatee can obtain in no other way than by an *actio familiae erciscundae*—the action, that is, for dividing the inheritance usually received among heirs. It falls, indeed, within the judge's duty to adjudge a legacy left *per praeceptionem.* (G. 2, 217-219.)

The *Senatus Consultum Neronianum* (reign of Nero) provided that a legacy left in unfit words should take effect just as if it had been left in the best way known to the law. The best way was considered to be *per damnationem.* (Ulp. Frag. 24, 11.)

A *praelegatum*, or legacy *per praeceptionem,* could exist only if there was more than one heir; it was an advantage given to one heir over the rest in addition to his share of the inheritance. When there were several heirs, one of them might be both an heir, and, as regards his co-heirs, also legatee.

III. Restriction as to the object of the bequest.

1. In legacies *per vindicationem.*

Those things alone can rightly be left *per vindicationem* that are the testator's own *ex jure Quiritium.* In the case, however, of things essentially such that they can be weighed, numbered, or measured, it is held to be enough if they are the testator's *ex jure Quiritium* at the time of his death —wine, for instance, oil, corn, coined money. But all other things ought to be the testator's *ex jure Quiritium* at both times—that is, both when he made the will and when he died—since otherwise the legacy is void. (G. 2, 196.)

Undoubtedly this is so by the *jus civile.* But afterwards, at the instance of Nero Cæsar, a *Senatus Consultum* was passed providing that if each testator by the form "I give and leave as legacy," left what was never his, the legacy should be valid, just as if it had been left in the best form known to the law. Now, the best form of legacy known to the law is that *per damnationem.* By this kind even what belongs to another can be left, as will appear lower down. (G. 2, 197.)

But if a man leaves a thing of his own by the form, "I give and leave as a legacy," and then after making the will alienates it, most think not only that the legacy is void by the *jus civile,* but that it is not confirmed under the *Senatus Consultum.* The reason this is said is, because even if a man leaves a thing of his own *per damnationem,* and afterwards alienates it, most think that although at strict law the legacy is due, yet the legatee, if he demands it, can be repelled by the *exceptio doli mali,* as demanding it contrary to the wishes of the deceased. (G. 2, 198.)

2. In legacy *per damnationem.*

By this kind of legacy even what is another's can be left, so that the heir must buy it up and supply it, or give its value. (G. 2, 202.)

A thing, too, that in the nature of things is not in being, if only it is to come into being, can be left *per damnationem;* the fruits, for instance, that are to grow on such and such a farm, or the offspring such and such a female slave is to have. (G. 2, 203.)

3. Legacy *sinendi modo.*

This kind of legacy goes further than that *per vindicationem,* not so far as that *per damnationem.* In this way the testator can leave as a valid

legacy not only what is his own, but also what is his heir's. *Per vindicationem*, on the other hand, he can leave only what is his own. *Per damnationem*, what belongs to any outsider. (G. 2, 210.)

If at the time of the testator's death the thing is the testator's own, or his heir's, the legacy is manifestly valid, although at the time of making the will it belonged to neither. (G. 2, 211.)

But if it is after the testator's death that the thing first comes to be the heir's, it is questioned whether the legacy is valid. Most think that it is not. What then? Even although a man leaves as a legacy what was never his, and what never afterwards came to be his heir's, then under the *Senatus Consultum Neronianum* it seems to be all the same as if the legacy had been left *per damnationem*. (G. 2, 212.)

4. Legacy *per praeceptionem*.

From this we understand that, in the opinion of our teachers, nothing can be left as a legacy *per praeceptionem* unless it is the testator's; for nothing but what belongs to the inheritance can be brought into this action (*familiae erciscundae*). If, therefore, the testator leaves a thing not his own in that way, by the *jus civile* indeed the legacy will be void, but under the *Senatus Consultum* it will be confirmed. In one case, however, they (*i.e.*, the Sabinians) own that even what is another's can be left *per praeceptionem* —when, namely, a man leaves a thing as a legacy that he has given by *mancipatio* to a creditor *fiduciae causa*. In this case they hold that the *judex*, in the discharge of his duty, can compel the co-heirs to pay the money and release the thing, that so the legatee may pick it out beforehand. But the authorities of the opposing school think that even to an outsider a legacy can be left *per praeceptionem*, just as much as if the entry in the will were, "Let Titius pick out my slave Stichus," and that the addition of the syllable *prae* (beforehand) is mere surplusage. It would seem, then, that it is *per vindicationem* that the thing is left; an opinion that is said to be confirmed by a constitution of the late Emperor Hadrian. According to this opinion, then, if the thing was the deceased's *ex jure Quiritium*, the legatee can claim it by a *vindicatio*, whether he is one of the heirs or an outsider. If, again, the testator owned it only *in bonis*, it will be a valid legacy to an outsider under the *Senatus Consultum*, and to an heir it will be supplied by the *judex* in discharge of his duty in the proceeding *familiae erciscundae*. If, however, the testator had no right to it, both to an heir and to an outsider it will be a valid legacy under the *Senatus Consultum*. (G. 2, 220-222.)

IV. Divestitive Fact.

A legatee likewise frees the heir in the same way (*i.e.* by *mancipatio*) from a legacy left *per damnationem*. There is, however, this difference: Where the debtor declares that on such and such a ground he is condemned to do so and so for the other, there the heir declares that under the will he is condemned to give so and so. The only legacy of which he can be freed in this way is a legacy of things essentially such that they can be weighed or numbered, and even then only if it is determinate; but some hold that this applies also to what essentially can be measured. (G. 3, 175.)

A thing left *per vindicationem*, being the property of the legatee, could, of course, be released only by executing a conveyance to the heir as to any other person.

Gaius says nothing as to the mode of release in the third and fourth kinds of legacy.

V. Joint Legacy.

1. Legacy *per vindicationem.*

It is agreed that if to two or more persons the same thing is left as a legacy *per vindicationem*, whether jointly or severally, and all come to the legacy, then to each singly his own share belongs; and if anyone fails to, his share accrues to his co-legatee. Jointly a legacy is left thus,—"To Lucius Titius and Seius I give and leave the slave Stichus;" severally thus,—"To Lucius Titius I give and leave the slave Stichus; to Seius I give and leave the same slave." (G. 2, 199.)

2. Legacy *per damnationem.*

There is also this point of difference in the case of a legacy *per vindicationem.* If the same thing is left as a legacy to two or more persons *per damnationem*, if it is left jointly, then clearly his own share is due to each as in a legacy *per vindicationem;* but if severally, the entire thing is due to each, and so of course the heir must supply one with the thing and the other with its value. In the case of joint legatees also, the share of anyone that fails does not belong to his co-legatee, but remains in the inheritance. (G. 2, 205.)

As to what we have said, that the share of anyone that fails in the case of a legacy *per damnationem* is kept in the inheritance, in the case of a legacy *per vindicationem* accrues to the co-legatee, we must note that this was so by the *jus civile* before the *lex Papia.* But after that statute the share of one that fails becomes an escheat, and belongs to those in the will that have children. Although, too, in laying claims to escheats, the heirs that have children come first, and next if the heirs have not children, the legatees that have them; yet that very *lex Papia* points out that a joint-legatee, if he has children, is to be preferred to the heirs, although they are found to have children. Most have held that, so far as relates to this branch of the law settled by the *lex Papia* for joint legatees, it makes no difference whether the legacy is left *per vindicationem* or *per damnationem.* (G. 2, 206-208.)

3. Legacy *sinendi modo.*

A greater difference of opinion that occurs in regard to this legacy is this. If the same thing is left to two or more severally, some think it is due entire to each, as in a legacy *per damnationem;* some hold that the man that first takes possession is to be preferred. The reason these latter give is this, that in a legacy of that kind the heir is condemned to suffer the legatee to have the thing; it follows, therefore, that if he suffers the former one to have it, and he takes it, the heir need care nothing for him that afterwards demands the legacy, because he neither has the thing so as to suffer it to be taken by the latter claimant, nor has he done anything in bad faith to keep him from having it. (G. 2, 215.)

4. Legacy *per praeceptionem.*

Whether, however, they are heirs according to our teachers' opinion, or even if they are outsiders according to the opinion of the other school, if two or more persons have the same thing left them jointly or severally, each ought to have his share. (G. 2, 223.)

Second Period.—The Law of Bequest during the Empire (*Fideicommissum*).

By means of *fideicommissa* the formal modes of legacy were supplemented in like manner as in the case of the *testamentum*.

I. In respect of the rights of the legatee.

1. As to the effect of undue delay (*mora*) in paying the legacy by the heir.

On trusts, interest and the fruits are due if only payment is delayed by the debtor under the trust. But on legacies no interest is due; and this is pointed out in a rescript of the late Emperor Hadrian. I know, however, that Julian held that in the case of a legacy left *sinendi modo* the rule of law was the same as in the case of a trust; and this opinion, I see, prevails in our time. (G. 2, 280.)

In the time of Paul, legacies in this respect were put on the same footing as trusts (*mora fieri videtur cum postulanti non datur*). (Paul, Sent. 3, 8, 4.)

Again, what a man pays by mistake in excess of what is due under a trust he can demand back. But in the case of a legacy *per damnationem*, what on some false ground is paid in excess of what is due cannot be demanded back. The rule of law is the same with regard to the entire sum which, though not due, has been paid by mistake either in this case or in that. (G. 2, 283.)

II. In respect of Investitive Facts.

1. Form.

(1.) Again, legacies written in Greek do not take effect: trusts do. (G. 2, 281.)

(2.) A legacy before the appointment of an heir is void; because, of course, wills owe all their force to the appointment of the heir, and therefore his appointment is as it were the source and foundation of the whole will. On the like principle no grant of freedom could be made before appointing an heir. Our teachers hold that not even a *tutor* can be appointed in that place; but Labeo and Proculus think he can, because none of the inheritance is spent by the appointment of a *tutor*. (G. 2, 229-231.)

There is a great difference between legacies left by a trust and those that are left directly at law. For instance, a legacy can be left by a trust even before appointing an heir; but a legacy left at the beginning of a will is in any other case void. (G. 2, 268-269.)

(3.) Again, a man that has made no will can on his deathbed leave anyone a thing by trust through him to whom his goods belong; but in no such way can he leave a legacy. (G. 2, 270.)

Again, a legacy left by *codicilli* takes effect only if these are confirmed by the testator; if, that is, the testator in his will provides that all he shall have written in *codicilli* is to be valid. But a trust can be left by *codicilli* even although they are not confirmed. (G. 2, 270 A.)

Again, through a legatee a legacy cannot be left, but a trust can. Nay, even through a man to whom we leave something by a trust, we can again leave something to some one else by a trust. (G. 2, 271.)

Again, to another man's slave no grant of freedom can be made directly, but through a trust it can. (G. 2, 272.)

2. Modality.

A legacy after the heir's death is void—a legacy, that is, left in this way, "When my heir shall be dead I give and leave," or "let him give." But a legacy is good if left thus, "When my heir shall die," because it is left not after the death of the heir, but at the last moment of his life. A legacy cannot again be left thus:—"The day before my heir shall die." There seems no reason of any worth for this, but it is the received view. (G. 2, 232.)

The same we must understand to be said of grants of freedom. (G. 2, 233.)

But whether a *tutor* after the death of the heir can be named, will perhaps be found by inquiries to be the same question that is discussed with regard to the *tutor* that is named before the appointment of the heir. (G. 2, 234.)

3. Restraints on investitive facts.

(1.) As to the object of bequest.

A man can leave single things by a trust; a farm, for instance, a slave, a garment, silver, coined money. He can ask either the heir in person to give it up to some one; or a legatee, although through a legatee a legacy cannot be left. (J. 2, 24, pr.; G. 2, 260.)

Again, not only what is the testator's own can be left by a trust, but also what belongs to the heir, or legatee, or him that takes by trust, or anyone else. The legatee, therefore, and the man that takes by a trust, can be asked to give up to another not only what is left him, but also anything else, whether his own or another's. This only must be attended to—no one must be asked to give up to another more than he himself took under the will; for all in excess of the legacy is void. But when what is another's is left by a trust, he that is asked must of necessity either buy it up and supply it, or pay its value. This is the rule of law also if what is another's is left *per damnationem*. [There are some, however, that think that if the owner will not sell what is left by a trust, then the trust is extinguished; but that the case of a legacy *per damnationem* is different.] (J. 2, 24, 1; G. 2, 261-262.)

(2.) As to the persons capable of being legatees. (See also pp. 798, 824.)

A legacy to a strange posthumous child is void. (G. 2, 241.)

All the rest we have said above properly belongs to legacies: although some hold, not without good reason, that an heir cannot be appointed by

way of penalty. Indeed, it will make no difference whether an heir is ordered to give a legacy if he does anything or does not do it, or whether a co-heir is added to him. By adding a co-heir, just as much as by giving a legacy, you force him to do something contrary to what he means to do. (G. 2, 243.)

3. As to *Causa*.

A legacy left by way of a penalty is void. A legacy is left by way of a penalty when it is left to coerce the heir, to make him do or not do something. For instance, a legacy running thus :—"If my heir bestows his daughter in marriage on Titius, let him give ten thousand *sestertii* to Seius;" or thus, "If you do not bestow your daughter in marriage on Titius, then give Titius ten thousand *sestertii*." If, further, the testator orders the heir, if (say) within two years he has not set up a monument to him, to give ten thousand *sestertii* to Titius, that is a legacy by way of a penalty. In short, starting from its very definition, we can frame many like forms or cases. (G. 2, 235.)

Not even a grant of freedom can be made by way of a penalty; although this has been questioned. (G. 2, 236.)

About a *tutor* we cannot raise any question, because an heir cannot be forced by the appointment of a *tutor* to do anything or not to do it. A *tutor*, therefore, is not appointed by way of a penalty. But if a *tutor* were so appointed, the appointment would seem to be conditional rather than by way of a penalty. (G. 2, 237.)

Again, there is now no doubt that neither by a trust can anything be left by way of a penalty. (G. 2, 288.)

C. Divestitive Facts.

There appears to have been a formal release of heir by legatee, but in trusts the person burdened could be released by any informal signification of the intention of the person benefited. This consent could not, however, have effect until the interest had vested (*dies cedit*).

D. Remedies.

1. Form and Place of Suit.

Besides, legacies we demand by a *formula;* but trusts we enforce at Rome before a consul or before the Prætor, whose chief duty is to administer the law of trusts; in the provinces before the president or the provinces. (G. 2, 278.)

Again, the law of trusts is administered at all times in the city; but of legacies, only when all law business is going on. (G. 2, 279.)

As to law terms, see pp. 51-53.

2. Damages.

Again, if an heir denies a legacy left *per damnationem*, the action against him is for twice the amount. But on account of a trust, the claim we enforce is always for the sum simply. (G. 2, 282.)

Third Epoch.—The Law of Legacy as settled by Justinian. (Fusion of *Legatum* and *Fideicommissum*.)

After this let us see about legacies. This part of the law seems outside the matter before us ; for we are speaking of the forms of the law by which we acquire things *per universitatem*. But since we have once spoken of wills, and of heirs that are appointed by will, this matter of law may be handled in the next place not without reason. (J. 2, 20, pr.)

A legacy, then, is some gift left by the deceased. (J. 2, 20, 1.) Of old there were four kinds of legacies—*per vindicationem*, *per damnationem*, *sinendi modo*, and *per praeceptionem*. Certain determinate words were assigned to legacies of each kind, by which the several kinds of legacies were pointed out. But under the constitutions of the late Emperors, verbal formalities of this sort were entirely taken away. And a constitution of ours, that we made after much study, in our desire that the wishes of the deceased should take most effect, and favouring as we do not their words but their wishes, has arranged that all legacies are to have one nature, and that whatever the words in which anything is left, the legatees may lawfully follow it up not only by personal actions, but by actions in *rem* and by the action peculiar to mortgages (*hypothecaria*). The well-weighed limits of this constitution it is possible to gather most completely by studying its whole tenor. (J. 2, 20, 2.)

But not even at that constitution have we held that we ought always to stop. Antiquity, we find, limited legacies strictly, but granted trusts that came down more from the wishes of the deceased a richer nature. We therefore have thought it necessary to make legacies entirely equal to trusts, so that there should be no difference between them. What is wanting to legacies is all to be filled up from the nature of trusts, and whatever there is in excess in legacies is to go to swell the nature of trusts. But that we may not in this first cradle of the statutes, by setting forth the two as mixed up, bring studious youth into any difficulty, we have thought it worth while in the meantime to treat separately first of legacies and afterwards of trusts ; that when the nature of both branches of the law is known, those thus instructed may be able with more subtle ears to take them in as intermixed. (J. 2, 20, 3.)

Definition.

Justinian defines a legacy as any gift from a deceased person. It need not be made by testament, or even by *codicilli*, for any expression of intention to give, to take effect only after the donor's death, constituted a legacy. It will be convenient to call legatee not only the person that receives what was in technical propriety a *legatum*, but also the person that benefits by a *fideicommissum*. This language has the authority of the Digest as well as convenience in its favour. (D. 32, 87.) Unluckily there is no generic term correlative to legatee. The person bound to pay a legacy was generally the heir (*heres*), not always ; for even legatees and debtors might be burdened

with legacies. For all those persons there is no single common designation; we cannot call such persons executors or trustees; and as there are many objections to coining a word, we must be content to describe the idea by a phrase.

Legacy includes *donatio mortis causa.* (P. 915.)

It may be necessary to repeat that the following account of the law of legacy (including therein both *legatum* and *fideicommissum*) must be taken to speak from the time of Justinian, and that it includes the chief novelties introduced by his legislation.

Rights and Duties.

A. *Rules common to all Legacies.*

(A.) Rights *in rem* of Legatee.

The right of the legatee was either *in rem* or *in personam;* not, as prior to Justinian, according to the form of bequest, but according to the nature of the legacy. When a particular, determinate, specific thing was bequeathed, the legatee became owner of it. But when a quantity of anything was bequeathed, the legatee had no right to any specific things, but only that the heir should deliver the quantity named by the testator. In this case the right of the legatee was *in personam* against the heir. If the testator left the legatee twenty *aurei*, the legatee became a creditor of the heir for that amount; but if the bequest was of all the *aurei* in a particular cash-box, the legatee became owner of the particular coins in that box. His right was *in rem.*

When the legatee had a right *in rem*, it accrued to him immediately that the heir entered on the inheritance, as if it had been directly conveyed to him by the deceased. If an interval occurred between the entry of the heir and the death of the deceased, the conveyance is rather from the *hereditas jacens*, than from the heir, to the legatee. (D. 31, 80; D. 30, 86, 2.)

Stichus is bequeathed to Titius. Before Titius knows that the legacy belongs to him, he dies, bequeathing the same Stichus by his will to Seius. The heirs of Titius did not repudiate the legacy. Seius is owner of Stichus. (D. 30, 81, 6.)

Sempronius bequeaths a horse to Maevius. On the death of Sempronius, his heir, before learning whether Maevius would accept the legacy, delivered the horse to Gaius. If Maevius accepts, the delivery is void, and Gaius must restore the horse. (D. 34, 5, 15.)

Titius bequeaths Stichus to Seius. Before the heir enters, and after the death of Titius, Stichus stipulates with Julius for 10 *aurei*. After the heir enters, Stichus is found to be appointed heir in the will of Maevius. Afterwards Seius accepts the

legacy of Stichus. Does Seius become entitled to the 10 *aurei* and also to the inheritance? Inasmuch as the ownership of Stichus is transferred by the entry of the heir, it follows that Seius is entitled to command Stichus to enter on the inheritance of Maevius, and so acquire it for him. (D. 30, 86, 2.) But Seius was held not to have been owner of Stichus before that time, and consequently the 10 *aurei* do not belong to him, but augment the inheritance. (D. 31, 38.)

A slave was bequeathed to Gaius from Titius as heir. The slave stole some clothes from Titius prior to his entry on the inheritance. If Gaius accepts the legacy, he may be sued by Titius for the theft committed by the slave, because *noxa caput sequitur* (p. 167). At the time of the theft the slave belonged to the *hereditas jacens*, but by the entry of Titius he was immediately transferred to Gaius with all his noxal liabilities. (D. 47, 2, 64; D. 9, 4, 40.)

When the legacy of a specific thing was conditional, *i.e.*, dependent upon the happening or not happening of a future and uncertain event, the ownership was not vested in the legatee, but meanwhile remained in the heir.

Stichus is bequeathed to Titius if a certain ship arrives from Asia. Seius the heir, sold Stichus before the ship arrived. Afterwards the ship came in. The sale of Stichus becomes void, and Titius can reclaim him as his property.

(B.) Rights *in personam* of legatee. Duties of persons on whom legacies are imposed.

I. The object of a legacy may be a thing or some act (*factum*) of the heir or other person on whom the legacy is imposed.

The first duty of such person, then, is to deliver the thing to the legatee, or to do the act required of him. If the testator requires his heir to render any personal service, the heir must himself do what is required; but in other cases a sum of money may be given to the legatee in discharge of the duty of the heir. (D. 32, 11, 25.) This kind of legacy is comparatively rare, and we need consider only legacies of things.

1. When a particular thing was bequeathed, and it was not the property of the testator, it was the duty of the heir, or other person charged with the legacy, to buy and deliver that particular thing. If the heir or such other person cannot buy the thing specifically bequeathed, he must pay its value. (D. 32, 30, 6; D. 32, 11, 17.)

To this rule, that a specific legacy must be specifically performed, an exception existed when the heir could not obtain it without paying an exorbitant price. If the heir got possession of the thing bequeathed, he was bound to give it up to the legatee, however precious it might be in his eyes as a family heirloom. (D. 30, 71, 4.) When the bequest, however, was of a slave, the heir could retain the slave, paying the value to the

legatee when the slave was a relation of his own. as his father, mother, or brother. (D. 30, 71, 3.)

When the bequest is not of specified things the heir or person charged has the option of giving the things or paying their value. (D. 34, 2, 38, 1.)

2. The duty of the person charged with a legacy is not to give a good title to the legatee (D. 30, 44, 8), but to deliver free and unburdened possession (*vacua possessio*).

1°. Does this duty imply that the heir is bound to release the thing bequeathed if it has been mortgaged by the testator?

If any one leaves as a legacy a thing bound to a creditor, the heir must of necessity release it. In this case, too, it is held as in the case of what belongs to another, that the heir must of necessity release it only if the deceased knew it was so bound. So the late Emperors Severus and Antoninus decided by a rescript. If, however, the deceased wished the legatee to release it, and expressly said so, the heir is not bound to release it. (J. 2, 20, 5.)

The question turned entirely upon the intention of the testator. The presumption of law was that, if the testator knew the thing was mortgaged, he intended his heir to release it; but if it be shown that the testator was ignorant of the mortgage, it follows that he could not have intended the heir to discharge it. (D. 30, 57.) This presumption was held equally to exist even when the legatee was himself also the mortgagee. (D. 31, 85.) If the creditor had exercised his right of sale, the heir must pay the price of it to the legatee, unless the contrary is proved to have been the testator's intention. (C. 6, 42, 6.)

2°. If the usufruct of the thing bequeathed did not belong to the testator, was the heir bound to deliver the thing with the usufruct? It was presumed that the testator intended so, because the enjoyment of a thing could not be said to be given without the usufruct. (D. 31, 66, 6; D. 31, 26.)

3°. Servitudes (excepting usufruct, if it can correctly be described as a servitude) were burdens on the legatee. The heir was not obliged to deliver the thing released from servitude, unless the testator expressed his intention by employing the clause, "*Uti optimus maximusque.*" (D. 30, 69, 3.) The distinction assigned between these servitudes and usufruct is that the latter was essential to the enjoyment of the bequest. (D. 31, 76, 2.) But it would have been manifestly so inconvenient to require the heir to release land from ordinary servitudes, that no other reason is required. This rule was so strictly observed, that even when the servitude was due to the heir, and thereby lost (as it would be if the bequest were conditional, and thus the heir was for a time owner of both

the servient and dominant land), the heir could refuse to deliver the land until the legatee re-established the servitude.

4°. Other real burdens (*onera realia*).

The heir was bound to pay all the burdens of taxation and the like up to the time of delivering the land, but no longer. This included rent for State lands (*vectigal*), land-tax (*tributum*), ground-rent (*solarium*), sewers'-rate (*cloacarium*), and water-rate (*pro aquae forma*). (D. 30, 39, 5.)

3. The heir must deliver to the legatee not merely the bare thing bequeathed, but whatever else is indispensable to the use or enjoyment of it.

A testator bequeaths a farm to Titius, and the usufruct of an adjoining farm to Maevius. There is no access to the latter farm except through that bequeathed to Titius. Titius is not entitled to possession until he guarantees permission to Maevius to pass through his land. (D. 33, 2, 15, 1.) If the heir surrenders the farm to Titius without exacting this promise, he must at his own expense buy a right of way from Titius and deliver it to Maevius. (D. 30, 44, 9.)

A testator by *codicilli* bequeathed to the citizens of Tivoli the free use for ten months in the year of the Julian bath adjoining his house; the bath to be kept in good condition by his heirs. This includes the cost of repairs, and everything necessary to enable the public to enjoy the bath. (D. 32, 35, 3.)

4. Is the heir entitled to accessions, or bound to make good losses in things specifically bequeathed? The rule is that the benefit of all additions and accessions goes to the legatee, while all losses fall upon him, except in so far as they are due to the act or default of the heir.

A testator, after making a will and bequeathing his Titian farm, adds some land to it. The whole belongs to the legatee. (D. 30, 24, 2.) In like manner, the legatee suffers the loss if the testator takes away a field from the farm. (D. 30, 24, 3.)

A flock is bequeathed. The increase in the flock is in favour of the legatee. (D. 30, 21.)

A testator bequeaths a piece of land, and afterwards builds on it. The building is also included in the legacy. (D. 31, 39.)

After bequeathing a statue, a testator adds an arm to it. The whole goes to the legatee. (D. 34, 2, 14.)

A testator bequeathed to Titius a sum of 10 *aurei* due to him by the heirs of Gaius Seius, and he desired his heir to transfer to Titius his action against the heirs, and the pledges he held in security. His heir must transfer the action for the interest as well as the 10 *aurei*. (D. 32, 34, pr.)

An heir cut down trees on land bequeathed, or pulled down houses, or imposed a servitude on it, or released a servitude due to it; in all these cases he must give compensation to the legatee. (D. 7, 6, 2.)

5. Duty of the heir in respect of the produce of the thing (*fructus, causa*).

In the first place, it is obvious that the income and adven-

titious gains obtained from the thing bequeathed during the lifetime of the testator cannot be claimed by the legatee. (D. 30, 91, 6.)

Exception.—If a flock is left as a legacy, and it afterwards comes down to one sheep, what remains can be claimed by a *vindicatio*. When a flock is left, those sheep as well that after the will is made are added to the flock pass (as Julian says) with the legacy. For a flock has one body, though it is made up of separate individuals; just as a house is one body, though it is made up of the stones that hold together. When a house, then, is left as a legacy, the pillars and marbles that after the will is made are added, go (we say) with the legacy. (J. 2, 20, 18-19.)

The question, then, is as to the time between the death of the testator and the acquisition of the legacy by the legatee. In one case the question is easily determined. When a thing belonging to the testator is bequeathed to a legatee, and the legatee becomes entitled as owner on the entry of the heir, it follows that prior to the entry of the heir the legatee is entitled to nothing, and after that, as owner, he is entitled to everything. When, however, a thing is specifically bequeathed, but the legacy is not to take effect until after a certain time, or until a condition happens, for that period the heir is entitled to the possession and the income (*fructus*) and casual gains (*causa*).

A testator bequeathed certain slaves by name to his sister on trust to give them to her children on her death. During her life certain slaves were born of those contained in the legacy. These, it was held, were not included in the gift of trust to the children. (D. 32, 41, 10.)

A distinction was, however, drawn when the legacy was not conditional, but only postponed, say for ten years. If the delay was intended to be a benefit to the heir, the heir was entitled to the income and profit for the ten years; but if it was for the benefit of the legatee, as a postponement until he reached the age of puberty, then the whole profit of the ten years must be given up to the legatee. In this respect the heir was purely a trustee. (D. 31, 43, 2.)

When a legatee had a right *in rem*, he became entitled to the *fructus* from the moment the ownership vested in him, although the crops had just then come to maturity. (D. 22, 1, 42.) This was the rule even if the ground had been prepared and sown by a tenant, who, however, had an action against the *heres* upon his contract. (D. 30, 120, 2.)

When the legatee had only a right *in personam*, the rule was

somewhat different. He was not entitled to the income or produce necessarily from the moment when the legacy became due. He became entitled only when the heir refused or neglected to perform his duty. Unless there was a breach of duty (*mora*) by the heir, and undue delay in performing his obligation, the legatee had no claim for arrears of income or interest. (Paul, Sent. 3, 8, 4.)

When the heir is required to restore the income (*fructus*), what he must restore is not the income he actually obtained, but the income that the legatee could have obtained if he had been in possession. (D. 30, 39, 1.)

II. The person charged with a legacy must make good any loss sustained by a legatee through his misconduct (*dolus*) or negligence (*culpa*). Thus if the heir delays entering upon the inheritance in order to hurt the legatee, he must pay compensation. (D. 7, 1, 35, pr.)

As to the degree of care required, an important distinction is drawn by Africanus. He says that if the person charged with a legacy derives no benefit whatever under the will of the deceased, but is asked to give up all that he gets, such a person is to be responsible only for actual misconduct (*dolus*), not for negligence (*culpa*). But if he derives any benefit under the will, he is bound to exercise the care of a good *paterfamilias*. (D. 30, 108, 12; D. 30, 47, 5.) Africanus supports this view by the analogy of *bonae fidei* contracts. If only one of the contracting parties derived any benefit from it, he could not require from the other any responsibility except for misconduct (*dolus*); but if both gained by the contract, each was responsible also for due diligence.

In the absence of negligence, the person charged was not liable to make good the loss of the thing bequeathed. But if the loss occurred after he had failed to perform his obligation (*mora*), or by his own act, even if an innocent one, he must make good the loss. (D. 30, 108, 11; D. 32, 26.)

If the thing left as a legacy perishes without any act on the part of the heir, it is on the legatee the loss falls. If also another man's slave, without any act on the part of the heir is manumitted, the heir is not liable. But if a slave belonging to the heir is left, and the heir manumits him, he is liable, as Julian wrote; and it makes no difference whether he knew or did not know that the slave had been left as a legacy through him; nay, even if he gave the slave to another, and the man to whom he was given manumitted him, the heir is liable, although he did not know that the slave had been left as a legacy through him. (J. 2, 20, 16.)

III. Written instruments showing the title of lands bequeathed may be kept by the heir, and the legatee cannot demand them; but the heir must give sureties for their production when required in the interest of the legatee. (C. 6, 42, 24.)

(c.) Duties of Legatee = Rights *in personam* of the person charged with the legacy.

Is the legatee bound to make good to the heirs or persons charged with the legacy what has been spent for the preservation of the thing bequeathed? The legatee was not bound to pay even for necessary repairs, because the right of the heir or person charged to take the produce or income was a sufficient equivalent. (D. 30, 61.) But when the expenditure went to the root of the bequest, the heir had a right to compensation. Thus, if without the fault of the heir (D. 30, 59) a house bequeathed was burned down, and he rebuilt it, he is not bound to give up possession when the legacy falls due, unless compensation is made to him on an equitable scale (D. 30, 58); and even after surrendering the property without obtaining compensation, he can bring an action against the legatee on the ground that he has paid to him more than was due. (D. 30, 60.)

B.—Rules applying to Particular Legacies.

The duties of the heir and the rights of the legatee had one common origin in the will of the testator, and their limits were simply a question of interpreting that will. To a certain extent, therefore, no universal rule can be laid down, because each testator had a right to have his will interpreted by itself so long as he kept within the limits of the law. Still one testament was necessarily very much like another, and legacies ran in grooves. Hence the language of testators came to be tried by the standard of legal custom, and it might happen that an incorrect use of terms defined by custom would cause the testator's will to be interpreted erroneously, and so defeat his intentions. But custom was never set up as an absolute tyrant; it was accepted as a guide only if the testator had not clearly shown a different intention. The legal interpretation, or rather the interpretation arrived at from considering a multitude of wills, took rank only as a presumption of law

which by clear and conclusive evidence to the contrary might be rebutted.

With this explanation we may proceed to notice the chief examples of legacy in the Roman law, and in doing so shall follow the arrangement of rights adopted in the present work.

A. Legacy of Rights *in rem* over Human Beings—Slavery.
B. Legacy of Rights *in rem* over Things.
  (A.) Unqualified Ownership.
  (B.) Qualified Ownership.
  (C.) Usufruct.
C. Rights *in personam*.
D. Legacy of *Hereditas*.

A. Rights *in rem* over Human Beings—Slavery.

The chief distinction that occurs in legacies of slaves is that between *servi urbani* and *servi rustici*. The latter were either agricultural labourers or attached to farms, the urban slaves were rather personal attendants on the owner. (D. 32, 60, 1.) But the real test was the custom of the owner. The urban and rural slaves were supplied with different kinds of food, and the household accounts kept them separate. The evidence derived from this source was considered most satisfactory. (D. 32, 99, pr.)

If a man leaves as a legacy female slaves with their children as well, even if the female slaves die, their offspring goes with the legacy. It is the same if ordinary slaves are left, and the slaves of those slaves (*vicarii*) as well, so that even although the ordinary slaves die, yet their slaves go with the legacy. But if a slave is left, and his *peculium* as well, by the death or manumission or alienation of the slave, the legacy of the *peculium*, too, is extinguished. (J. 2, 20, 17.)

B. Rights *in rem* over Things.

(A.) Unqualified Ownership.

I. Animals.

Cattle (*Pecus*) includes all animals that feed in flocks or herds, including swine. (D. 32, 65, 4.)

Sheep (*Oves*) does not include lambs (Paul, Sent. 3, 6, 74) nor rams. (D. 32, 81, 4.) Lambs (*agni*) were generally so called until they were a year old (Paul, Sent. 3, 6, 74); but the usage varied—in some places until the first shearing. (D. 32, 65, 7.) A legacy of lambs, therefore, applied to different ages, according to the custom of the place.

A legacy of birds (*Aves*) included aviaries, geese, pheasants, and fowls, but not the slaves that watched them. (D. 32, 66.)

II. Legacy of Lands or Houses.

Land or houses might be bequeathed simply or with their appurtenances.

1. Simple legacy of farm or estate (*Fundus*).

A legacy of a farm is a gift of the soil, buildings, and fixtures (*quaecumque infixa inaedificataque sunt*) (D. 33, 7, 21), but not of the moveables on the farm. (D. 19, 1, 17, pr.—11.) A legacy of a house included the land on which it stood, and a legacy of land included the house built upon it. (Paul, Sent. 3, 6, 68.)

The boundaries of a farm were determined by the views of the testator, which, if necessary, were to be ascertained by extrinsic evidence.

"To my sister Tyranna I leave my Grecian farm, with the stable and all the rural stock." Does this include meadows for pasture which were bought by the testator along with the farm, and used in connection with it? If, according to the usage of the testator, these meadows were included in the name of the farm, they pass to the legatee. (D. 33, 7, 20, 7.)

Amongst other lands, Titius bequeathed to his nephew the Seian farm. For convenience, in order to get a tenant, the testator let out this farm in two portions, of which one was designated the Upper Seian, and the other the Lower Seian farm. Does the nephew get both of them? Paul said, in the absence of proof that the testator intended to bequeath one only, the Upper or the Lower, both went to the legatee, because all the land was held under one name (Seian Farm). (D. 31, 86, 1.)

A testator bequeathed to his brother two farms—of Cassius and Nonius, with their osier-beds and woodlands. Does this include osier-beds and woodlands not embraced by the names of the farms, but which adjoined the farms, were purchased at the same time by the testator, and are necessary for the cultivation of the farms? Scaevola replied in the negative, and said that nothing passed to the legatee but what was included in the designation of the farms. (D. 33, 7, 27, 5.)

"To Titius I give and bequeath my Seian lands, just as they were purchased." The purchase referred to included lands known as Gabian. This is not enough to pass them also. The best evidence is the accounts and correspondence of the testator showing whether he called these lands also by the name of Seian. (D. 32, 91, 3.)

2. Legacy of a farm with its stock (*fundus cum instrumento*).

"*Instrumentum*" included everything on a farm placed there for the purpose of its cultivation, and necessary for the cultivation. It thus included all the implements required for sowing, planting, or preparing the crop—as spades, ploughs, pruning-hooks, etc., for gathering the crop—as sickles, scythes, panniers, etc., and for storing the crop. (D. 33, 7, 8, pr.; D. 33, 7, 12, 1; D. 33, 7, 12, 10; D. 33, 7, 18, 3.)

Alfenus was of opinion that *instrumentum* applied only to implements, and not to animals or slaves, but Ulpian held this to be an error; but live stock was included only in so far as it was required for the cultivation of the farm. (D. 33, 7, 12, 2.)

Thus if a flock of sheep is bequeathed, and it was bought for the sake of the mutton and wool, it is not included in "*instrumentum;*" but if the land is fit only for sheep, then the sheep are included, as by them alone can the produce of pasture be obtained. (D. 33, 7, 9.) Again, if the land is used for bees, both bees and hives are contained in "*instrumentum.*" (D. 33, 7, 10.) The same is true of birds reared and kept in islands on the sea. (D. 33, 7, 11.) If the principal value of the estate consisted in fishing, fowling, or hunting, then the dogs, and gamekeepers (being slaves),

and all the necessary apparatus, are included in the bequest. (D. 33, 7, 12, 12 ; D. 33, 7, 22, pr. ; Paul, Sent. 3, 6, 41.)

The slaves used for the cultivation of the land, as also the bailiff (*villicus*) and overseers (*monitores*), are included in "*instrumentum ;*" the latter only, however, when they were bound to give up the whole produce to their owner, receiving such maintenance as he thought fit ; not if they cultivated the farm for a fixed rent. (D. 33, 7, 18, 4 ; D. 33, 7, 20, 1.) When any of these slaves, or others employed exclusively on the farm (D. 33, 7, 12, 5), were included in a legacy of "*instrumentum*," their wives and children also passed to the legatee, in order to avoid the harshness of breaking up their families. (D. 33, 7, 12, 7.)

These things fell under the general description of "*instrumentum*" only when they were on the farm, and destined to remain there for its use. (D. 33, 7, 12, pr.) The mere fact that slaves attached to a farm were accustomed to be let out part of the year for hire, does not, however, take them out of the category of "*instrumentum.*" (D. 33, 7, 12, 8.) So if they were taken away by the testator to attend on him for a temporary purpose, when farm operations were suspended, they still were considered as part of the stock of the land. (D. 33, 7, 27, 1.)

3. A legacy of a farm with its furnishing (*fundus instructus*).

"*Instrumentum*" involved the idea of a means to an end, but that end was to get the use of the land ; it did not include household furniture (*suppellex*). "*Fundus instructus,*" although there was some variety of opinion on the subject, seems to have been considered as including not only "*instrumentum,*" but everything prepared for the comfort or pleasure of the owner. (D. 33, 7, 12, 27.) Such a legacy, therefore, includes the furniture of the farm-house, the clothes, gold, silver, wine, and utensils of the testator (D. 33, 7, 12, 28) ; also the domestic slaves (D. 33, 7, 12, 35) ; the books and library (D. 33, 7, 12, 34) ; but not the crop ready for the market. (D. 33, 7, 12, 30.)

These things, however, are included only if they are permanently assigned (*non temporis causa*) for the furnishing of the farm. (C. 6, 38, 2.)

4. Legacy of a house simply.

A legacy of a house includes a garden having an access to the house, if it was bought for the purpose of increasing the attraction of the house, and not as a market-garden. (D. 32, 91, 5.)

5. Legacy of a house *cum instrumento.*

This includes whatever moveable is attached to a house for protection from the weather or fire, but not pictures and the like used only for ornament ; nor windows, unless they are intended for shelter. (D. 33, 7, 12, 16.) But it includes vinegar stored for the purpose of putting out fires. (D. 33, 7, 12, 18.) Statues, if fixed, pass with the house as part of the immoveable. (D. 33, 7, 12, 23.)

6. A legacy of a house furnished (*domus instructa*).

This embraces all *instrumenta*, and also the various classes of household slaves. (D. 33, 7, 12, 42.)

Nothing passed by a legacy of land or houses, except the immoveables and fixtures, unless they were expressly or by implication contained in the gift. (D. 33, 10, 14.)

"As it is" (*sicut est*), is a legacy of implements and furniture. (D. 33, 7, 27, 4.)

"*Uti optimus maximusque est*" has not the same effect unless a contrary intention appears. (D. 32, 93, 4.)

The addition "*uti possedi*" is indecisive, and leaves open the question for argument upon the particular will. (D. 33, 7, 20, 9.)

"To Gaius Seius, my foster-son, I wish to be given such and such farms as they are furnished (*ita ut instructi sunt*), and the upper house." Held that the house also is bequeathed with its furnishings, unless a contrary intention is shown by the testator. (D. 33, 7, 20, 2.)

If a farm fully stocked (*fundus instructus*), or with the stock (*cum instrumento*) as well, is left as a legacy, it is the same; for if the farm is alienated, the legacy of the stock too is extinguished. (J. 2, 20, 17.)

Paul explains, however, that this is merely a presumption from the language employed; so that if the legacy were *fundus et instrumentum* or *fundus instructus*, the alienation of the farm does not take away the legacy of the stock (*instrumentum*), but Labeo agrees with the text. (D. 33, 7, 5.)

7. A form of legacy closely resembling those described was made when a farm or house was bequeathed with whatever should be found on the premises at the time of testator's death. (*Domum quaeque mea ibi erunt quum moriar.*)

Such a gift includes the household slaves (D. 31, 32, 2), and money deposited in the house for safety (D. 32, 79, 1), but not money kept for loan (D. 32, 44), nor the claims against debtors (*nomina*), (D. 31, 86, pr.); nor the written securities of debtors. (D. 33, 7, 18, 14; D. 32, 92, 1.)

The gift includes all that forms part of the appurtenances of the house, although they are not actually present at the moment of testator's death; and, on the other hand, excludes what is only accidentally present. (D. 32, 78, 7.)

"To my freedwoman, Pamphila, I wish to be given my Titian Farm, with its stock, and whatever is on the premises at my death." Stichus, a slave attached to the farm, was sent away a year before the testator's death for instruction, and had not returned. Held that Stichus belongs to Pamphila, unless the separation of Stichus from the farm was intended by the testator to be final. (D. 33, 7, 20, 6; D. 32, 78, pr.)

"Let my heir give to Titius the Cornelian Farm, and the slaves that shall be there at my death." A female slave belonging to the farm ran away, and during her flight had a child. She had not returned at testator's death. Held that both she and the child belonged to Titius. (D. 30, 84, 10.)

"I direct Pamphilus, my freedman, to pick out and reserve for himself my Titian Farm and the little Sempronian property, with the stock, and whatever shall be there on my death; and also the slaves that live on the farm, except those I may manumit." This legacy includes the money left on the farms. The testator had had on the premises a stock of wine that he had sold when alive, and actually received one-third of the price. Held that the rest of the wine not delivered belongs to Pamphilus. This carries the testator's liberality further, as bequeathing what had actually been sold; but the testator was presumed to have this intention towards a freedman, who was a favoured person. (D. 33, 7, 27, 3.)

III. A legacy of furniture (*supellex*).

Furniture (*supellex*) is defined to mean the ordinary things required for the use of a house, but not plate or garments (D. 33, 10, 1); or what is included in any other of the well-known kinds of legacy, as provisions, ornaments, silver goblets, written securities, etc. (D. 33, 10, 3; D. 33, 10, 6, 1.) In early times of poverty, even articles of furniture, if made of ivory or other valuable substance, or studded with gems, were not considered to be contained in this legacy, but with the growth of wealth this scruple was removed. (D. 33, 10, 7, 1.)

IV. Legacy of aliment.

Such a legacy includes a due supply of food (*cibaria*), clothes, and house-room, because without these life cannot be sustained. It does not include, however, cost of education (D. 34, 1, 6), unless such is proved to have been the testator's intention. (D. 34, 1, 7.) It includes also an allowance of water, in places where water is sold. (D. 34, 1, 1.)

The quantity to be given was the same as the testator had been accustomed to give; if he had not begun the aliment, then the amount is to be fixed with reference to his wealth, and to the degree of affection he had for the legatee. (D. 34, 1, 22, pr.) If it varied in the lifetime of the testator, then the measure is what he was accustomed to give towards the end of his life. (D. 34, 1, 14, 2.) If it was his custom, the allowance may be demanded in money. (D. 34, 1, 9, 1.)

If the testator fixed no limit to the duration of the legacy, it must be continued for the life of the legatee. (D. 34, 1, 14, pr.) If it was left until the legatee reached puberty, a special interpretation was put upon the gift by Hadrian—namely, that it should be continued for boys up to eighteen, and for girls to sixteen. (D. 34, 1, 14, 1.)

When the duty of furnishing aliment was imposed on several heirs, a certain inconvenience resulted in each being required to give his small contribution, and therefore, according to rescripts of Antoninus Pius, if the testator had not confined the obligation to one of the heirs, an application was to be made to the judge to arrange so that one heir alone should be liable for aliment to one person. (D. 34, 1, 3, pr.)

V. Akin to the above is a legacy of provisions (*penus*).

This is a legacy of what may be eaten or drunk, or provision for the support of a family, including slaves and carriage horses (D. 33, 9, 3, pr.); also what is required for the use of friends, guests, clients, etc. (D. 33, 9, 3, 6.)

VI. Legacy of wheat, wine, oil.

If a given quantity of wine, oil, or wheat is bequeathed, and none is left by the testator, the heir must purchase the quantity and give it to the legatee. (D. 33, 6, 3, pr.) If no quantity is specified, then the legatee gets all that is left by the testator. (D. 33, 6, 7, pr.) In respect of quality, if none is mentioned, the heir is not bound to give the quality that the testator was accustomed to, or was usually found in the place where he lived, but any quality he pleased. (D. 33, 6, 4.)

"Wine" includes all beverages that the testator was accustomed to signify by that name. (D. 33, 6, 9, pr.)

"Old wine" is to be interpreted by the usage of the testator (D. 33, 6, 9, 4); but if none such appears, then all wine that was a year old or upwards, *i.e.*, was not new. (D. 33, 6, 10-11.)

A legacy of wine includes the casks in which it is contained (D. 33, 6, 3, 2), but not those butts (*dolia*) that were used only for containing the wine in the course of its preparation. (D. 33, 6, 15.)

VII. A bequest of books included all volumes, whatever the material on which

they were written, but not the book-case. (D. 32, 52, pr.; D. 32, 52, 3.) A legacy of a library includes the books. (D. 32, 52, 7.)

VIII. Other common species of legacies were of firewood (*lignum*), material for building (*materia*), (D. 32, 55, pr.); wool (D. 32, 70, 9); jewellery (*ornamenta*) (D. 34, 2, 25, 10); gold and silver (Paul, Sent. 3, 6, 85; D. 34, 2, 19, 13); silver vessels (*vasa*) (Paul, Sent. 3, 6, 86); clothes (*vestis*) (D. 34, 2, 23, 1); women's toilette (*mundus muliebris*), (D. 34, 2, 25, 10); or, more generally, whatever is specially assigned for the use or service of women (*uxoris causa parata*). (D. 32, 45; D. 32, 49, 3; D. 34, 2, 13.)

(B.) Qualified Ownership.

I. Legacy of *peculium*.

This legacy includes only what remains after the claims of the master are satisfied. (D. 33, 8, 5.) Deduction must also be made for damage done by the slave to a fellow-slave (D. 33, 8, 9, 1); or for a debt due to a fellow-slave (D. 33, 8, 8, 2); or to the heir. (D. 33, 8, 6, 5.) The heir, moreover, is not obliged to surrender the *peculium* until he obtains an indemnity against the creditors of the slave (*creditores peculiares*). (D. 33, 8, 18.)

1. Are sums due by a testator to a slave included in a legacy of *peculium*?

The same Emperors (Severus and Antoninus) decided by a rescript, that by a legacy of the *peculium* it is not implied that the slave can demand for himself the money he has spent on his master's accounts. (J. 2, 20, 20.)

This rescript is criticised by Ulpian. (D. 33, 8, 6, 4.) He asks why should not the slave be entitled, if such was the intention of the testator? (In the will of the testator was the sole foundation of the law of legacy.) At all events, says Ulpian, the slave must be allowed to set off what the master owes him against what he owes the master. (*That* is consistent with the terms of the rescript.) Again, says Ulpian, suppose the master has acknowledged in writing the amount he owes the slave, is that sum not to be included in the legacy? Pegasus, Nerva, and Atilicinus took the negative, which was also adopted by Ulpian, in deference to the rescript.

Gneus Domitius bequeathed to his daughter her *peculium*, and an annuity he was wont to give her, but had not paid for two years. In his accounts, however, he charged himself as her debtor for 50 *aurei*. According to the terms of the rescript, that sum could not be recovered by the legatee. (D. 33, 8, 6, 4.)

A testator bequeathed to his slave Stichus his freedom, 10 *aurei*, and his *peculium*. At the time of his death Stichus had spent money out of his *peculium* on his master's business, and it was the custom of his master to repay him such excess. Held that the heirs must do the same. (D. 33, 8, 23, 1.)

A slave bought his freedom and paid a sum to his master. Before the manumission was executed the master died, bequeathing to the slave his freedom and *peculium*. Is the money paid for his freedom to be included in the *peculium*? If the testator, on receiving it, at once credited it to himself as money received, it was no longer *peculium*; but if, pending the formal manumission, he continued to regard it as the property of the slave, it remains *peculium*, and must be given up to the slave. (D. 40, 1, 6; D. 33, 8, 8, 5.)

A father bequeathed to his daughter, who was subject to his *potestas*, her *peculium*. After the will was made he recovered sums due to the daughter and credited them to his own account. This is presumptive evidence that he did not reckon them part of his daughter's *peculium*, but it is open to her to prove that he had not that intention. (D. 34, 4, 31, 3.)

2. Increase and decrease of *peculium*.

If a *peculium* is left as a legacy, then without doubt all that is added to it or lost from it, in the life of the testator, is so much gain or loss to the legatee. But if after the testator's death, and before the inheritance is entered on, the slave acquires something, Julian says that if it is to himself when manumitted that the *peculium* is left, then all that is acquired before the inheritance is entered on goes to the legatee, because the legacy vests from the day the inheritance is entered on; but that if it is to any outsider that the *peculium* is left, those acquisitions do not go with the legacy, unless the increase is one to property forming part of the *peculium*. (J. 2, 20, 20.)

Julian says that all additions up to the entry of the heir go to the slave if he is legatee, but that the *peculium* is, so to speak, arrested at the time of testator's death, when another person is the legatee. Nevertheless, if the *peculium* consists of slaves (*vicarii*) or cattle, the offspring of such slaves or cattle born after the death of the testator went to the legatee. But the legatee could not claim what accrued from the labour of the slave, or gifts made to him. (D. 15, 1, 57, 2.) The distinction was based on the presumed will of the testator. When the testator manumitted a slave and gave him his *peculium*, it was to be supposed that he meant the whole of it to go to him, but where he left it to another there was no reason why the rule applicable to other legacies should be departed from, although in this case also the legatee would get everything if he could prove that the testator meant him to have it. (D. 33, 8, 8, 8.)

If the slave gets his freedom, not at once but conditionally, the *peculium* is reckoned with all accretions up to the moment when he becomes free. (D. 15, 1, 57, 1.)

3. When a manumitted slave gets his *peculium*.

Unless, too, the *peculium* is left him as a legacy, it is not due to a manumitted slave; and this although if his master manumits him in his lifetime it is enough if it is not taken away from him. So the late Emperors Severus and Antoninus decided by a rescript. (J. 2, 20, 20.)

The same Emperors decided by a rescript that the slave's *peculium* is left him when he is ordered to be free if he gives in his accounts and out of it pays those that are outstanding. (J. 2, 20, 20.)

Freedom was bequeathed if a slave rendered his accounts and paid 100 *aurei*. It was implied that he was not to give more. But a clause that the manumitted slaves should be *inexcussi* (literally, released from accounts) did not imply a gift of the *peculium*, but signified only that the accounts were not to be scrutinised too closely, and that the slaves were not to pay for their carelessness or neglect. (D. 33, 8, 23, 2.)

II. Legacy of Dowry (*Dos*).

A legacy of a dowry to a wife included only what could be recovered by an *actio de dote*.

If a husband leaves his wife her dowry, the legacy takes effect; because a legacy is something fuller than an action for dowry. (J. 2, 20, 15.)

But if he leaves as a legacy a dowry he has not received, the late Emperors

Severus and Antoninus decided by a rescript that if the legacy is unconditional it does not take effect, but if a fixed sum of money or some determinate object or deed of dowry is pointed out to be first taken as a legacy, then the legacy takes effect. (J. 2, 20, 15.)

Julia gave a dowry to Gaius on his marriage with her daughter Seia, and stipulated for the return of it. Gaius bequeathed the dowry to his wife. She cannot recover it unless it was clearly proved that the testator intended his heirs to pay the amount to his wife as well as to repay it to her mother. (D. 33, 4, 16.)

A husband bequeathed to his wife "so much as he had got, namely 50 *aurei*." He had got really only 40. Held that 50 was due by the legacy. (D. 33, 4, 6, pr.)

A husband got slaves for his wife's dowry, and bequeathed to her money in lieu of them. The slaves died in the husband's lifetime, and the wife survived him. Held that she was entitled to the money bequeathed. (D. 33, 4, 8.)

(c.) Usufruct, etc.

If a usufruct is given simply, it is regarded as a single legacy held for life, but if it is given from day to day (*in dies singulos*) or in annual instalments, it is regarded as a number of successive legacies, according to the interpretation put upon annuity. (D. 7, 3, 1, pr.) A usufruct may be bequeathed of all the testator's effects, moveable or immoveable. (D. 33, 2, 37.)

It was often difficult to determine whether a testator meant to give a legatee a usufruct or the ownership.

"I bequeath to Gaius Seius the annual produce of my farm." This is a legacy of a usufruct. (D. 33, 2, 41.)

"I bequeath to my wife the rents (*reditus*) of my farm for life." This is not a usufruct, it is only an annuity for life; that is, not a right *in rem*, but only a right *in personam*. (D. 33, 2, 38; D. 33, 2, 22; D. 33, 1, 21, pr.)

"I bequeath to Sempronius a sixth of the proceeds of sale of the fruits and vegetables of certain land." This is not a usufruct, but only a legacy of an annuity to the extent of one-sixth. (D. 7, 1, 58, 1.)

"I desire that my slave Scorpus should work for my concubine Sempronia." This is a legacy of the usufruct of Scorpus simply. (D. 33, 2, 24, 1.)

A testator appointed his sons heirs, and bequeathed to his wife apparel, her toilette materials, wool, flax, linen, and other things, and added, "I wish the ownership of these things above mentioned to revert to my daughters or the survivors of them." This does not limit the wife's interest to a usufruct, but makes her a trustee for the daughters on her death. (D. 33, 2, 39.)

C. Legacy of Rights *in personam*.

I. Annuity.

An annuity is a right to an annual or monthly sum for life, or for a fixed or indefinite time. (D. 33, 1, 18, pr.; D. 33, 1, 23.) It is contrasted with usufruct.

1. A usufruct is one legacy, however long it may last. An annuity is regarded as a number of successive legacies for as many years as the annuitant lives. (D. 36,

2, 10.) The payment is unconditional, but each succeeding payment is subject to the condition "if the annuitant lives," so that on the death of the annuitant it expires. (D. 33, 1, 4 ; D. 33, 1, 12.) The same construction was adopted in *pacta* (D. 2, 14, 52, 3), but the opposite rule prevails in annuities created by stipulation. (D. 39, 635, 7.) In *stipulatio* the *juris vinculum* could not be broken by mere lapse of time.

If you make a stipulation of this sort, "Do you undertake to give me 10 *aurei* a year as long as I live?" the obligation is understood to be simple and unconditional, and is binding for ever. For a debt cannot be due for a time only. But your heir, if he claims payment, will be repelled by an *exceptio pacti*. (J. 3, 15, 3.)

2. An annuitant is entitled to payment for the whole year if he lives only a part of the year (D. 33, 1, 22) ; so that if the annuitant lives but one year and a day, two years' payment will be due. (D. 33, 1, 5.) The usufructuary is entitled only to what he gathers. (D. 33, 1, 8.)

3. A usufruct dates from the entry of the heir, an annuity from the death of the testator ; so that if the heir should not enter for years, the annuity would still be due from the testator's death. (D. 36, 2, 12, 3.)

4. Prior to Justinian a usufruct was lost by any change of status, and testators used to guard against this by providing that as often as the legatee should suffer a change of status, the usufruct is re-granted to them. But an annuity was not lost by change of status so long as the legatee was free. (D. 33, 1, 8.)

II. Legacy of securities (*chirographa*).

A legacy of the written security (*chirographum*) implied a legacy of the amount due by the testator's debtor (D. 30, 44, 5 ; D. 32, 59), but a legacy of the amount due does not imply a gift of the chirograph.

The duty of the heir is not to pay the amount, but simply to allow the legatee to sue in his name. (D. 30, 44, 6 ; D. 30, 105.)

Things both corporeal and incorporeal can be left as legacies. Therefore what is due the deceased can be left to anyone, so that the heir must supply the legatee with his actions, unless the testator in his lifetime exacted the money,—for in this case the legacy is extinguished. (J. 2, 20, 21.)

III. Legacy of release of a debt to a debtor.

1. When there is one debtor only.

If a man leaves a release to his debtor, the legacy is valid, and neither from the debtor nor from his heir nor from anyone else in the position of his heir can the creditor's heir make a demand. On the contrary, he may be summoned by the debtor to release him. A testator, too, can order that for a time the heir shall not make a demand. (J. 2, 20, 13.)

The release here referred to is the formal release by *acceptilatio*. (D. 34, 3, 3, 3.)

The heir of the debtor is not released, if the testator indicates an intention that he should not. (D. 34, 3, 20, pr.)

Thus, "Let my heir refrain from demanding the debt from Lucius Titius alone." (D. 34, 3, 8, 3.)

2. When there are several debtors.

If the correal debtors are not partners, the release of one does not release the others; and hence the debtor released can defend himself only by *exceptio pacti*, and cannot demand an *acceptilatio*, because that would release his co-debtors as well. But if the correal debtors are partners, the release of one is the release of all, because otherwise the person released could be sued by the other partners if they were compelled to pay. In this case the proper mode of release is *acceptilatio*. (D. 34, 3, 3, 3.)

3. Sureties.

The legacy of a release to a principal releases also the surety, otherwise the principal would be bound to pay the surety, and his release be illusory. (D. 34, 3, 10.) But a release of the surety is not a release of the principal. (D. 34, 3, 2, pr.) If, again, the surety has intervened gratuitously, and has no action against the principal debtor in the event of his being obliged to pay the debt, the release of the principal does not operate in his favour. (D. 34, 3, 5, pr.)

IV. Legacy of a sum due to a creditor.

On the contrary, if the debtor leaves his creditor what he owes him, the legacy is void if there is no more in it than in the debt, because the creditor has nothing more by the legacy. But if the debt is due on a certain day, or conditionally, and the legacy is unconditional, the legacy is valid, because it is to be paid forthwith. If, however, in the lifetime of the testator, the day comes or the condition is fulfilled, Papinian wrote that none the less the legacy is good, because it once was in force; and this is true. For the opinion of those that hold a legacy extinguished because it has come into a case in which it could not begin, has not been adopted. (J. 2, 20, 14.)

A testator bequeathed to his wife 50 *aurei*, which he said he had received from her as a loan on a written security. If there was a real loan, the legacy was void (D. 34, 3, 28, 13); but if the wife was defeated in suing for the debt she could recover the legacy. (D. 34, 3, 28, 14.)

Gaius has stipulated with Maevius for Stichus, and Titius has bequeathed Stichus from Maevius, his heir, to Gaius. Can Gaius sue both for the stipulation and the legacy? Certainly, because Titius does not by will release Maevius. But if there was no valuable consideration for the stipulation, Maevius can protect himself by the rule that he is not compelled to give the same thing twice *ex causa lucrativa*. (D. 30, 108, 4.)

Titius bequeathed Stichus to Gaius. Sempronius bequeathed the same Stichus to the same Gaius, but on trust to give Stichus to Julius. Maevius was heir to Titius, and also to Sempronius. Held that he must give Stichus and also his value to Gaius, because Gaius was obliged by one will to give up Stichus. (D. 30, 108, 5.)

Maevius bequeathed a farm to Seius and Sempronius conditionally. The heir of Maevius bequeathed the same farm to Seius under the same condition. Was this legacy a discharge of the debt due by the heir to Seius? If the condition happened, part of the farm would be due to Seius twice over. Papinian said this was most unlikely, and that the intention of the heir of Maevius was to bequeath to Seius the part that went to Sempronius by the first will. (D. 31, 66, pr.)

D. Legacy of *Hereditas*.

A person could not bequeath his own universal succession to a legatee, but he could bequeath the whole of an inheritance acquired from another person. (D. 32, 29. 2; D. 31, 88, 2.) He could also bequeath a part of his own universal succession.

in which case the legatee was called *legatarius partiarius*. If no part is mentioned, the legatee gets half the inheritance. (D. 50, 16, 164, 1.) The heir was bound to divide the property with the legatee, or give an equivalent. (D. 30, 26, 2.)

CO-LEGATEES.

If the same thing is left as a legacy to two persons, either jointly or severally, and both come to the legacy, it is split between them. If one of the two fails, either because he despises the legacy, or because he dies in the lifetime of the testator, or in any other way fails, the whole belongs to his co-legatee. A legacy may be left jointly, as when one says, "To Titius and Seius I give and leave the slave Stichus;" or severally, as "To Titius I give and leave the slave Stichus, to Seius I give and leave Stichus." But if he said expressly "the same slave Stichus," the legacy is understood to be equally several. (J. 2, 20, 8.)

According to the law as settled by Justinian, the difference between those two forms was as follows:—When two persons were co-legatees *conjunctim*, *i.e.*, united in the same disposition for the same object (elsewhere called *re et verbis*, D. 50, 16, 142), each had a right to take the share of the other, if it became vacant, before the title to the legacy vested (*dies cedit*). They need not take this part unless they pleased; but if they did, they must accept with it the burdens that may have been imposed on it. If there are several co-legatees, and some refuse, the others may take the vacant shares.

When the legacy is *disjunctim* (*i.e.*, the same thing given *pro indiviso* by different dispositions), and all accept at the time when the legacy vests, they take in equal shares. One cannot demand the thing bequeathed, leaving to the others to exact the value of it, unless the testator has expressly so appointed. If, however, some do not take, the person in whom the legacy vests gets the whole. The proper interpretation of a disjunctive gift is that the testator gives the whole to the legatee first mentioned, and subsequently encroaches on the legacy by appointing additional legatees for the same thing. Hence if these or any do not take, the legatee gets his whole bequest undiminished; in other words, the accession of their parts is independent of the will of the legatee. Hence also, the accepting legatee is not necessarily subject to the burdens imposed on the lapsed shares. The question in each particular case depends on the testator's intention, but the object of a disjunctive legacy was that each legatee should bear his own burdens solely, and if the testator wished a different result, there was nothing to hinder him doing so by explicit language. (C. 6, 51, 1, 1).

In the same constitution Justinian abolished the old law relating to *caduca* (C. 6, 51, 1, 2), but left intact the law relating to *legata ereptitia*; *i.e.*, those which were taken away from unworthy (*indigni*) legatees. (C. 6, 51, 1, 12.)

When a house was bequeathed to testator's freedmen, and by the same will a certain portion of it to Fortunius, it was held that the legacy of the house to the other freedmen was diminished just to that extent. (D. 32, 41, 1.) Justinian confirmed this interpretation; and generally when a thing is left to one, and afterwards any part of it to another, the first legacy is held to be *pro tanto* reduced. (C. 6, 37, 23.)

A testator leaves a usufruct to "Attius, Seius, and my heirs." Attius gets one-third, Seius one-third, and the heirs, whatever their number, the remaining third. (D. 7, 2, 7.)

DONATIO MORTIS CAUSA.

There is also another mode of acquisition—namely, gift. Of gifts there are two kinds—in prospect of death, and not in prospect of death. (J. 2, 7, pr.)

A gift in view of death is one made because the approach of death is suspected, when a man gives something away on condition that if the common lot of man befalls him, he that received it shall have it; but that if he survives the giver shall take it back, or if he repents of giving it, or if he to whom it is given dies first. These gifts in prospect of death have been brought down to the model of legacies in every respect. Men learned in the law had long held it doubtful whether it ought to be made like a gift or like a legacy. Of both cases it gave some of the characteristics, and some sought to drag it to the one kind, some to the other. But we settled that in nearly every point it should be numbered with legacies, and that it should proceed according to the form given it in our constitution. In short, a gift in prospect of death is when one wishes to have the thing himself rather than that he to whom it is given should have it, but that the latter should have it rather than his heir. So too, in Homer, Telemachus makes gifts to Peiraeus :—"Peiraeus, for we know not at all how these deeds shall be, if the haughty suitors should slay me by stealth in the halls, and divide among them all that was my father's, I wish you to have these things and enjoy them rather than one of them. But if among them I shall plant slaughter and an evil fate, then to me in my joy bring these things to my home in thy joy." (J. 2, 7, 1.)

A gift *mortis causa* is not complete until the death of the donor, and is revocable during his life. (D. 39, 6, 32; D. 39, 6, 16; D. 39, 6, 30.) It may be made not only during sickness, but in view of old age or of any peril to life. (D. 39, 6, 3-6.)

A gift in anticipation of death (*donatio mortis causa*) is completed by the delivery of the thing to the donee, or to any one for him to be given to him, even after the donor's death. Justinian required five witnesses, whether the gift was in writing or not, as in wills and legacy. (C. 8, 57, 4.)

If the donor recovers or escapes the apprehended peril, he can sue the donee by *utilis actio in rem* or *condictio* (D. 39, 6, 30; D. 39, 6, 29), but must pay all necessary and beneficial expenditure incurred by the donee while the thing was in his possession. (D. 39, 6, 14.)

The object of a gift *mortis causa* need not be property.

Titia gave to Ageria the written obligations of her debtors Maevius and Septicius, requesting her, if she (Titia) died, to give them to the debtors; if she survived, to return them to her (Titia). She died, leaving Maevia her heir. Ageria delivered the chirographs to the debtors. Maevia cannot recover the debts. (D. 39, 6, 18, 2.)

A nephew, creditor to his uncle for a sum, and desiring to release him on his death (nephew's), wrote that the chirographs whereon they were should be void. On the death of the nephew, the uncle could defeat his heir by the plea of fraud (*doli mali exceptio*). (D. 39, 6, 28.)

Generally speaking, as stated in the text, gifts *mortis causa* are assimilated to legacies. (D. 39, 6, 37, pr.) The differences between them resulted from the circumstance that a *donatio* did not depend in any manner upon the validity of a will, and was equally good whether the donor died testate or intestate. (D. 39, 6, 25, pr.) But the *donatio* resembled *legatum* in the following points:—(1.) It was subject to the deduction of the Falcidian Fourth. (C. 8, 57, 2.) (2.) It was rescinded by the insolvency of the testator (D. 35, 2, 66, 1); or (3) if the donee died before the donor. (D. 39, 6, 23.) But a substitute might be made for such a case, after the analogy of wills (*si ipse capere non potest*). (D. 39, 6, 10.) (4.) A *donatio mortis causa* was revoked if the donor suffered capital punishment. (D. 39, 6, 7.) (5.) A *Senatus Consultum* made every one who was by law incapable of taking a legacy equally incapable of receiving by *donatio mortis causa*. (D. 39, 6, 35, pr.) But every one that could

take a legacy could also take by *donatio mortis causa*. (D. 39, 6, 9.) (6.) Those who could make a will could give a *donatio mortis causa* (D. 39, 6, 15); but even persons who could not make a valid will were allowed to make donations *mortis causa*. This a *filius familias* could do with the consent of his father, although such consent gave no validity to a will made by him. (D. 39, 6, 25, 1.)

INVESTITIVE FACTS.

In order to determine whether a given person was a legatee, it might be necessary to consider a multiplicity of circumstances. These we may arrange in the following order:—

A. Making of Legacies.
  (A.) Simple Legacy.
  (B.) Modality of Legacies.
  (C.) Restrictions on Legacy.
B. Revocation of Legacies.

A. Making of Legacies.

(A.) Simple Legacy.

I. The old *legatum* could be made only by will. (D. 35, 1, 38.) Hence if the will became invalid, or the heirs named in the will refused to take, the legacies fell to the ground. So a trust contained in an ineffective will failed. (D. 32, 11, 1.) Even legacies left to the Emperor by an imperfect will were disallowed. (D. 32, 23.) If, however, an imperfect will was held to be binding as *codicilli* on the heirs *ab intestato*, the legacies were valid. (C. 6, 42, 29.) We have already seen (p. 829) under what circumstances a will was allowed to take effect as *codicilli*.

It was not a duty of persons appointed heirs by will to accept the inheritance in order to prevent the failure of the legacies. (D. 29, 4, 17.) Suppose, then, the person appointed heir by will could also get the inheritance *ab intestato*, was he allowed to renounce under the will, and thereby get rid of the legacies? This was frustrated by an edict of the Prætor, by which an heir, if he evaded the wishes of the deceased, was nevertheless compelled to pay the legacies, just as if he had taken under the will. (D. 29, 4, 1, pr.) This stringency was, however, exercised only when the heir had deliberately refused or neglected to take under the will (D. 29, 4, 1, 6), and with the object of defeating the legatees. (D. 29, 4, 21.) If the heir took *ab intestato*, not knowing that he could take under a will, the edict did not apply. (D. 29, 4, 1, 4.)

A legacy before the appointment of an heir was formerly void; because of course wills owe all their force to the appointment of the heir, and therefore his appointment is, as it were, the source and foundation of the whole will. On the like principle no grant of freedom could be made before appointing an heir. But we thought it unworthy of the law to follow the mere order of writing (a thing even antiquity itself thought fit to revile), and to despise the testator's wishes. By a constitution of ours, therefore, we have amended this fault too, so that it is lawful, either before appointing an heir, or in the midst of appointments of heirs, to leave a legacy, and much more freedom, whose use is still more to be favoured. (J. 2, 20, 34.)

II. Who could be charged with the payment of a legacy?

1. At first no one except an heir taking under a will could be required to pay a legacy. (Ulp. Frag. 24, 20.) When *codicilli* were introduced, the heir *ab intestato* could be charged, and under the latitude sanctioned by trusts, legatees also, and donees *mortis causa.* (C. 8, 57, 1.) Lastly, any person whatever, although neither heir nor legatee, that received a benefit from the deceased by his death, could be required to pay a legacy. (D. 32, 1, 6.) A person could not, after accepting any benefit from the deceased, repudiate a trust imposed upon him. (D. 34, 1, 15, pr.) But no trust could be imposed on one who ought to have been appointed heir, and was either passed over in silence (D. 32, 2; C. 6, 42, 31) or disinherited (D. 30, 126, pr.), although such persons might succeed *ab intestato.*

Money was deposited by Titius with Gaius. Titius by his will charged Gaius to give the money to Sempronius. According to a rescript of Antoninus Pius, the heir of Titius cannot demand the money from Gaius, who must give it up to Sempronius. (D. 30, 77.)

A father, emancipating his son, gave him all his property except two slaves, stipulating that the whole should be restored on demand, or on the son's death, and that meanwhile the son would not impair the property. On his death-bed the father wrote a letter to his son, charging him to pay certain sums to certain persons, and to manumit the slave Lucrio. It appears that at first, since the son was not an heir or legatee, the letter could not make him a trustee. But by that rescript of Antoninus Pius, debtors could be subjected to trusts, and the letter of the father was tantamount to a demand of a portion of the property in terms of the stipulation. (D. 32, 37, 3.)

A testator bequeathed to his mother her own farm, charging her on her death to give it to his wife, Flavia Albina. After testator's death, the mother acknowledged before a magistrate her willingness to obey the son's injunctions, and to deliver the farm to Flavia Albina, provided she got the year's rent. She never delivered the land nor received the rent. Could she sell the farm? Yes; because what was bequeathed to her was already her own, and the trust, therefore, failed, but she was bound by the trust if she had accepted any other benefit under the son's will. (D. 32, 37, pr.)

If a person that takes nothing under a will is charged with a legacy, he cannot, except the legacy be for aliment, call upon the heir to give him the means of performing the trust.

Titius is appointed heir, and the testator charges Gaius-Seius (who is not made heir) to pay 10 *aurei* to each of testator's foster-children out of the property Seius shall recover from testator's inheritance ; also out of the proceeds to give them maintenance, the balance to be given to Numerius. This trust gives Gaius-Seius no right to act as heir and sell the testator's property, but he can compel Titius, saving the Falcidian fourth to give him enough to pay the aliment. He cannot exact the balance in favour of Numerius. (D. 34, 1, 9, pr.)

2. No person can be burdened with a trust or legacy for more than he has actually received through the bounty of the testator (D. 30, 26, pr.; D. 30, 78; D. 30, 96, 2; D. 30, 122, 2), even when he has refused or neglected to demand what has been left to him. In this case, however, he is bound to transfer to the legatee his right of action against the heir. (D. 31, 70, pr.; D. 32, 8, pr.)

Seius left his inheritance to Maevius on trust after the death of Maevius for Titius. Maevius appointed Titius his heir on trust to surrender his inheritance, and also the inheritance of Seius, on his death, to Sempronius. Seeing that Titius was entitled to the inheritance of Seius on the death of Maevius, could he be compelled to surrender it to Sempronius ? If the income he derived from the estate of Maevius, before his death, was equal in value to the inheritance of Seius, then he has got the equivalent of it, and must restore all, on his death, to Sempronius. (D. 31, 77, 31.)

A testator bequeathed land to Gaius on trust after his death to give it to Sempronius ; and he also charged Gaius to pay Titius 100 *aurei*. Seeing that nothing else was left Gaius, must he pay the 100 *aurei* ? If Gaius lived so long that the income of the land amounted to 100 *aurei*, he must pay it to Titius ; but if not, and the legacy is to take effect on the death of Gaius, it fails altogether. (D. 30, 114, 3.) Gaius must give security for payment of the legacy in the event of his obtaining enough to satisfy it. (D. 30, 114, 4.)

A legacy of 100 *aurei* on trust, after death to give 200 *aurei*, is good as a trust only for 100 and interest. A legacy of 100 *aurei* on trust to give a farm, if the legatee accepts the money, is good for the farm, although he alleges that the farm is worth more. (D. 31, 70, 1.)

Titius has a usufruct of a farm of which Gaius is owner. Titius gives up the farm to Gaius, before his death, as a gift *mortis causa*. The advantage derived from the farm during the lifetime of Titius is sufficient to support a trust imposed upon Gaius. (D. 32, 3, 3.)

To Titius is bequeathed a usufruct of land, and out of it he is to give aliment to freedmen. On the death of Titius the usufruct is extinguished ; his heirs cannot be required to go on paying aliment. (D. 34, 1, 20, 2.)

3. In certain bequests legatees cannot be charged to pay any legacies.

1°. When the bequest has a value that cannot be measured in money. Thus a trust cannot be charged on a slave who receives only his freedom by will (D. 50, 17, 106), nor on a person charged to manumit a slave, although he thereby acquires the valuable rights of patronage. (D. 30, 94, 3.) If, however, the liberty of the slave is deferred to a future day, the profits from his labour previous to that time formed a fund on which a trust might be imposed. (D. 32, 3, 1.)

2°. No trust can be charged on a creditor that receives the amount due to him by will, unless he receives some advantage over and above the debt. (D. 32, 7, 2.) Thus

a trust may be charged on a legacy of a dowry, in so far as the wife gains by a speedier payment. (D. 33, 4, 2, pr.)

III. Words that create a legacy. This depended entirely on the intention of the testator, according to the true construction of the words employed.

"I believe that you will give," was held binding. (D. 30, 115.)

"I commend him to you," was not considered enough to impose a trust, according to a decision of Antoninus Pius. (D. 32, 11, 2.)

"I do not doubt that whatever my wife gets she will give up to her children." This was held to be valid, according to a rescript of Marcus Aurelius, on account of the confidence arising from the relation between husband and wife. (D. 31, 67, 10.)

"A legacy of 100 *aurei* was left to a freedman, and the testator added, "I know that everything I leave you (Pamphilus) will come to my children, knowing as I do your affection for them." The heirs of Pamphilus must give the 100 *aurei* to the children, although the testator's intention was hardly expressed with sufficient clearness. Here, again, the special relation of the parties governed the construction. (D. 32, 39, pr.)

"My son, I ask you to manage well the lands bequeathed to you, in order that they may go to your children." This is a bequest of the lands to the children after the death of their father, the legatee. (D. 32, 11, 9.)

A testator bequeathed to Felix his liberty and the usufruct of certain land, saying, "I think you will get the ownership of it if you keep on good terms with my heir; and also do you, my heir, do everything to maintain an amicable relation." This did not create a trust of the ownership. (D. 33, 2, 32, pr.)

A widow on her marriage gave a mandate to her two sons by her first husband, that they should stipulate for her dowry in every event by which the marriage could be dissolved; so that even one of the sons could demand the whole dowry. During the marriage one of them died, and his mother wrote a letter to the surviving brother, requesting him to sue for only half the dowry, and *to be satisfied* with that. She afterwards died. Held that the son could recover only half the dowry, and that an implied trust was created in respect of the other half for the husband, who took by survivorship. (D. 32, 37, 4; D, 32, 11, 4.)

A mother deposited a written gift of certain lands in a temple without the knowledge of her son, and afterwards wrote a letter to the keeper of the temple to this effect, "I desire the written expression of my will to be delivered to my son after my death." This imposes a trust on the heirs *ab intestato* on behalf of the son as legatee of the lands contained in the instrument of gift. (D. 31, 77, 26.) But such a direction was not held to create a trust, except in the case of a son or other near relation. (D. 39, 5, 31, 3.)

A father gave a dowry and other property to his daughter on her marriage. He appointed her as heir along with her brothers, if she brought the dowry and other property into hotchpot. She did not enter on the inheritance, and the will was construed as a trust in her favour for the dowry and other property. (D. 37, 7, 8.)

A grandfather bequeathed 100 *aurei* to each of his daughter's children, and said that if it had not been for some misfortunes—one a bad debt of their father's for 15 *aurei*—he would have given them larger sums. These grandchildren became heirs to their father, and so were liable for the debt. Held that this declaration by their grandfather was an implied release of the debt. (D. 44, 4, 17, 1.)

A woman appointed heirs her son and his sons, substituting them reciprocally for one another. She requested her son to emancipate his sons, but did not ask him to give up the inheritance to them. The son entered on his mother's inheritance. Held

that he must both emancipate his children and give up their share of the inheritance, otherwise the first part of the will could have no effect. (D. 35, 1, 92.)

Titia appointed her children Sempronius and Maevia heirs in equal shares, and requested Maevia to manumit by will her slave Stichus, because she intended to leave so many slaves to her by *codicilli*. She bequeathed no slaves by *codicilli*. Held that Maevia could not claim any slaves under that general clause, and that she was, therefore, not bound to manumit her slave Stichus. (D. 31, 34.)

"Out of the 100 *aurei* I have bequeathed to Titius, let my heir give 50 to Seius." There was no such legacy to Titius. Held that these words of description did not amount to a legacy of 50 to Titius. (D. 35, 1, 72, 8.)

A father appointed his daughter heir, and substituted her son, and bequeathed 200 *aurei* to the daughter's husband, saying that he would be content with that, because he had made his daughter and her son heirs, and recommended them to share all his property with him. The daughter bequeathed the whole inheritance away from her husband. Held that he was a legatee only for the 200 *aurei*. (D. 36, 1, 78, 8.)

IV. The intention of the testator must be declared with reasonable certainty. Two things must be certain: (1) the object bequeathed, and (2) the person to whom the bequest is made. This certainty may be impaired or destroyed in two ways. The legacy may be perfectly clear, but the testator may have bequeathed what he did not intend to bequeath, or to a person he did not wish to be legatee, through some error. Again, the language of the testator may be obscure or susceptible of more than one meaning, or not susceptible of any clear, probable meaning. There may be mistake or ambiguity. The testator has either certainly done what he did not intend to do, or he has not clearly signified what he did intend to do. The sources of error are comparatively few, but the sources and varieties of ambiguity are endless. For convenience, therefore, the subject of interpretation is reserved for separate examination—a course the more expedient, because many of the examples belong to the department of Rights of Legatee rather than to the Investitive Facts. Here then attention will be confined to three things: (1) certainty in the object; (2) certainty in the person of the legatee; and (3) essential error; that is, such error as is fatal to the legacy.

1. Certainty in the object of the legacy.

A legacy was good if there were any distinct means of ascertaining the object of the bequest.

A testator bequeathed Stichus. This is intelligible enough, but it turned out that the testator had several slaves of that name. It was open to any legatee to show which Stichus was intended; and failing such evidence, the heir could give whichever he pleased, but he must give one Stichus. (D. 30, 32, 1.)

A testator bequeathed an annuity without saying for what sum. According to Mela, the legacy was void for uncertainty, but Nerva said that the sum might be determined by evidence, either from the amount the testator had been in the habit of

allowing the legatee, or from the rank and dignity of the legatee. It was for the judge, according to the latter opinion, to impart certainty and completeness to the legacy. This was also the opinion of Ulpian. (D. 33, 1, 14.)

A testator manumitted a young slave Stichus by will, and charged his heir to pay for teaching him a trade, by which he might be able to maintain himself. The testator did not specify any trade. But Valens (deciding against Pegasus) held that it was for the Prætor or an arbiter to supply the omission, having regard to the wishes of the deceased, and the age, position, disposition, and talent of the slave. (D. 32, 12.)

A testator left a legacy to the town of Graviscas (not saying for how much) for the repair of the road leading from that place to the Via Aurelia. Unless the sum required is enormous, or the estate of the testator small, in which cases the presumption was that he had not intended to give his whole property to the repair of a road, the judge would determine the exact sum to be given, keeping in view the value of the inheritance. (D. 31, 30.)

2. Certainty in the person of the legatee.

A legacy left to an indeterminate person was of no effect. Now a person appears to be indeterminate when a testator adds him with an indeterminate notion of him in his mind; as, for instance, if the legacy were left thus: "To the man that comes first to my funeral, let my heir give ten thousand *sestertii*." The rule of law is the same if he gave a legacy generally to all—"Whoever comes to my funeral." In the same case is what is left thus, "Whoever bestows on my son his daughter in marriage, to him let my heir give ten thousand *sestertii*." So also a legacy of this nature, "Whoever, after this will is written, shall first be named consuls," is held equally to be a legacy to an indeterminate person; and, in fine, there are many other examples of this sort. (G. 2, 238.)

But a legacy is rightly left to an indeterminate person if he is determinately pointed out, as, "Of my kinsmen as they now are, whoever comes first to my funeral, let my heir give him ten thousand *sestertii*." (G. 2, 238.)

Freedom, too, it is held, cannot be given to an indeterminate person, for the *lex Fufia Caninia* orders slaves to be freed by name. (G. 2, 239.)

A *tutor* also must be determinate when he is appointed. (J. 2, 20, 25; G. 2, 240.)

To indeterminate persons it was not allowed of old to leave either a legacy or a trust. Not even a soldier could leave anything to an indeterminate person, as the late Emperor Hadrian decided by a rescript. Now a person seemed to be indeterminate when the testator added him with an indeterminate notion of him in his mind; as, for instance, if one were to say, "Whoever bestows on my son his daughter in marriage, to him let my heir give such and such a farm." A legacy, too, left to the first persons to be named consuls after the will was written, was held to be equally a legacy to an indeterminate person; and in fine, there were many other forms of this sort. Freedom, too, it was held, could not be given to an indeterminate person, for the received opinion was that slaves must be freed by name. But a legacy was rightly left if the person was determinately pointed out: that is, to an indeterminate person from among determinate persons, as, "Of my kinsmen as they now are, if one takes my daughter to wife let my heir give him such and such a thing." But legacies or trusts left to inde-

terminate persons and paid by mistake could not be demanded back ; so the sacred constitutions had provided. (J. 2, 20, 25.)

This rule was extended to a number of cases (such as that of *alieni posthumi*, if conceived in the lifetime of the testator or person whom they succeeded *ab intestato*) where the legatees were perfectly certain, until the hardship of such technical rigour led to an amendment of the law. (C. 6, 48.)

A testator manumits Stichus by will. He has more than one slave named Stichus. Held that none of them can get the benefit of the bequest unless proof is given to show which was meant. (D. 40, 4, 31 ; D. 34, 5, 27.) So if a legacy is left to Stichus, and there are two of that name, whichever proves that he was intended, becomes the legatee.

A testator bequeathed in his will house-room (*habitatio*) to all his freedmen whom he should name in *codicilli*. He named none. The legacy fails. (D. 33, 2, 18.)

A legacy is given to each of two called Titius. The testator revokes his legacy to Titius, without saying which. The legacies of both are revoked if neither can prove that the other's legacy alone was intended. (D. 34, 4, 3, 7.)

3. Error.

Mere clerical errors, such as the omission of single words, *dare* (D. 30, 106), or *volo* (C. 6, 42, 10), do no harm, particularly if the meaning of the testator can be made out from the context. If the writing is illegible or unintelligible, such part only is struck out ; what is legible remains valid. (D. 50, 17, 73, 3.) The addition of statements not essential to the legacy, if they are erroneous, do not impair the legacy. Superfluities do no harm. (D. 50, 17, 94.)

An error in the object of the bequest (*in corpore*) is fatal.

A testator wishes to bequeath plate ; but what he writes or dictates (it is immaterial which) is garments. The error is fatal. (D. 28, 5, 9, 1.)

A testator wishing to leave a legacy of garments used the words "*supellex*" (furniture), thinking that that word covered garments. The error is fatal, because it is an error, not in the name of a person, but in the name of a thing. (D. 30, 4, pr.)

A testator left a legacy of 200 when he meant only 100. Held that 100 was due, because it is *in* the 200. (D. 30, 15 ; D. 28, 5, 9, 4.) Suppose the testator wrote 100 when he meant to give 200, the legacy was valid, but was the amount to be 100 or 200 ? The answer given is 200. (D. 28, 5, 9, 2.)

If a testator made a mistake in the name, the after-name, or the first name of a legatee, provided the person was agreed on, the legacy none the less takes effect. The same rule is observed in regard to heirs, and rightly. For names have been discovered in order to point out men, and if in any other way it is understood who they are, it makes no difference. (J. 2, 20, 29.)

Nearly akin to this is the rule of law, that a false description (*demonstratio*) does not annul a legacy. If, for instance, one leaves a legacy thus : "Stichus my slave home-born I give and leave," then even although he is not home-born but was bought, yet as the slave meant is agreed on, the legacy holds

good. Agreeably to this also, if he describes him as "Stichus the slave I bought from Seius," and he was bought from somebody else, the legacy holds good if the slave meant is agreed on. (J. 2, 20, 30.)

A *demonstratio* is a statement—an adjective clause—not necessary to determine the object of the legacy. This is generally the case when the qualifying or descriptive statement is added to the name of a person, the name being sufficient to mark the legatee or other object of the legacy with certainty. The rule, then, may be expressed thus:—when a part of the description is sufficient to identify the object or person, and part of the description is unnecessary, the truth or falsehood of this superfluous addition is not material. But if the whole of the description is necessary and part of it is false, the legacy fails. In this case the description is called "*determinatio*."

A testator had two slaves—Philonicus a baker and Flaccus a fuller. He bequeathed to his wife Flaccus the baker. If the testator is proved to have known the names of the slaves, Flaccus will be the legacy to the wife; but if not, she gets Philonicus the baker. (D. 34, 5, 28.)

"I bequeath to you the sum Titius owes me." Titius owes nothing, and as there is nothing to determine the sum except that circumstance, the legacy fails on account of uncertainty in the object. (D. 30, 75, 1.)

"I bequeath to you 10 *aurei*, the sum I owe to Titius." The testator owes nothing. This is a valid legacy for 10 *aurei*, because, rejecting the second clause, there is a definite legacy in the first clause. The recital is in any case nugatory, because a testator cannot bequeath a sum he owes. (D. 30, 75, 1.)

"I bequeath to you the 10 *aurei* Titius owes me." Here the language of description is manifestly essential, because what the testator means to bequeath is not 10 *aurei*, but the debt of Titius. If there were no debt, the legacy fails; because even if there were a debt the heir is not bound to pay the money, but only to transfer his right of action against the creditor. (D. 30, 75, 2.)

A testator bequeathed all his lands, extending to the place called Galas, on the borders of Galatia, under the charge of his first bailiff. Part of the land under this bailiff adjoined Cappadocia, not Galatia. Held that the erroneous reference to the boundary is immaterial, since the land is sufficiently ascertained by the description that it is under the charge of a particular bailiff. (D. 32, 35, 1.)

A testator bequeathed the two polished plates he had bought in the place where image-vendors are. The testator bought two plates as described, but they were engraved, not polished. He made his will only three days before his death, and had bought no other plates. Held that the description "polished" is immaterial, since without it the plates can be identified. (D. 32, 102, 1.)

"Let my heir give to Titius what is due to me by the will of Sempronius." The testator after making his will made a novation of the debt, so that it was no longer due by the will of Sempronius, but by the promise of the heir of Sempronius. The description thus became inaccurate. Nevertheless, the description as it stood was sufficient to identify the object of the legacy, which was accordingly valid. (D. 31, 76, 3.)

"To Pamphila I wish to be given 400 *aurei*, made up as follows:—So much from Julius my steward, so much from my property in camp, and so much from cash in possession." The testator survived many years, and at his death there was no money

answering the description given in the legacy. The legacy was valid, because the description was merely of the nature of an instruction to the heir, showing where he could with convenience get the money. Its falsity was therefore immaterial. (D. 30, 96, pr.)

A testator and his brother were joint-owners of certain property. The testator made his daughters heirs, and saying that the property was valued at 2000 *aurei*, requested them to accept from their uncle Lucretius Pacatus 1000 *aurei* for their share. The testator survived several years, and the property greatly increased in value. Were the daughters bound by the statement of value to accept 1000 *aurei* from their uncle? It was held that they were entitled to their half of the property according to its true value at the time of testator's death, as the figures mentioned by him were merely descriptive, and not intended to restrict the bequest. (D. 31, 89, 1.)

Much more an untrue ground (*falsa causa*) does no harm to a legacy; as when one says, "To Titius, because in my absence he looked after my business, I give and leave Stichus;" or, "To Titius, because by his advocacy I was cleared of a capital charge, I give and leave Stichus." For although Titius never managed any business for the testator, and although his advocacy never cleared him, yet the legacy takes effect. If, however, the ground were put forth conditionally—in this way for instance, "To Titius, if he has looked after my business, I give and leave a farm"—the rule of law is different. (J. 2, 20, 31.)

Causa here means the motive assigned by a testator for his liberality. This is manifestly less necessary for the determination of the object of a legacy than the "*demonstratio*," and consequently its falsity is even less material. A *causa* is distinguished from a condition by its relating to some past or present act or event which the testator does not regard as doubtful. A condition relates either to a future act or event or to a past act or event of which the testator is doubtful.

A testator bequeathed a farm to his wife; for, said he, it was on her account I got it. The reason stated was not correct, but the legacy is good, as there is no doubt as to the object of it. (D. 33, 4, 1, 8.)

A testator appointed his two sons heirs, and gave one of them a prelegacy of a farm, saying that his brother had obtained an advance in cash. The prelegacy is good even if no advance had been made. (D. 35, 1, 17, 2.) But if the testator had said that the prelegacy would be given *if* the other brother had had the advance, then the legacy would fail, since the condition failed. (D. 35, 1, 17, 3.)

"I wish 1000 *solidi* to be given to Endo, because he was the first born after his mother obtained her freedom." Endo is entitled to the legacy, although unable to prove that he was born after his mother's manumission. (D. 40, 4, 60.)

"I inform my heir that I owe Demetrius my uncle 3 *denaria*, and that Seleucus my uncle deposited with me 3 *denaria*, and I desire these sums to be forthwith returned and paid to them." The legacy is void if the sums were really due, because a legacy could not be made of a sum due to a creditor; but if not, the sums will be due as legacies, notwithstanding the error in the recitals (*falsa causa*). (D. 31, 88, 10.)

But if the person charged with a legacy can prove that the testator would not have left the legacy but for his erroneous belief, then he can defeat the legatee, on the ground that his claim is against good conscience (*doli exceptio*). (D. 35, 1, 72, 6.)

Pactumeius Androsthenes appointed Pactumeia Magna his heir, and substituted her father Pactumeius Magnus for her. The father was killed, and the rumour was that the daughter also was dead. Thereupon the testator made a new will, appointing Novius Rufus his heir, saying that he did so because he could not have the heirs whom he wished. (*Quia heredes quas volui habere mihi continere non potui Novius Rufus heres esto.*) Paul states that on the petition of Pactumeia, the rumour of whose death was false, the cause was tried, and resulted in her obtaining the inheritance, as the recital showed such to have been the testator's intention. She was, however, liable for the legacies contained in the second will, just as if she had been named heir therein. (D. 28, 5, 92.)

Titius appointed as heirs his mother and Sempronius, substituting Cornelius to both. The mother died, Sempronius was deported, and it appeared, therefore, that Cornelius would be sole heir. To him Titius wrote as follows :—"Titius to Cornelius his heir, greeting. I request you, Cornelius, since my mother's share has devolved on you, and also the share of Sempronius, once my curator, now suffering deportation, and you are heir-presumptive of all my property, that you will give Gaius Seius one-third of the inheritance." Sempronius was pardoned, and along with Cornelius entered on the inheritance. This trust could not be charged to him by implication, but Cornelius was bound to give Gaius Seius one-sixth of the inheritance. The testator's recital was true in regard to one-half, and turned out to be erroneous in regard to the other half; and under the circumstances of the case it was held that his intention was best carried out by reducing the burden of the trust in proportion to the benefit derived by Cornelius from the will. (D. 36, 1, 75, pr.)

"I order to be restored to my wife Sempronia by my heirs 100 *aurei* I have borrowed from her." Sempronia sued on the alleged loan, but failed to prove it. It was held that she could demand the money as a legacy. (D. 32, 93, 1.) If, however, the testator said she had sworn to return the money, the recital would be sufficient evidence of the loan, and it could be recovered as a debt. (D. 32, 37, 5.)

Modus.—This term may be considered here along with *demonstratio*, *determinatio*, and *causa*.

When a provision in a will was intended to impose a duty on a legatee or heir, and not to suspend the vesting of the legacy, it was called *modus*. Security for its performance may be demanded from the legatee by the heir before payment of the legacy. (D. 35, 1, 40, 5; D. 34, 3, 26; D. 35, 1, 80; D. 32, 19.) It has this in common with suspending facts or conditions, that if illegal it was regarded as not written (D. 35, 1, 37), or the testator's wishes might be carried out *cy près*.

A testator left land to a city, out of the rents of which certain games were to be annually celebrated in his memory. The games prescribed were not permitted by law in that place. Modestinus said it was not right that the land should go to the heir, for whom it was never intended. He therefore said the heirs should meet the heads of the city, and fix on a scheme by which the memory of the testator might be preserved by lawful celebrations. (D. 33, 2, 16.)

When a legatee fails to carry out the whole injunctions of deceased, he must resign a proportion of the profits to the heirs (D. 33, 2, 17); but if the legatee is prevented by circumstances out of his power, he can retain the legacy. (D. 30, 92, 1; D. 31, 88, 3.)

At first the heir was the only person that could require a legatee to perform a *modus;* but Gordian enacted that anyone interested in the performance of the duty might call upon the legatee to observe the terms of bequest. (C. 6, 45, 2.)

V. In certain legacies the election of the heir or legatee is necessary to vest the legacy.

1. Legacy of choice (*Legatum optionis*).

A legacy at a man's option—that is, where the testator had ordered the legatee to choose from among his slaves or other property—involved in itself a condition; and therefore unless the legatee himself made the choice in his lifetime, he did not transmit the legacy to his heir. But under our constitution this, too, has been remodelled and put on a better footing; and full leave has been given the legatee's heir to choose, although the legatee has not done so in his lifetime. As greater diligence, too, has been used in handling the matter, this addition has been made in our constitution:—if there are several legatees to whom the option is left, and they differ as to the choice of the object, or if one legatee has several heirs, and they differ among themselves about choosing, and one desires to choose one object, another another,—then, that the legacy may not be lost (the rule brought in by most of those learned in the law, contrary to all good feeling), fortune is to be judge of the choice, and the case is to be finally settled by lot, so that the opinion of him to whom the lot comes is to prevail in the choice. (J. 2, 20, 23.)

In the constitution referred to, Justinian observes that the person that has the election obtains the thing chosen, and compensation is to be made to his co-legatees, or in the case of the heirs of a single legatee, to the co-heirs, of the value of their share. In the case of slaves Justinian fixed the following scale of maximum prices. (C. 6, 43, 3, pr.):—

					Not exceeding
Slaves, male or female,		under	10 years of age,		10 *solidi*.
,,	,,	above	,,	unskilled labourers,	20 ,,
,,	,,	,,	,,	skilled ,,	30 ,,
,,	,,	,,	,,	notaries,	50 ,,
,,	,,	,,	,,	doctors and midwives,	60 ,,
,,	eunuchs	under	,,		30 ,,
,,	,,	above	,,	unskilled labourers,	50 ,,
,,	,,	,,	,,	skilled ,,	70 ,,

If the choice were left to a third person, and for any reason that person failed or refused to make a choice within a year, the legatee himself was allowed by Justinian an option. He was not, however, to choose the best, but must content himself with a medium specimen of the kind from which he is allowed a choice. (C. 6, 43, 3, 1.)

When a choice was allowed of slaves without specifying the number, Antoninus Pius in a rescript states that the legatee might take three. (D. 33, 5, 1.)

An election once made cannot be altered (D. 30, 5, pr.), unless some of the things have been concealed from the legatee, in which case he has another choice. (D. 33, 5, 4.)

A right of selection implied a right to inspect prior to making the choice; as, *e.g.*, to taste wine. (D. 33, 6, 2, 1.)

The time within which the choice must be made, if not named by the testator

might be fixed by the Prætor ; but even after the time had elapsed, the legatee could make his choice if the heir had not sold the things in question. (D. 33, 5, 6.)

2. Alternative legacy.

Such a legacy as this takes effect :—"Let my heir be condemned to repair such a one's house," or "to free such a one from debt." (J. 2, 20, 21.)

"I give and bequeath Stichus to Titius if he does not choose Pamphilus." "I bequeath Stichus or Pamphilus to Titius, whichever he pleases." This is a single legacy with a choice to the legatee, unless the choice is expressly given to the heirs of the testator. (D. 33, 5, 9, pr.)

"I bequeath 10 *aurei* to Sempronius ; or if he do not take them, I give him my slave Stichus." In this case there are two legacies, the second of which is conditional upon the refusal of the first. (D. 31, 8, 1.)

3. Legacy of a thing in general terms.

If a slave or other property is left in general terms, the choice lies with the legatee, unless the testator has said otherwise. (J. 2, 20, 22.)

When the choice was with the heir, he must give a slave of whom the legatee could retain the possession (*ut eum habere liceat*), and therefore one that was not liable as *noxa;* but the slave need not be healthy. (D. 30, 45, 1.) Also the heir must not give a slave that steals ; he must select a slave in good faith. (D. 30, 110.)

VI. When it is uncertain whether the legatee or the testator died first.

In cases of apparently simultaneous death of two or more people, as by shipwreck, fire, or in battle, it often was material, in determining the devolution of an inheritance or the fate of a legacy, to ascertain which died first. The same rules apply both to inheritance and legacy.

The rule, subject to exceptions presently to be stated, was, that when there was no evidence to show which of two or more persons died first, the law would not presume that one died before the other. (D. 34. 5, 18, pr.) This rule operated, therefore, in favour of the person in possession, or the person that did not require to invoke the aid of the law.

A gift (which was valid unless revoked in his lifetime) was made by a husband to his wife. Both husband and wife perished together. It was held that the gift was valid, because the donor did not survive to reclaim the gift. (D. 34, 5, 8.)

A mother stipulated with her son-in-law for the return of her daughter's dowry to her, if the daughter died before the death or divorce of her husband. The mother and daughter perished together. The mother's heir could not recover the dowry, because there was no evidence that the mother survived the daughter ; and according to the law, if she died before the daughter, her heirs had no claim to the dowry. (D. 34, 5, 16, pr.)

A husband bequeathed her dowry to his wife, and both perished together. If the wife survived the husband for a moment, her heirs could recover the legacy ; but in the absence of proof of that fact, the heirs of the husband could not be sued for the dowry. (D. 34, 5, 17.)

Exceptions.—The exceptions to the above rule are dictated by a desire to prefer certain claimants to others.

1. When a child above the age of puberty perished along with a parent, and there was no evidence to show which survived, it was presumed that the child survived the parent. (D. 34, 5, 22.) When a father and son were killed in battle, the rival claimants for the father's property were the mother as heir to the son, and the agnatic collaterals as heirs to the father. If now the son survived the father, he became his father's heir (without the necessity of any acceptance), and the mother succeeded to both. On the contrary, if the father survived, the property went away from his wife to his agnatic kinsmen. To avoid a result at variance with popular feeling, the son was presumed to survive the father. (D. 34, 5, 9, 1.) That this is the true reason of the rule, and not any abstract idea of the probability of a son being stronger and surviving, is evident from another case. When the father was a freedman, and the patron, therefore, was entitled to succeed him, the presumption was reversed, and it was held that the father survived the son in order that the rights of the patron might be secured. (D. 34, 5, 9, 2.)

2. When a child under the age of puberty perishes along with a parent, the child is presumed to die first. (D. 34, 5, 23.)

It was agreed between a father-in-law and a son-in-law, that if the daughter died leaving a child a year old, the son-in-law should retain the dowry; but if the son died first, the husband should retain only a portion of the dowry. The mother and son perished in a shipwreck. Held that the father should retain only part of the dowry as agreed upon. (D. 23, 4, 26, pr.)

3. A person is burdened with a trust if he dies leaving no children surviving him. Both he and his only son perished together. It was presumed that the son died first, and thereby the trust took effect. This is a presumption in favour of a trust. (D. 36, 1, 17, 7.)

4. A female slave was to get her freedom if her first child was a son. She had twins—a boy and a girl. If there was no evidence to show which was born first, it was presumed to be the boy, in order that the mother may get her freedom and the daughter be freeborn. (D. 34, 5, 10, 1.)

(B.) Modality of Legacies.

Place of Performance.—When a thing is bequeathed, it is to be given to the legatee where it is found at the testator's

death, or where it is afterwards removed in good faith by the heir. (D. 30, 47, pr.) Hence if a slave runs away before the testator's death, the cost of pursuit falls on the legatee (D. 30, 108, pr.) ; but if after the testator's death, on the heir. (D. 31, 8, pr.; D. 30, 39, pr.)

If the testator expressly adds a place where the legacy is to be given, his injunctions must be observed. (D. 30, 47, pr.) This intention may be gathered from the nature of the legacy, as when a testator bequeaths grain warrants (*tesserae frumentariae*) to his freedmen for their maintenance. These were orders for the delivery of so much grain from the national granaries, and could be bought and used only in Rome. It was held that although the greater part of the testator's property was in the provinces, his heir must deliver these warrants in Rome. (D. 5, 1, 52, 1.)

Time of Performance.—If no time is fixed by the testator, and the legacy is unconditional, the legacy may be demanded as soon as the heir enters upon the inheritance (D. 31, 32, pr.); but if the heir does not dispute the legacy, he must be allowed a moderate time for payment before an action can be brought against him. In case of dispute the length of delay to be granted was determined by the Prætor. (D. 30, 71, 2.) The legatees are not bound to wait for the result of a trial in which the genuineness of the will is unjustly attacked, but they must give security to restore the property in the event of the accusation proving well founded. (C. 6, 37, 9.)

A testator may, however, give the heir a specified time for performing, which was done by a *clausula prorogationis*. This clause was not applied to specific gifts, but to legacies of *res fungibiles*, i.e., *quae numero pondere mensurave constant*.[1]

The instalments must be equal (D. 33, 1, 3, pr.), unless the testator has otherwise determined. (D. 33, 1, 3, 2.)

Postponed and Conditional Legacies (*Dies, Conditio*).

The testator may name a day on which the legatee is to be paid.

As has been already explained (p. 587), a distinction was made in the Roman law between the time when a right vests and the time when its performance may be required. The

[1] *Quas pecunias legavi, quibus dies adpositus non est, eas heres meus annua bima trima die dato.* (D. 30, 30, pr.)

former was expressed by the phrase *dies cedit*, the latter by the phrase *dies venit*.

(1.) After the vesting (*dies cedit*), payment may be made of the legacy, although it cannot be demanded until the day named (*dies venit*). But if the right has not vested (*dies non cedit*), payment, if made, can be recovered as the discharge of what is no debt. (D. 12, 6, 16, pr.) This distinction is equally true, both for contract and for legacy. (D. 35, 1, 49; D. 35, 1, 1, 1.)

Titius was charged to give certain property to his nephews, subject to a condition. These nephews were under the *potestas* of their father. Titius could not get a valid discharge until the condition was fulfilled; for it might happen that before the condition was fulfilled, the nephews might be *sui juris*, and so acquire for their own benefit, and not for their father. Again, some of them might die, and the shares of the survivors be thereby augmented. Titius was therefore not allowed, by anticipating payment, to vary the rights of the parties. (D. 30, 114, 11.)

A wife made her husband her heir, and Appia his substitute. She charged him to give the whole to Appia on his death; or if Appia died before him, to Valerian, her nephew. The husband might give Appia the property in his lifetime, but if he survived Appia, he must answer for the whole of it to Valerian. (D. 32, 41, 12.)

(2.) If the legatee dies after the vesting (*dies cedit*), but before the day of demand, his heir is entitled to the legacy; but if the legatee dies before the vesting of the legacy, his heir takes nothing. This point makes a cardinal difference between contract and legacy. After a contract had been made, although the creditor died before the day of vesting (*dies non cedit*), his rights passed to his heir. (D. 36, 2, 5, pr.; D. 36, 2, 3.) The reason for this difference is given as follows:—A person in making a contract is understood to act with a view to the benefit of his heir as well as of himself. But a testator distributes his property with regard to the favour in which the legatees stand with him. It is for them his bounty is intended. Their heirs are necessarily unknown to him, for if the legatee dies leaving a will, one set of persons may succeed; and if he dies intestate, quite a different set. There can therefore be no general presumption that a testator intends his bounty for those unknown persons, the heirs of his legatee; and it is more reasonable to suppose that if the legatee dies before the vesting of the legacy, the testator would desire his portion to go to the co-legatees, also objects of his bounty, rather than to the heirs of the legatee.

After a legacy vests, it is simply property, and as such descends to the heirs of the legatee.

(1.) When the legacy is unconditional (*legatum purum*), and no day is fixed for performance, the right of the legatee vests (*dies cedit*) at the moment of testator's death. (C. 6, 51, 1, 1.) Performance, however, cannot be demanded (*dies non venit*) until the heir enters on the inheritance.

If the legacy is conditional, but the condition is illegal, the right of the legatee also vests at the time of testator's death. (D. 36, 2, 5, 3 ; D. 36, 2, 5, 4.)

Exception.—When a usufruct is bequeathed, it does not vest (*dies non cedit*) until the heir enters. (D. 36, 2, 2.) The reason is, that as a usufruct expires with the life of the legatee, nothing is to be gained by throwing back the day of vesting to the time of testator's death. (D. 36, 2, 3.) The sole purpose of making the day of vesting retroactive, since nothing can be claimed until the heir enters, is, that in the event of the legatee dying between the death of testator and the entry of the heir, he may transmit his own rights to his heir. Perhaps a better reason is that a usufruct can hardly be said to vest until the right to actual enjoyment accrues. Hence it appears that until the day of demand (*dies venit*) the right of the usufructuary does not vest (*dies non cedit*). (D. 7, 3, 1, 2.)

(2.) When a legacy is unconditional, and a day (*dies*) is fixed by testator, the legacy vests (*dies cedit*) at the testator's death, but the demand must be put off until the day named (*dies venit*). The day may be remote, as 100 months ; but if it is certain, the legacy vests at once on the death of the testator. (D. 36, 2, 21, pr. ; D. 36, 2, 5, 1.)

(3.) When the legacy is conditional it does not vest, and so is not transmitted to the heirs of the legatee until the condition is fulfilled (D. 36, 2, 5, 2), unless, of course, the failure of the condition is caused by the heir. When that happens, performance may generally be demanded ; that is, on the performance of the condition at once *dies cedit* and *dies venit*. (D. 35, 1, 41.)

Conditions.

I. What is a condition ? (*conditio*).

A condition has two marks—*futurity* and *uncertainty*. It suspends the operation of an investitive fact until a future and uncertain event has or has not happened.

1. Condition is distinguished from *dies*. Both relate to a future event ; but *dies* relates to a certain, condition to an uncertain, event. The uncertainty of an event may, however, mean one of two things ; either that the event is certain, as the death of Titius, but the time uncertain, or the event itself is uncertain, as that Titius, aged two years, will reach puberty. In the law of contract there is no condition, unless the event

itself is uncertain. Thus a promise to give on his death by a debtor, is not a conditional promise; the *dies* is future, but it will certainly happen, although it is uncertain when. In this case, then, *dies cedit* when the contract is made, *dies non venit* until the death of the promiser. (D. 12, 6, 17.)

In the law of wills and legacies an exception occurs. If the event is the death of the heir, it is held not to be an *incertus dies*, but a *conditio*. In this event only is the saying true, *dies incertus conditionem in testamento facit.* (D. 35, 1, 75, pr.)

"Let my heir, when Titius is dying, give him 100 *aurei.*" This is unconditional, as in the case of contract. (D. 35, 1, 79, pr.; D. 36, 2, 4, 1.)

"Let my heir, when dying, give Titius 100 *aurei.* This is a conditional legacy, in opposition to the case of contract. (D. 35, 1, 1, 2; D. 36, 2, 4, pr.; D. 35, 1, 79, 1.)

The purpose of this illogical distinction is to prevent the possibility of an heir of a legatee taking when the legacy has never vested in the legatee. This appears by a consideration of the two cases.

When the death of the legatee is the event upon which the legacy is payable, it is considered to vest in the legatee with his last breath. By this momentary vesting his rights pass to his heirs in the ordinary way of devolution. His heirs take from him, not from the testator.

When the death of the heir was the event upon which the legacy depended, the legatee might die before the heir; and thus, when the event occurred, no legatee be in existence to whom payment could be made. In such a case by no possibility could the legatee be entitled; and thus his heirs would take directly from the testator. It was considered, however, that the testator never meant to extend his liberality to the heirs of the legatee. (D. 35, 1, 79, 1.) But although for this purpose the death of the heir was held to be a condition, still, contrary to the rule governing conditions if the heir chose to pay the legacy in his lifetime, repayment of it could not be demanded although the legatee died before him. (C. 6, 42, 12; D. 32, 41, 12.)

Titia appointed her son, who had children, as heir on trust to surrender the whole of her property to his sons or their children, *on demand (quum ipsi petissent).* The demand is not a condition of the vesting, but simply fixes the time (*dies*) when the trust must be performed. (D. 35, 1, 85.)

Seius Saturninus left Valerius Maximus his heir on trust to give the inheritance to his son Seius Oceanus *on his attaining his sixteenth year.* Before reaching that age Oceanus died. Mallius Seneca, uncle of Oceanus, claimed the inheritance of Saturninus as next of kin to Oceanus. Maximus resisted the claim on the ground that Oceanus having died before the vesting of the legacy, it did not pass to his heirs, and that he was therefore entitled to hold the property discharged from the trust. It was held that the clause, "on attaining his sixteenth year," was not a condition, but merely specified the time for performance. This judgment rested on the view that in delaying the trust for his son until he reached sixteen, Saturninus consulted his interest, and not the benefit of Maximus, and that he had no intention to make the rights of his son depend on the hazard of his sixteenth year. Mallius, therefore, got the property. (D. 36, 1, 46.)

A testator bequeathed 10 *aurei* to his daughter Ælia Severina, which she was to receive on her attaining her legal majority. She died before reaching majority, but

after the testator. Her heirs are entitled to the legacy after the lapse of the time that would have brought her, if she had lived, to her majority; *i.e.*, when she had completed her twenty-five years. (C. 6, 53, 5.)

A testator left 100 *aurei* to Titius, adding, "Let my heir give him the money bequeathed if my mother dies." The use of the present tense would seem to show that the legacy was unconditional, and that the death of the mother simply fixed the time for performance. Ofilius, taking that view, said the heirs of the legatee were entitled although Titius died before the mother, but after the testator. Labeo and Javolenus, however, said it was a condition; it was so in terms, and there was no sufficient reason to believe that the testator meant anything else. (D. 35, 1, 40, 2.)

"When Titius is thirty years old, let Stichus be free, and let my heir give him a farm." Titius died before thirty. The legacy of the farm fails, but the gift of liberty was construed as unconditional; the arrival of Titius at thirty years merely fixing a time during which the gift of freedom was to be postponed. (D. 40, 4, 16; D. 40, 7, 19.)

A testator desired his heirs to manumit Stichus, and charged Seius, if Stichus continued to live with him, to supply Stichus with food and raiment; and also when he (Seius) reached his twenty-fifth year, to buy a commission (*militia*) for him. Seius died before reaching twenty-five. It was held that the heirs of Seius must buy the commission after the time that would allow Seius to reach twenty-five. (D. 34, 1, 18, 12.)

2. *Conditio* is distinguished from *Modus*.

Modus is when a duty is imposed on a legatee by a testator to do something after the legacy vests—as to build a tomb, or to execute a public work, or to give up part of the legacy to another. (D. 35, 1, 17, 4.) A condition is an essential preliminary to the vesting of a legacy.

A testator gave liberty to his slaves Saccus, Eutychia, and Hirene, on condition that they should every alternate month burn a lamp in his tomb, and make a sacrifice for the dead. This is not a condition, but a duty imposed on the slaves on attaining their freedom, which the judge can compel them to perform. (D. 40, 4, 44.)

"Let Pamphilus be free, provided that (*ita ut*) he render his accounts to my children." Julian said that the meaning of the testator was clear. He did not intend that the accounts should be rendered satisfactorily before Pamphilus got his liberty, but that he should be manumitted, and compelled to give an account to his sons. (D. 40, 4, 17, 2.)

"Let my heir give to Maevius whatever sum he receives from Titius." By this legacy the right of Maevius is not dependent on the actual recovery of the sum by Titius; the testator meant to impose a duty on the heir, not to make the legacy conditional; and therefore Maevius can, upon the entry of the heir, compel him to transfer his right of action against Titius. (D. 31, 50, 2.)

3. *Conditio Extrinsecus*.

When a legacy depends on some event determined by the law—as the *aditio hereditatis* (D. 36, 2, 7, pr.)—or incidentally prescribed by the testator, that event does not make a condition, but simply delays the demand of the legacy. (D. 35, 1, 99.) If before such event happens the legatee dies, his heirs are entitled to the legacy if the event subsequently happens (D. 36, 2, 6, 1.)

"Let Titius be heir. If Titius enters on my inheritance, let him give 10 *aurei* to Maevius." If Maevius dies before the entry of the heir, and the legacy is interpreted as conditional, the heirs of Maevius would not be entitled. But although the testator in express terms made the legacy depend on the entry of Titius, it was not considered as a condition, because every legacy had to await the entry of the heir, and therefore the heirs of Maevius are entitled. (D. 36, 2, 22, 1.)

Titius bequeaths to Gaius a farm, part of his wife's dowry, and a sum of money in lieu of it to his wife. Before the wife made her election, Gaius died. Were his heirs entitled? If the wife elected to take the farm, neither Gaius nor his heirs could get it; and so, in point of fact, the acceptance of the pecuniary legacy was a condition without which Gaius was not entitled to the farm. If it were a condition, the heirs of Gaius could not claim the farm, because Gaius died before acceptance, and therefore before the condition was fulfilled. It was held, however, that the testator did not mean the legacy to stand or fall by that event, and that his intentions are most effectually carried out by construing the legacy as simply delayed until the wife makes her election. (D. 36, 2, 6, 1.)

II. Fulfilment or Failure of Conditions.

A condition may be an event independent of the will of the legatee, or it may be an act or forbearance required of him. When the condition is an event independent of the will of the legatee, cases of difficulty seldom arise; but if the condition is an act or forbearance of the legatee, questions may arise as to the sufficiency of performance.

(A.) First case: Performance of Acts by Legatee.

1. By whom a conditional act may be performed.

If the condition were that the legatee should render a personal service, he alone could satisfy the condition; but when it was the payment of money, anyone could pay it on behalf of the legatee, and so fulfil the condition. (D. 40, 7, 39, 5.)

When the condition was that something should be done by two or more legatees, could one do the whole; and if he did, did he acquire all the rights? It depends on whether the performance can be divided or not.

The same thing is bequeathed to two persons if they give the heir 100 *aurei*. One of them by giving 50 gets the half; and if the other does not give 50, can get the other half by paying an additional 50. (D. 35, 1, 54, 1.)

If Stichus and Pamphilus give 10 *aurei* they shall be free. Either by paying 5 *aurei* gets his freedom, and if the whole is paid both are free. (D. 40, 4, 11, 1.)

Freedom is bequeathed to two slaves if they render proper accounts (*si rationes reddiderint*). If their accounts are separate, each gets his freedom by proving his accounts and paying the balance he owes; but if the accounts are mixed, neither gets his liberty until the accounts of both are made up, and the balance due by both paid. (D. 40, 4, 13, 2; D. 40, 7, 13, 2.)

Freedom is given to two slaves on condition that they build a house or put up a statue. If one does the whole, he gets his freedom and the other remains a slave; if both join in the work, both are free. (D. 40, 4, 13, pr.; D. 35, 1, 112, pr.)

2. To whom the act may be performed.

The rule in this case was stringent. If anything was required to be done or given to a person specified by the testator, it could not be done or given to any other person, not even to the heir of the person specified. To this rule there were two limitations: (1) if the legatee could prove that the testator meant to give him greater latitude (D. 40, 7, 20, 4); and (2) in bequests of freedom. (D. 35, 1, 51, 1.) If money was to be given to the heir, and the heir died, the slave could obtain his freedom by giving the money to the heir's heir; or if there were no such heir, then without giving anything at all. (D. 35, 1, 94, 1.) If the money was to be given to a person other than the heir, and that person died, the slave got his freedom without paying anything. (D. 35, 1, 94, pr.)

If the legatee must give money to two persons, he cannot divide the payment.

A farm is left to a legatee on condition of his paying 10 *aurei* to two heirs. By paying 5 to one heir, the legatee takes nothing; if one of the heirs refuses to accept 5, the legatee can pay the full 10 to the other, and get the farm. (D. 35, 1, 23.)

"Likewise if Titius pays Symphorus and Januarius 100 *aurei*, I bequeath a farm to him." Symphorus dies. In strictness the legacy would be void because of the impossibility of satisfying the condition; but this was considered to be inconsistent with the testator's wishes, and it was held that by paying half (*i.e.*, 50) to Januarius, Titius could recover half the farm. (D. 35, 1, 112, 1.)

3. In certain cases, where it is impossible to comply exactly with the terms of the condition, a partial compliance or non-compliance is accepted as sufficient.

1°. When the legatee is prevented doing what he is asked by the person to whom he is asked to do it, the condition is regarded as fulfilled. (D. 35, 1, 81, 1.) The same rule obtains in stipulations, when the stipulator prevents the promiser fulfilling a condition. (D. 35, 1, 24.)

A slave is bequeathed his freedom if he goes to Capua. The heir prohibited the slave from going. The slave was at once thereby made free. (D. 40, 7, 3, 3.)

A. is appointed heir if he gives 10 *aurei* to Titius. Titius refuses the money. A. is heir. (D. 28, 7, 3.)

Maevia appointed her grandson Publius Maevius heir. He was above the age of puberty. By her will she bequeathed an annuity of 10 *aurei* to Lucius Titus if he undertook the management of the property of her grandson, the heir. After a time Maevius refused to allow Titius to manage his property. If he was not compelled to this course by the misconduct of Titius, he must continue to pay Titius his annuity. (D. 33, 1, 13, pr.)

Slaves got their freedom and a bequest of aliment so long as they dwelt with the heir. For a time they did so, but were driven away by his cruelty. They were still entitled to aliment. (D. 34, 1, 13, 2.)

An heir was charged to manumit Stichus, Dama, and Pamphilus after payment of testator's debts. The heir purposely put off paying the debts in order to retain them in slavery. It was held that the slaves were entitled to their freedom without waiting for the payment of the debts. (D. 40, 5, 41, 1.) This is an instance of an heir refusing to fulfil a condition, which came to the same thing as if he prevented the legatee performing a condition.

2°. When the legatee is prevented fulfilling a condition by a person to whom the act is not to be performed, the condition is also regarded as fulfilled.

"Let Titius be heir if he erects statues in a town." A site was refused. Titius was entitled to the inheritance. (D. 35, 1, 14.)

"Let my son be heir if he adopts Titius; if he does not adopt him, let him be disinherited." Titius refused to be adopted. The son is heir. (D. 20, 8, 11.)

A testator bequeathed freedom to Stichus and Pamphila, and if they married, a legacy of 100 *aurei*. If Stichus refused to marry Pamphila, she could claim the half of the legacy. (D. 35, 1, 31.)

3°. When the legatee is prevented from fulfilling a condition by something else than the will of the heir or other person, the rule is not so simple.

(1.) If the fulfilment of the condition lay entirely in the power of the legatee (*conditio potestiva*), and if the performance was prevented, the condition was regarded as fulfilled.

A sum is bequeathed to Titius on condition of his manumitting Stichus. Stichus dies before the time of manumission. Titius is entitled to the sum. (D. 30, 54, 2.)

Pamphilus receives a bequest of freedom on condition of his giving to the heirs his *peculium*. Pamphilus owed more to his master than the whole *peculium*. By giving the heirs all that he had in his *peculium*, he was entitled to his freedom, although in effect the heirs got nothing. (D. 40, 7, 40, 1.)

A husband received money and things taken at valuation (*res aestimatae*) for his wife's dowry. He bequeathed her a sum equal to the value of her dowry and 10 *aurei* if she produced and delivered to the heir all the property contained in the marriage settlement (*dotalia instrumenta*). Some of the property was consumed by use, and so could not be produced. It was held that if the wife gave up what actually remained, she fulfilled the condition. (D. 33, 4, 12.)

The same liberality of construction was adopted in regard to the legacy of aliment, and also to bequests of freedom. (D. 40, 7, 3, 10.)

A testator bequeathed a legacy of food and clothes to his freedmen so long as they dwelt with Claudius Justus. A rescript of Antoninus Pius states that they were entitled to aliment after the death of Justus. (D. 34, 1, 13, 1; D. 33, 1, 20, pr.)

A slave was bequeathed his freedom on condition of making up his accounts within thirty days after testator's death. The heir did not enter until after that time. Nevertheless, in favour of liberty, an extension of time was allowed. (D. 40, 7, 28, pr.)

"If Stichus gives Attia 10 *aurei*, let him be free." Attia died after the will was made, but before the testator. In spite of a difference of opinion, it was established that Stichus got his freedom. (D. 40, 7, 39, 4.)

(2.) When the performance of the condition was not wholly in the power of the legatee, but depended also on some other person, the condition failed if the non-compliance of the legatee arose from any other cause than the refusal of that person. Such a condition was said to be mixed (*mixta*). When a condition depended neither solely on the legatee, nor partly on him and partly on another, the condition was called casual or fortuitous (*casualis*).

An uncle left a legacy to his niece on condition of her marrying his son. The son died before he was of marriageable age. The niece was not entitled to the legacy, because the marriage depended on the will of the son as well as on her own will. (C. 6, 46, 4.) If the son lived and refused, she got the legacy. (D. 35, 1, 31.)

A father by his will expressed his desire to marry his daughter, Severiana Procula, to her relative Ælius Philippus, and bequeathed land to her on condition of marrying him; if she refused, the land to go to Philip. Before she was old enough to marry, she died. Was Philip entitled to the land? No, because the condition was her refusal; and as she never refused, the condition failed. (D. 35, 1, 101, pr.)

Within what time must a condition be performed?

1°. When no time is fixed by the testator, the question that arose was whether the condition could be fulfilled in the lifetime of the testator. Conditions depending upon accident, or events independent of the volition of either the heir or legatee, might easily happen in the testator's lifetime. (C. 6, 25, 7.) Thus a legacy to a daughter on her marriage was valid if the marriage occurred before the testator's death. (D. 35, 1, 10, pr.) But when the condition was any act of the legatee or heir in obedience to the will, necessarily it could not be performed until after the testator's death; because, as the will was a secret document, no obedience could be rendered to it during testator's life. (D. 35, 1, 2.)

2°. When a limit of time has been fixed by the testator, the condition cannot be performed afterwards, unless the legatees were prevented by no fault of their own from performing it within the time. (D. 40, 5, 41, 12.)

"If within five years Stichus pays a sum, let him be free." After the five years, Stichus cannot get his freedom by offering the sum. (D. 40, 7, 23, pr.)

Titius by will manumitted his stewards on condition of their settling their accounts within four months after his death. By the delay of the heir the accounts could not be rendered in time. Held that the stewards must be allowed four clear months to fulfil the condition. (D. 40, 7, 40, 7.)

(B.) Second case: Forbearance by Legatee.

1°. When a time was limited by the testator.

A legacy was bequeathed to Titius after ten years, if he did not exact security from the heir. Titius died in five years, and of course after that it was impossible he

should exact security, so that by his death the condition was fulfilled. The legacy is, therefore, transmitted to his heir. (D. 35, 1, 103.)

2°. When no time is fixed by the testator.

"Let Stichus be free if he does not go up the Capitol." So long as Stichus lived it was possible he might go up the Capitol, and thus defeat the bequest of freedom. Can Stichus obtain his freedom? The answer depends on the intention of the testator. If the testator meant the condition to be taken literally—that is, if he meant Stichus to get his freedom only with his last breath—the legacy was a mockery and void. (D. 40, 4, 61, pr.) But if the testator really wished Stichus to be free, then it was held that the condition was fulfilled as soon as he had an opportunity of going up the Capitol, and did not go. (D. 40, 4, 17, 1.)

"A legacy to Seia, if she does not marry Titius." She marries Gaius. Still the condition is not fulfilled, because Gaius may die, and she may marry Titius. It is in effect, therefore, a legacy to her on her death or the death of Titius, whichever happens first. (D. 35, 1, 106.)

Muciana Cautio.

To obviate this inconvenience, a legatee was allowed, when the legacy was under a condition *non faciendi aliquid*, to take the legacy, subject to a promise by stipulation to the person entitled to the legacy on the failure of the condition (D. 35, 1, 18) to restore the object of the bequest, with all the profit derived from it (D. 31, 76, 7), if he did that which the condition forbade him to do. (D. 35, 1, 79, 2.) This was called the *cautio Muciana*. This practice was sanctioned by the opinion of Aristo, Neratius, and Julian, and lastly by a constitution of Antoninus Pius. It applied generally in favour of heirs as well as legatees, when the condition was negative (*in non faciendo*). (D. 35, 1, 7, pr.)

A wife appointed her husband heir for a part of her property, if he did not sue for or exact payment of the dowry she had promised, but had never given him. The husband may give notice to the co-heir, and upon offering him a release or a stipulation not to sue, may enter as heir. (D. 35, 1, 7, 1.)

A usufruct is bequeathed subject to a condition of not doing something. The usufructuary is entitled to possession on giving the *Muciana cautio*. (D. 35, 1, 73, 3.)

But the legatee is not entitled to offer this security, when the condition of not doing (*non faciendi*) is meant by the testator to indicate some particular event.

"A legacy to a daughter-in-law if she does not divorce her husband." The meaning of this is, that the legacy is due on the death of the husband. (D. 35, 1, 101, 3.)

"A legacy to Titia if she does not go away from her children." Strictly, this would mean after the death of the children, and such was the decision of some jurists; but Papinian said the *Muciana cautio* must be allowed, because the testator could not be supposed to have had before his eyes the sinister contemplation of the death of the children before their mother. (D. 35, 1, 72, pr.)

III. Restrictions on Conditions.

1. A legacy is void if the condition deprives it of positive value.

A legacy of 50 *aurei*, on condition that the legatee gives the heir 50 *aurei*, is nugatory. (D. 35, 2, 65.)

"If Titius gives security to my heir to give Maevius 100 *aurei*, let my heir give Titius 100 *aurei*." This is a valid legacy, and is equivalent to a legacy of 100 *aurei* to Titius on trust for Maevius. (D. 30, 84, pr.)

A legacy of a farm supposed to be worth 100 *aurei* was made to Titius, on condition of his giving the heir 100 *aurei*. The legacy is valid, because the farm may have a special value to Titius. (D. 31, 54.)

2. The condition "*si volet.*"

The condition "if the heir pleases" makes a legacy nugatory, just as a contract cannot be made if the promiser is bound only according to his own good pleasure. But if the language does not imply that the choice is perfectly arbitrary, as if it be "if you think fit" (*si fueris arbitratus*, *si putaveris*, *si aestimaveris*, *si utile tibi fuerit visum*), the condition is good, at least in bequests of freedom, and is interpreted to mean the discretion of a fair and honest man (*arbitrium viri boni*). (D. 40, 5, 46, 3.)

"I desire and beg you, sweetest sister, to regard with the utmost favour Stichus and Dama, my stewards, whom I have not manumitted until they shall have rendered their accounts. And if they also are approved by you, I have stated my opinion." It was held that the sister could not refuse to receive the accounts; and if they were satisfactory in the eyes of a reasonable man, she must give them their freedom. (D. 40, 5, 41, 4.)

A testator charged his heir, if he did not obey a particular injunction of the will, to give a legacy. This is a good condition, although it is in his power to do it or not to do it, and therefore the legacy may seem to be left to his good pleasure. (D. 31, 3.)

"Unless my heir refuses, let him give." This is a good condition, requiring the express assent of the heir to the vesting of the legacy. (D. 32, 11, 5.)

A legacy of a thing on trust to give it to another when the legatee pleases, is valid, and enables the legatee to keep it for the whole of his life. (D. 32, 41, 13.)

"To Titius, if he wishes, I bequeath Stichus." The legacy is conditional (D. 30, 65, 1), and does not vest until the legatee accepts. (D. 35, 1, 69.)

"Let Publius Maevius, if he wishes, be heir." A different rule applies to the heir. The clause, *si volet*, is held to be superfluous, and not to make a condition, except in the single case where a slave of the deceased was named heir. (D. 28, 7, 12.) The slave was the only person that was compelled to take. The reason of the different interpretation between legacy and inheritance was, no doubt, an anxiety to prevent wills being made void. If a legatee did not accept, no one suffered but himself; but if an heir did not take, all the legacies fell to the ground.

An appointment of heirs cannot be left to the decision of a third person. Such a condition was inconsistent with the theory that a testament derived its authority from the will of the deceased, not from the will of any other person. (D. 28, 5, 32, pr.)

"If Titius pleases, let Sempronius be heir." The assent of Titius gives no efficacy to such an appointment. But, "If Titius ascends the Capitol, let Sempronius be heir," is a good appointment, although it is entirely in the power of Titius to go up or not. (D. 28, 5, 68.)

Whether a legacy can be left to the assent of a third person, is a point on which the Digest speaks with an uncertain voice. "If Titius ascends the Capitol, let my heir give Maevius 100 *aurei*," is a good condition, but there is a difference of opinion in regard to the form "If Titius pleases." Modestinus says such a condition makes the legacy nugatory, and cites this as an illustration of the rule, "*expressa nocent, non expressa non nocent;*" and that the express dependence of a legacy on the will of a third person is void, although the implied dependence, as in "if he goes up the Capitol," is valid. (D. 35, 1, 52.) On the other hand, Ulpian says there is no difference between the two, and that both conditions are good. (D. 31, 1, pr.)

Power of Appointment.—An heir or legatee might be charged to give certain property to certain persons, as "my freedmen," "to which of them he pleases" (*cui eorum voles rogo restituas*). If he did not appoint any one of them, all are entitled to equal shares, according to a rescript of Antoninus Pius. (D. 40, 7, 21, 1; D. 31, 67, 7.)

If any person is selected under such a trust, he takes not from the heir or legatee that has the power of appointment, but from the testator, in the same manner as if he had been named legatee in the will. (D. 31, 67, pr.)

3. Conditions that cannot take effect until after the death of the heir or legatee.

A legacy, after the death of the heir or legatee, in like manner was void; as, for instance, when anyone said thus: "When my heir shall be dead, I give and leave it;" or again, "The day before my heir or legatee shall die." But in a like way we have corrected this too, and have given effect to legacies of this kind after the analogy of trusts; that even in this case legacies might not be found to be in a worse position than trusts. (J. 2, 20, 35.)

4. Impossible and illegal conditions.

When the condition cannot be fulfilled, or is forbidden by the law to be fulfilled, it is regarded as a superfluity, leaving the legacy valid and unconditional. (D. 35, 1, 3; D. 28, 5, 50, 1.) The legacy vests (*dies cedit*) at the death of the testator. (D. 36, 2, 5, 3; D. 36, 2, 5, 4.)

(c.) Restriction on Legacy.

I. In respect of the object of a legacy.

In describing the rights and duties arising from bequest, we have shown by particular examples the range of things that might be the objects of a legacy. Not only every right of

property, but rights arising from contract, and even a *hereditas*, might be bequeathed. The limits, then, to legacy are simply the limits to property.

It has also been mentioned that a testator could by way of trust bequeath what did not belong to him to a legatee.

Not only what belongs to the testator or his heir, but what belongs to another, can be left as a legacy. In that case the heir is forced to buy it up and supply it; or if he cannot buy it up, to give its value. If, however, the thing is such that it cannot be bought or sold, not even its value is due:—as if a man leaves the *Campus Martius*, or a basilica or temples, or things set apart for the public use: for the legacy is of no force. In saying that what is another's can be left as a legacy, we must be understood to mean if the deceased knew that it was another's, but not if he did not know; for perhaps if he had known it was another's he would not have left it; and so the late Emperor Pius decided in a rescript. The truer view also is, that the man that brings the action (the legatee, that is) ought to prove that the deceased knew the thing was another's, not that the heir ought to prove he did not know it was another's; because the necessity of proving his case rests always on him that brings the action. (J. 2, 20, 4.)

If a man leaves what is his own in the belief that it is another's, the legacy takes effect; for what rests on truth is more effectual than what rests on opinion. If, further, he thought it was the legatee's, it is agreed that the legacy takes effect, because the wishes of the deceased can be fulfilled. (J. 2, 20, 11.)

If a man leaves as a legacy what belongs to the legatee, the legacy is void; because what is his private property cannot become any more his; and although he has alienated it, neither it nor its value is due. (J. 2, 20, 10.)

II. Who may not be legatees.

A legacy can be left to those only with whom there is *testamenti factio*. (J. 2, 20, 24.)

Those that cannot be heirs cannot be legatees; but can an heir be also legatee under the same will? A sole heir cannot be legatee, because he would at the same time be both creditor and debtor: as legatee he would be creditor, and as heir debtor. But if there are several heirs, one of them may be charged with a legacy in favour of the others. (D. 30, 116, 1.) This gives rise to a curious result when the heir is made co-legatee along with other persons not heirs.

A farm is bequeathed to Titius (one of two co-heirs), and to Seius, who is not heir. Titius is entitled to half the farm, Seius to the other half. But since there are two heirs jointly liable, Titius can claim one-half of his half from his co-heir. Can he claim the other half of the half from himself? No, for then he would be at once creditor and debtor. He can claim, therefore, only one half of his share from the co-heir, and thus Seius gets in addition to his own half a half of the share of Titius. (D. 30, 34, 11.)

A farm is bequeathed from Titius and Seius, co-heirs, to Titius, A. and B., as co-legatees. If Titius were not heir, he, along with A. and B., would be entitled to a third of the farm. But this third, as it happens, is due in equal parts from himself and Seius. He cannot get the part due from himself; therefore he gets only the half of his third, *i.e.*, one-sixth of the whole. The other half is divided equally between A. and B., who thus each get one-third *plus* one-twelfth, or five-twelfths, Titius getting two-twelfths. (D. 30, 116, 1.)

Titius and Gaius are co-heirs, Titius having one ounce and Gaius eleven ounces. A farm is given them as a legacy. In what proportion will they enjoy the legacy; Titius as heir cannot owe to himself any part of the farm, but Gaius can owe him eleven-twelfths of the farm. Gaius cannot owe himself any portion of the farm, but Titius, as heir for one-twelfth, may owe him one-twelfth. Thus Titius gets eleven-twelfths of the farm, and Gaius one-twelfth, and they take the legacy in shares inversely as their shares of the inheritance. (D. 30, 34, 12.)

A slave could not be a legatee, except for aliment.

An annuity for aliment was left to a person who was condemned to the mines, but afterwards pardoned by the Emperor. Held that he was entitled to payment for the time he was a convict, as well as for future years. (D. 34, 1, 11.)

A slave is to be freed after a certain time, and meanwhile a legacy of aliment is given. Held that before he attains freedom, he may, according to a rescript of Severus Antoninus (D. 33, 1, 16), claim the allowance. (D. 30, 113, 1.) Even if the slave dies before the time fixed for his manumission, what has been given him as an allowance cannot be demanded back by an heir from the co-heir who made the allowance. (D. 10, 2, 39, 2.)

Can the slave of a sole heir be legatee?

Whether a legacy we leave to a person in the *potestas* of the man we appoint our heir is a good one, is questioned. Servius approves of the view that it is good, but thinks the legacy disappears if he is still *in potestate* at the time when the legacies usually vest. Whether, therefore, the legacy is unconditional, and in the lifetime of the testator he ceases to be in the *potestas* of the heir, or whether it is conditional, and that happens before the condition is fulfilled, in either case he holds the legacy is due. Sabinus and Cassius, on the other hand, think a legacy can rightly be left conditionally, but not unconditionally. Although, they say, he might in the testator's lifetime cease to be in the *potestas* of the heir, yet on this ground the legacy ought to be understood to be void, that it would have no force if the testator died at once after making the will; and it would be absurd to say that it took effect because he dragged out his life longer. The authorities of the opposing school, again, think that not even conditionally can the legacy be a good one; because we can owe nothing to those we have in our *potestas* any more conditionally than unconditionally. (G. 2, 244.)

Whether a legacy we leave to a slave of our heir is a good one is questioned. It is agreed that an unconditional legacy is void, and that it goes for nothing that in the testator's lifetime the legatee went out of the *potestas* of the heir; because since the legacy would have been void if the testator had died at once after making his will, it ought not to take effect merely because the testator lived longer. A conditional legacy, however, is a good one; so that we must ask carefully whether at the time the legacy fell due the slave was not in the *potestas* of the heir. (J. 2, 20, 32.)

On the contrary, it is agreed that through a person in your *potestas*, if he is appointed heir, a legacy can rightly be left to you. If, however, you become heir through him, the legacy vanishes; because you cannot owe yourself a legacy. But if the son is emancipated or the slave manumitted or transferred to another, and himself becomes heir or makes another heir, then the legacy is due. (G. 2, 245.)

On the contrary, if a slave is appointed heir, there is no doubt that even an unconditional legacy to his master is a good one. For even if the testator died at once after making the will, yet the legacy is not understood to vest in him that is heir; because the inheritance is distinct from the legacy, and through the slave another can be made heir, if before he enters on it by his master's orders he is transferred to the *potestas* of another, or by being manumitted is himself made heir. In these cases the legacy is good. But if he remains in the same case, and enters by order of the legatee, the legacy disappears. (J. 2, 20, 33.)

III. Unlawful objects, or purposes, or conditions.

1. A thing cannot be acquired twice by a *lucrativa causa*.

If what belongs to another is left as a legacy, and in the testator's lifetime the legatee becomes its owner, then if the ground of its ownership is purchase, he can under the will obtain the price by an action; but if the ground of his ownership is gainful (*lucrativa*)—if it is a gift for instance, or any other like ground—he cannot bring an action. The rule handed down is this, that two grounds of ownership both gainful cannot meet in the same man with regard to the same thing. On this principle, if under two wills the same thing is due to the same man, it makes a difference whether he obtained the thing or its value under one will. If he obtained the thing he cannot bring an action, because he has the thing on a ground that is gainful; but if he obtained its value, he can bring an action. (J. 2, 20, 6.)

To acquire a thing *lucrativa causa* is to obtain it without a valuable consideration.

If a man has another man's farm left him, and buys the ownership of it without the usufruct, and the usufruct comes to him, and thereafter he brings an action under the will, Julian says he can rightly bring the action and demand the farm, because in his demand the usufruct holds the place of a servitude. But it falls within the duty of the judge to order the value, less the usufruct, to be made good to him. (J. 2, 20, 9.)

In this case the assumption is that the usufruct is obtained without valuable consideration. In strict law, this was immaterial in an action brought for ownership, the usufruct being viewed as a servitude. But although technically a servitude, the usufruct was substantially a fragment of the ownership, and therefore the legatee was allowed to recover only the value of the reversion, *i.e.*, deducting the usufruct or life-interest.

2. Legacy left by way of penalty.

To leave a legacy, or to revoke it, or to transfer it by way of a penalty, was useless. A legacy is left by way of a penalty when it is left in order to coerce the heir, and to make him do or not do something. An instance is if a man writes thus: "If my heir bestows his daughter in marriage on Titius;" or, on the contrary, "If he does not bestow her, let him give

10 *aurei* to Seius;" or if he writes thus, "If my heir alienates the slave Stichus;" or, on the contrary, "If he does not alienate him, let him give Titius 10 *aurei*." So much was this rule observed that very many imperial constitutions point out that not even the Emperor himself will accept a legacy left him by way of penalty. Even under a soldier's will such legacies did not take effect, although in other cases the wishes of soldiers in drawing up their wills are closely observed. Nay, even a grant of freedom, it was held, could not be made by way of a penalty. More than that, not even an heir could be added by way of a penalty, as Sabinus thought; as if one were to speak thus, "Let Titius be heir. If Titius bestows his daughter on Seius in marriage, let Seius also be heir;" for it made no difference in what way Titius was coerced, whether by giving a legacy or by adding an heir. But of such niceties as these we do not approve. We have therefore settled generally that what is left or revoked or transferred to others, although by way of a penalty, is to differ in no point from all other legacies as regards the giving or revoking or transfer, except, of course, things impossible or forbidden by the statutes, or otherwise disgraceful; for dispositions of this sort by testators the views of my times do not suffer to take effect. (J. 2, 20, 36.)

3. Restraint on the liberty of the legatee.

A legacy was made to a person on condition that he should always dwell in the same city, near the tomb of the deceased. The legacy is valid, but the condition is void. (D. 35, 1, 71, 2.) But such a restriction may be imposed on freedmen who get a legacy of aliment; so that if they neglect the testator's injunctions, their aliment may be stopped. (D. 34, 1, 18, 5.)

4. Restraint on alienation of property.

In terms of a rescript of Severus and Antoninus, a general or absolute prohibition of alienation of property left by legacy was void; but if the restriction was made in the interest of children, freedmen, heirs, or any specified person, it was upheld —without prejudice, however, to the creditors of the testator. (D. 30, 114, 14.)

Julius Agrippa in his will enjoined his heir not to mortgage nor in any manner alienate his burial-ground and suburban residence. His daughter was heir, and died, leaving a daughter, her heir, who in turn died, appointing certain persons not in the family her heirs. All this time the property in question had never changed hands. Julia Domna was niece to Julius Agrippa. Could she claim under the will of Julius Agrippa against the heirs named in his granddaughter's will, on the ground that the condition against alienation had been broken? No, because the prohibition in the will was absolute and unqualified, not limited by any object—as, to keep the property in the family. (D. 32, 38, 4.)

A mother appointed her sons heirs, and enjoined them "on no account to alienate the lands they would obtain from her, but to preserve them to their own family, and to give reciprocal sureties to that effect."[1] Held that this restriction was void on account of its being absolute and unqualified. (D. 32, 38, 7.)

[1] *Praedia quae, ad eos ex bonis meis perventura sunt, nulla ex causa abalienent, sed conservent successioni suae, deque ea re invicem sibi caverent.*

A father appointed his son Titius heir. Titius had three sons. The father bequeathed a farm to Titius on trust not to alienate it, but to keep it in the family. Titius died appointing as heirs his two sons and a stranger to the family. Held that the third son could under the will of his grandfather demand a third of the farm. (D. 30, 114, 15.)

A father bequeathed a farm to his son, forbidding him, *during his life*, to sell, give away, or pledge the land ; adding, that if he acted against his will the farm should go to the Exchequer ; for the prohibition was imposed in order that the farm should never go out of the family. On account of the limit, *during his life*, it was held that the son could *bequeath* the property even to persons not in his family. (D. 32, 38, 3.)

A testator bequeathed land with a shop to fifteen of his freedmen by name, and added, "I wish them to have and hold on the condition and terms that no one of them shall sell, give away, or in any other manner dispose of his share. If anything is done against this injunction, then I wish the portions so dealt with to belong to the town of Tusculum." Some of the freedmen sold their shares to two of the joint-tenants, and these two dying, left Gaius Seius (who was not one of the freedmen) their heir. This was not a forfeiture to the town of Tusculum, because it is consistent with the will that a freedman might sell to his fellow-freedman (although not to a stranger) ; and a freedman was not forbidden to leave what he had bought, but only what he had acquired from the will of the deceased patron. (D. 32, 38, 5.)

A testator appointed heirs his son and his son's children, who were emancipated, and said, "My will is that my houses be neither sold nor mortgaged by my heirs, but that they remain intact for ever to them and their children and grandchildren. If any of them desires to sell or mortgage his share, it shall be lawful for him to sell or mortgage to his co-heir. Whatever any of them does against this will shall be null and void." The son borrowed money from Flavia Dionysia, and the houses being in the hands of tenants, delegated to her the rents due to him. Was this a violation of the trust? No ; a conveyance of the rents was not a sale or mortgage within the meaning of the trust. The creditor Flavia acquired no right *in rem*, but only a right *in personam* against the tenants ; and what the testator forbade was an alienation of the son's interest, which was a right *in rem*. (D. 31, 88, 15.)

When property is settled in the manner shown in these examples, the trust is kept alive so long as there is any person in the family to take under it ; but the last member of the family can dispose of it freely. (D. 31, 78, 3.) This amounted to a very strict entail, as in the event of any attempt being made to defeat the trust, the person next entitled could recover the property from a purchaser or anyone in whose possession it was. (D. 31, 69, 3.) Emancipated children claimed under trusts for a "family ;" and failing direct descendants, the agnates were entitled (D. 31, 69, 4), and even the freedmen. (D. 31, 77, 11.) According to Justinian, the next of kin could claim after the children, then even a son-in-law or daughter-in-law, if the marriage was dissolved by death, and after them the freedmen. But a testator might bequeath the property in a narrower line if he pleased. (C. 6, 38, 5.)

"Dearest wife, I beg you to bequeath nothing to your brothers. There are your sisters' sons, to whom you may leave your property. You know that one of your

brothers robbed and murdered our son, and the other also has done me harm." The wife died intestate, leaving one of these brothers her heir. Held that a son of one of the sisters could exclude him under the trust contained in her husband's will. (D. 31, 88, 16.)

5. *Captatoriae Institutiones* or *Scripturae.*

To appoint a person your heir in order that he might appoint you his heir, is illegal. (D. 30, 64; D. 28, 5, 71, 1.) This prohibition was introduced by a *Senatus Consultum*, the name of which has been lost; and the object was to prevent rich men being entrapped into making needy adventurers heirs by the plausible device of making reciprocal bequests of all their property to each other. Hence if the bequest or appointment was the result of mutual affection, and there was no fraud, the *Senatus Consultum* did not apply. (D. 28, 5, 71, pr.)

"Let Titius be my heir if he shall have shown and proved that Maevius was appointed heir by him in his will." This is void, although a third person, Maevius and not the testator, is the person to be named. (D. 28, 5, 72, 1.)

"For whatever part Titius has appointed him heir, for the same proportion let Maevius be my heir." This is valid, because it refers to a past, not to a future appointment, and therefore cannot have any fraudulent effect. (D. 28, 5, 72, 1.)

6. Conditions as to taking oaths.

When a bequest is made, subject to the condition of taking an oath, to do or not to do something, the Prætor's edict releases the legatee from so much of the injunction as requires him to take an oath. (D. 28, 7, 8, 6.) The reason, says Ulpian, is, that while many are ready enough to take oaths to the discredit of religion, others are fearful of the divine displeasure even to the point of superstition. In respect of one class, oaths are useless; in respect of the other, they are unfair. (D. 28, 7, 8, pr.) An exception was made in favour of bequests of freedom, as it was considered that the most scrupulous slave could not hesitate to take an oath for his freedom. (D. 40, 4, 12, pr.)

7. Conditions in restraint of marriage, in addition to the usual objections, were specially obnoxious as inconsistent with the *lex Julia*, which imposed disadvantages on the unmarried state.

When a legacy or appointment of an heir was hampered by a general restriction that the legatee or heir should not marry, the appointment or bequest was valid, and the restriction null and void. But a narrower restriction might be imposed. (D. 36, 1, 65, 1.)

"I bequeath a farm to Maevia on her death, if she shall not have married" Although she marries, she can at once demand the legacy. (D. 35, 1, 72, 5.)

An annuity was left to a widow on condition that she did not marry while her children were alive. The condition is void; but if it were restricted to the time when the children were under the age of puberty, it would be effective, and her marriage before that time would forfeit the legacy. (D. 35, 1, 62, 2.)

A legacy to Maevia "if she does not marry Lucius Titius" is valid. (D. 35, 1, 64, pr.)

A condition, "if she does not marry Titius, or Seius, or Lucius," is also binding. (D. 35, 1, 63, pr.)

A condition, "if she does not marry any one at Aricia," is void, if it was unlikely that the legatee would get a husband at any other place; and therefore marriage with a man at Aricia did not forfeit the legacy. (D. 35, 1, 64, 1.)

A legacy was left by a husband to his wife on condition that she did not marry again; and that if she did, she should hold the legacy in trust for another. Gaius (D. 32, 14) says the condition is valid, and the widow, on marrying, must give up the legacy. Julian, on the contrary, says that the wife is entitled to the legacy, free from the trust. (D. 35, 1, 22.)

A testator bequeathed to Titia 200 *aurei* if she did not marry, and 100 if she did. She married. Was she entitled to 100 *aurei* because she married, and also to 200 because the condition was void? She got only 200. (D. 35, 1, 100.)

"If Seia marries with the consent of Titius, I bequeath her a farm." Whether Titius dies before or after the testator, and whether he consents to her marriage or not, Seia can claim the farm. (D. 30, 54, 1; D. 35, 1, 72, 4; D. 35, 1, 28, pr.)

A legacy to Seia "if she marries Titius." This condition is illegal if Titius is a person she could not honourably marry, for in that case the condition is equivalent to a prohibition of marriage; but if that is not so, the condition is valid. (D. 35, 1, 63, 1.)

The conditions, "if the legatee marries," or "if the legatee has children," are valid, but are remitted when the legatee becomes a monk or nun. (Nov. 123, 37.)

8. Conditions against morality are treated as null. (D. 28, 7, 9.)

"If the legatee does not redeem his father from captivity, or does not give a maintenance to his parents or patrons." Such a condition is void. (D. 28, 7, 9.)

A trust to adopt a person is not valid. (D. 32, 41, 8.) But a condition to emancipate a child is valid. (D. 35, 1, 92.)

"If the legatee throws the remains of testator into the sea." Such a condition raises a violent presumption against testator's sanity. If that presumption is clearly rebutted, the condition is to be disregarded. (D. 28, 7, 27, pr.)

"If the heirs give security to deliver legacies to persons who are by law incapable of taking legacies." The condition is void, and even if a promise be given to the legatees, it cannot be enforced. (D. 28, 7, 7.)

Regula Catoniana.

A legacy that, owing to one or other of the restrictions stated, would have failed if the testator had died at the moment of making his will, is not confirmed by the subsequent removal of the impediment. (D. 34, 7, 1, pr.) Thus, as we have seen, if something belonging to the legatee is bequeathed to him, he cannot claim the legacy, because he has sold the thing, and at the time of testator's death it is no longer his. So if a bequest is made of statues or columns that at the time of the will are fixtures, and cannot therefore be bequeathed separate from the land, the legacy fails, although before testator's death such a separation may take place. (D. 30, 41, 2.) This does not

apply, however, to conditional legacies (D. 35, 1, 98), nor to those that vest (like usufruct) at the entry of the heir, and not at the death of testator. (D. 34, 7, 3.)

In certain cases, the acquiescence of the heir makes up any defect. Thus if *codicilli* are set aside, but the heir accepts them and pays something under them, and allows slaves therein desired to be manumitted to remain free, they are entitled to full manumission. (D. 40, 5, 30, 17.)

Demetrius charged his heir (his mother) to give a freedman a monthly allowance of food and an annual allowance of clothes. She observed the wishes of the deceased for a long time (in such case not less than three years). Held that she must continue to do so, and pay all arrears. (C. 6, 42, 1.)

An heir cannot be compelled to perform a defective trust (C. 6, 42, 23); but if he does so, the money or property cannot be demanded back. (C. 6, 42, 2.)

B. Revocation of Legacies.

The peculiarity of wills and legacies is, that while made in the lifetime of the testator, they do not take effect until his death. Hence it is necessary to the final effect of a legacy that it be not revoked or rescinded. The revocation of a legacy may take place in several ways, which may be arranged under two heads. (A.) By the Act of Testator; (B.) By Events.

(A.) Revocation by Act of Testator.

I. *Ademptio.*

In the time of Justinian any legacy could be revoked by any expression of testator's wish to that effect. (D. 34, 4, 3, 11.)

The revocation of legacies, whether they are revoked in the same will or in *codicilli*, is valid, whether it is made in contrary words, as when a man has left a legacy in the form, "I give and leave," he may revoke it by saying, "I do not give, I do not leave;" or by words not contrary, that is, by any other words whatever. (J. 2, 21, pr.)

Revocation may be implied.

1. From a serious quarrel arising between the testator and legatee after the making of the legacy.

A testator gave his freedman a legacy, and by a subsequent will described him as "*pessimus*" (D. 34, 4, 13), or "ungrateful" (*ingratus*). (D. 34, 4, 29.) This is an implied revocation.

Seia left to Titius five pounds of gold. Titius accused her of having conspired to murder his father. After this accusation Seia wrote *codicilli*, but did not revoke the legacy. She died before the conclusion of the trial. It was shown, however, that she was no party to the death of Titius' father. Held that the legacy was revoked. (D. 34, 4, 31, 2.)

2. By the testator's subsequent dealings with the property bequeathed.

If a testator leaves what is his own, and afterwards alienates it, Celsus holds that if he did not sell it with the intention of revoking it, it is none the less due; and so the late Emperors Severus and Antoninus decided by a rescript. The same Emperors decided by a rescript that if a man, after making a will and leaving lands as a legacy, pledges those lands, he must not be held to have revoked the legacy, and that the legatee, therefore, can bring an action against the heir to have the lands released by the creditor. If, again, a man alienates part of what he has left as a legacy, the part that is not alienated is due in any case, but the part that is alienated is due only if it was alienated with no intention to revoke the legacy. (J. 2, 20, 12.)

We are told that alienation created a presumption of revocation, which it was for the legatee to rebut. (D. 34, 4, 15.) If the alienation was prompted by necessity, the burden of proving an intention to revoke lay on the heir. (D. 32, 11, 12.) If, however, the testator made a gift of the object bequeathed, the legacy was extinguished. (D. 34, 4, 18.)

A father left his daughter gardens with all their stock. He afterwards gave some of the slaves belonging to the garden to his wife. This was a revocation of the legacy so far as these slaves were concerned, even if the gift to the wife should not be valid. (D. 34, 4, 24, 1.)

3. Scoring out the name of a legatee by the testator is evidence of intention to revoke. (D. 34, 4, 16.)

But (1) revocation is not presumed, when in a subsequent imperfect will the testator does not repeat the legacy because he may have intended to revoke the first will only in the event of the second taking effect. (D. 32, 18.)

(2) A revocation of a legacy is not conclusive proof of an intention to revoke a trust imposed on the legatee. If, therefore, no such intention existed, the heir must execute the trust. (D. 34, 4, 19.)

II. *Translatio Legatorum* (Transfer).

1. A change in person of legatee.

A legacy can be transferred also from one to another; as when a man says, "The slave Stichus that I left to Titius, I give and leave to Seius." Whether he does this in the same will or in *codicilli*, in both cases the legacy to Titius is revoked, and it is at the same time given to Seius. (J. 2, 21, 1.)

If the second legatee is incapable of taking, as if he is a slave of the testator (D. 34, 4, 20), and the legacy thus fails, the first legacy is nevertheless revoked, because it was the intention of the testator to deprive the legatee of what he had at first intended for him. (D. 30, 34, pr.)

If, however, the second legacy is conditional, and the first unconditional, it was presumed that the testator did not mean to revoke the first, unless the condition of the second was fulfilled. (D. 34, 4, 7.)

"Let my heir give Titius a farm. If Titius alienates that farm, let him give the same farm to Seius." This is not a revocation of the legacy to Titius, but the heir may require security from Titius, because if he should attempt to alienate it, the heir would be compelled to make it good to Seius. (D. 34, 4, 3, 4.)

"I give and bequeath a farm to Titius; if Titius shall die, I require my heir to give it to Sempronius." This is a good legacy to Sempronius, even if Titius should be dead at the time of the will. (D. 34, 4, 3, pr.)

"Let my heir give 100 *aurei* to Titius; if he does not, then to Sempronius." If, from any cause, the legacy does not vest in Titius, then, and then only, is the sum due to Sempronius. (D. 34, 4, 3, 3.)

2. A change in the person charged with a legacy, as "What I charged Titius to pay, let Seius pay." (D. 34, 4, 6, 1.)

3. When the object of the legacy is changed. A testator appointed his two daughters heirs equally. To one he gave a pre-legacy of a farm on trust to pay 20 *aurei* to the other; afterwards he gave to the other half the farm. Held that this second bequest was a revocation of the gift of 20 *aurei*. (D. 32, 39, 2.)

4. When an unconditional legacy is subjected to a condition. When a testator leaves 100 *aurei* unconditionally, and the same amount subject to a condition, it is a question of his intention, whether the second attaches a condition to the first, or whether the two are independent. (D. 34, 4, 9.)

A testator bequeathed a farm to Titius on trust for Seius. Afterwards in *codicilli* he bequeathed the same farm to Titius without repeating the trust. Held that the latter writing is to be preferred to the earlier, and that the trust is not due. (D. 34, 4, 28.)

(B.) Revocation by Events.

I. The failure of the will in which the bequests are contained. The legacies fall with the will, unless there is clear proof that the testator meant to bind the intestate as well as the testamentary heirs.

II. The death of the legatee before the legacy vests (*dies cedit*). (D. 35, 1, 59, pr.)

III. *Interitus rei.*—The loss of a thing, or its destruction in any manner save by the act or fault of the heir, falls on the legatee. (D. 30, 26, 1; D. 30, 53, 5.)

Whether a change of species—as of wool into garments, timber into ships, and the like—was such a destruction of the original as to vitiate the bequest, was a moot point between the Proculians and Sabinians. According to the Proculians, a change of form was a change of thing (D. 32, 88, pr.); but according to the Sabinians, the legacy was due if the substance

bequeathed were still in existence, whatever the change of form. (D. 30, 44, 2; D. 30, 44, 3.)

DIVESTITIVE FACTS.—Legacy was in its nature a mode or form of acquisition, and therefore divestitive facts are out of place. A legatee could, of course, release an heir, as he could release any other debtor.

One divestitive fact, however, existed—time or condition. If a legacy were bequeathed until a certain time or event, the legatee continued to be entitled until the time or event came. Originally such legacies were disallowed (D. 30, 55); but Justinian sanctioned the restriction of legacies or trusts by time. (C. 6, 37, 26.)

REMEDIES.

A. Rights of Heir.

A legatee has no right to take possession of the things bequeathed without the consent of the heir; and if he does so, he may be compelled to return the things by the *Interdict Quod Legatorum*. (D. 43, 3, 1, 2.) The heir must, however, be ready to give security for the payment of the legacy, in the event of the inheritance being solvent. (D. 43, 3, 2, 1.)

B. Rights of legatee.

I. Simple, unconditional legacy.

1. If the bequest is of a specific thing, the legatee can recover it by the ordinary action (*per vindicationem*) given to an owner. (C. 6, 43, 1.)

2. If the bequest is not specific, the legatee may sue the heir or person charged with the legacy as a debtor.

3. In any case, the whole property of the deceased is held to be mortgaged to the legatees, who have thus another resource, the *actio hypothecaria* or *utilis Serviana*. (C. 6, 43, 1.)

When there are several heirs, the legatee must sue each for a part of the legacy proportional to his share, and cannot compel the solvent heirs to pay for the insolvent. (D. 31, 33, pr.)

II. When the legacy is not due at once, or is conditional.

1. When a legacy was not payable until a future time or event, or the law interposed delay to a suit for a legacy actually due, the heir or person charged might be required to promise by stipulation for the performance of the bequest, and that he would not maliciously destroy or make away with the property. (D. 36, 3, 1, pr.; D. 36, 3, 15, pr.) If the heir refused, the legatee could demand to be put in possession *custodiae causa*. (D. 36, 3, 1, 2.)

The heir might be released from the necessity of giving security by the testator (*Satis a Seio patre meo exigi veto.*) (D. 36, 3, 18, pr.) By a constitution of Zeno, confirmed by Justinian (Nov. 22, 41), a parent charged with a legacy for a child was not bound to give security, unless upon a second marriage, or by the express injunction of the testator. (C. 6, 49, 6.)

2. In the event of there being no person to give security, the legatee could be put in possession, to see that the produce was only gathered, and not made away with by the heir. (D. 36, 4, 5, 22.)

Part III.

INTERPRETATION OF WILLS AND LEGACIES.

EVERY question of interpretation is a question of the existence of a right, duty, investitive fact, etc., and might, therefore, properly find a place under one or other of these respective heads; but it is convenient to gather together instances from various departments to illustrate the general principles of interpretation, so far as such exist. In one sense, indeed, the whole law of legacies is a law of interpretation, for it rests upon nothing except the will of the testator; and the nature and extent of the rights and duties of the legatee, and the question whether a valid interest is vested in him, are simply questions of interpretation. Nevertheless, there are some general rules that relate more to the manner of interpretation than to the results, and these will now be discussed under the following heads:—

A. When the testator's intention is clearly and sufficiently expressed, but if literally interpreted involves illegality, or absurdity, or injustice.

B. When the testator's intention is clearly, but not completely, expressed.

C. When the testator's intention is ambiguously expressed.

The rules to be stated, unless when the contrary is expressed, are to be understood as applicable to the interpretation both of wills and legacies.

A. When a testator has expressed his intention in language clear and sufficient, his intention is to be carried out. (D. 32, 25, 1.) The language of the testator is to be construed in its ordinary sense, and if that sense yields an intelligible meaning, no evidence is admissible to show that the testator used the words with any peculiar signification. (D. 30, 4, pr.)

A testator bequeathed furniture (*supellex*). He was accustomed to consider silver and garments as included in that word. Servius held that these things could not be included in a legacy of "furniture" simply; the language must be construed according to ordinary usage, and not follow the idiosyncrasies of individuals. Tubero disagreed with this rule, as it might defeat the testator's intention; but it was approved by Celsus, and inserted in the Digest. (D. 33, 10, 7, 2.)

A testator bequeathed a *usufruct* of land to his wife, charging her after her death to give the land to his heirs. Now, as the wife is left only a usufruct, which dies with herself, it is impossible that she can fulfil the trust. Is then the *usufruct* to be

enlarged into *ownership* in order that the trust may be effectual? No, the testator's meaning is plain; he gives only a usufruct, and it is not to be enlarged, although the effect of interpreting it literally is to defeat the trust. (D. 33, 2, 25.)

To the rule, as here laid down, there are two general heads of exception—(1) when the directions of the testator are illegal, but his wishes could be carried out in accordance with law; and (2) where it can be proved that his real intention differs from the apparent scope of his words.

I. When a disposition is expressed in a form conflicting with law, but may be carried out in a legal manner. (D. 34, 5, 24.)

A father dying left a son and daughter, and charged his daughter by his will that she should not make a will until she had children. This command was illegal, because a testator could not prohibit a legatee making a will. The Emperor, in construing this case, said the testator meant that his daughter should be at liberty to prefer her children to her brother as heirs, but no other persons; just as if he had said that she should, in the event of her dying without children, give up her property to her brother. The words, therefore, were construed as a trust. (D. 36, 1, 74, pr.)

Titius left his property to Gaius, charging Gaius to make Maevius his heir. This charge was illegal, as no one could prescribe to another person who should be his heir, but it was construed as a trust to give the property to Maevius on the death of Gaius. (D. 30, 114, 6; D. 36, 1, 17, pr.)

A testator appointed two heirs, his son and daughter. He requested the daughter to take as a prelegacy *from herself* the villa of Gaza, and his son to take certain lands *also from himself* as a prelegacy. A legacy could not be charged by an heir on himself; but this disposition is read as if the words (*from himself*) were omitted, in which case the prelegacies would be valid. (D. 31, 34, 1.)

II. When the literal rendering of a will conflicts with or varies from the proved intention of the testator, the intention is to be preferred to the words.

1. In determining the person by whom or to whom a legacy is to be given, regard is to be had more to the nature of the legacy than to the names mentioned.

Julianus Severus died leaving several heirs, and bequeathed to his foster-son 50 *aurei*, to be paid by Julius Maurus, his tenant, out of the rent due by him. He also left a legacy to Maurus. Held that the heir, and not Maurus, was charged with the legacy, as the object of the testator was simply to point out the source from which the legacy was to be paid. (D. 32, 27, 2.)

A legacy to a *filiusfamilias*, if he continues in his father's *potestas*, is held to be a direct bequest to the father. (D. 35, 1, 42.) On the other hand, a legacy to a *filiusfamilias* to be paid to him (*ut ipsi solvatur*) cannot be sued for by the *paterfamilias*. (D. 36, 2, 14, 2.)

A testator charged his heir to pay the taxes of Titius. Titius is the legatee, not the tax-gatherer, as it was for the benefit of Titius the legacy was made. (D. 32, 11, 22.)

A testator bequeaths 10 *aurei* to Titius to discharge a debt of that amount due by testator to Sempronius. Is Sempronius entitled to the legacy? No, because he has his action against the heir, and it is nothing to him that the testator has directed a legatee to pay it. The heir is the real legatee, and he can sue Titius to force him to

pay the amount to Sempronius. (D. 30, 49, 4.) If in the above case Maevius were surety for the testator, he also could compel Titius to pay the debt. (D. 30, 49, 5.)

Maevius is surety for Titius. Maevius bequeaths a sum to a legatee to pay the debt for which he is surety. Titius and the heir of Maevius, or either of them, can compel the legatee to pay the debt. (D. 30, 49, 7.)

Maevius is surety for Titius to Sempronius. Maevius bequeaths the debt to Sempronius. Sempronius is not legatee, but Titius is, for the amount of the debt. (D. 30, 49, 6.)

A testator requires one of several co-heirs to pay all the debts due by him. The creditors cannot sue on the will, but the co-heirs can. (D. 30, 69, 2; D. 34, 3, 7, 3.)

When one of several joint-debtors is released by way of legacy, it is a question of intention whether this is a release of the debtors that are not named. If the debtors are partners, and one cannot be released without the other, it is presumed that the testator, in releasing one, meant both. (D. 34, 3, 3, 4.) But if the joint-debtors are not partners, and so one may be released, leaving the rest bound, the presumption is that only the debtor that is named is released, but that presumption may be rebutted by evidence of the testator's intention to release all. (D. 32, 11, 20; D. 32, 11, 21.)

A testator left as heirs his *tutor*, his brother, and others. To the *tutor* he bequeathed 10 *aurei*, of which he had been out of pocket for the brother. Held that the *tutor* was not a legatee, because the sum left was only the amount of his debt, and a legacy to a creditor is in vain (D. 34, 3, 28, 10), but the brother is legatee for the sum. (D. 34, 3, 28, 11.)

2. The context may show that the testator's intention differs from the literal rendering of his will.

Titius appointed as heirs Seia his wife and Maevia. Seia had one-twelfth, and Maevia eleven-twelfths. He stated that his body was to be delivered to his wife, to be buried by her in a particular field, and a monument was to be built to the value of 40 *aurei*. The share of Seia came to 150 *aurei*, and it was held that although the construction of the tombstone was specially charged to Seia, the testator could not have intended her to pay so much as 40 out of 150 *aurei*; and the true construction of the will was that Seia should pay one-twelfth, and Maevia eleven-twelfths of the 40 *aurei*. (D. 32, 42.)

"I charge my sons, if either of them dies without leaving children, to give his share of my inheritance to his surviving brother; and if both die without leaving children, I wish my property to go to my granddaughter Claudia." The first that died left a son, the surviving brother left no children. If the words are read strictly, Claudia will get nothing; but it was held that the true meaning was that Claudia should take the share of whichever brother died childless, and therefore she gets one-half of the inheritance. (D. 36, 1, 57, 1.)

3. Evidence, outside the will, may show that the testator's words, if construed literally, would defeat his intention.

A testator bequeathed to a person above fourteen and under twenty-five a legacy when he should have reached puberty. It was held that by puberty the testator meant full age; namely, twenty-five. (D. 32, 50, 5.)

A testator bequeathed to his concubine a farm, with its bailiff, his wife (*contubernalis*) and children. Do children include grandchildren? Generally not (D. 50, 16, 220, 1), but in this case it was held to include grandchildren, in order to prevent their separation from the mother, because if the literal construction were adopted, the bailiff's children would go with him to the legatee, and his children's children would belong to the heir. It was presumed that the testator did not wish to break up the family. (D. 32, 41, 5.)

A testatrix by will manumitted Dama and Pamphilus, and bequeathed them a farm, to go after their death to their children (*filii*). By her will she also charged her heirs to manumit Pamphila, the natural daughter of Pamphilus. Pamphilus, after his legacy vested, made a will appointing Maevius heir on trust to surrender his share of the farm to Pamphila as soon as she was freed. Held that Pamphila took directly under the will of the testatrix under the name of "children," although, being born in slavery, she could not be a legitimate child of Pamphilus. (D. 31, 88, 12.)

A testator bequeathed to "his freedmen" the allowance of food and other things he had been accustomed to give them. One of the freedmen was away four years on his own business, with the permission of testator, and of course during that time received nothing; but to him, as to the other freedmen, the testator gave a legacy of 5 *aurei*. Held that, notwithstanding his absence, the freedman was entitled to participate in the legacy of food, etc. (D. 34, 1, 19.)

Titia on her death bequeathed to all her freedmen and freedwomen the allowance of food and clothes she had been accustomed to make to them in her lifetime. As her accounts showed, only three of them were in receipt of such allowance at the time of her death; nevertheless, all get the benefit of the legacy. (D. 34, 1, 15, 2.)

A testator charged his heir to pay to *all* his freedmen a certain amount in lieu of maintenance. Two of his freedmen, Dama and Pamphilus, the testator had, two years before his death, and before the making of the will, driven from his house, and ceased to give them food. They could not claim the legacy unless they proved that the testator's feelings towards them had afterwards become more friendly. (D. 31, 88, 11.)

B. The will of a testator may be expressed clearly, but may not go far enough to enable it to be carried into effect; or the testator may have declared that his dispositions are not complete.

1. A testator gives clear and sufficient terms, but indicates his intention at a future time to modify his gift, or make it conditional.

"Let Titius be heir, subject to the conditions afterwards stated." No such conditions were stated. The appointment of Titius is unconditional. Justinian gave this decision in accordance with the opinion of Papinian, given in the following case. Villages (*vici*) were left on trust for the State; the villages had distinct boundaries. The testator said that in another document he would specify the boundaries, and the conditions of the annual games he wished to have celebrated, and died without doing so. Nevertheless, the legacy is valid. (C. 6, 25, 8; D. 31, 77, 33.)

2. When one of several co-heirs is asked to give anything to his co-heirs, and the shares in which these are to take are not specified, they take the shares in proportion to their shares of the inheritance. (D. 36, 1, 78, 4.)

Maevia appointed heirs her son Gaius for five-twelfths, her daughter Titia for three-twelfths, and her son Septicius for four-twelfths, on trust as to Septicius, if he died under twenty without leaving children, that his share should go to the other two. Septicius died under twenty without leaving children. His share is not divided equally between Gaius and Titia, but in the proportion of five to three. Gaius gets five-eighths and Titia three-eighths of the share of Septicius. (D. 36, 1, 78, 5.)

3. When the kind or quantity is left undetermined.

A legacy of a number of coins (*numerus nummorum*), without specifying what coins, is not void for uncertainty, but evidence is admissible to show what coins the testator meant. The most decisive evidence is the habits of the testator, and next the custom of the country. Regard is also to be had to the disposition of the testator, the rank of the legatee, or the affection or relationship subsisting between them; and finally, to the context. (D. 30, 50, 3.) The presumption is in favour of fixing the sum as low as possible. (D. 32, 75.)

When the kind of thing is clearly expressed, but the quantity is not, the general rule is that the legacy is to be made as little onerous as possible to the heir.

A legacy is left to Titius of as much as one heir gets. Held that the measure is the quantity taken by the heir that has the smallest share. (D. 32, 29, 1.)

A testator left to a person his Cornelian farm. It appeared that there were two of the same name. Held that the legatee must be content with the smaller, unless he can prove that the testator meant him to have the larger one. (D. 30, 39, 6.)

But in other cases, from the nature of the bequest, or from the relation between the testator and legatee, it was held that the testator meant to give as much as the words would carry.

Seia in her will said that if she lived she would do it herself, but if she died she requested her heirs to set up a statue, weighing 100 lbs., in the temple of her native place, with her name upon it. In the temple the statues were of bronze or silver. As Seia did not specify the material, it was held from her purpose of piety that she meant the best, and therefore the statue was to be of silver; not of gold, because such statues were not in that temple. (D. 34, 2, 38, 2.)

Pompeius Hermippus appointed his son Hermippus heir for nine-twelfths, and his daughter Titiana heir for three-twelfths, giving each certain lands by way of prelegacy. If Hermippus died without leaving children, other lands were to be given to Titiana. Afterwards the testator made *codicilli*, giving Titiana certain lands in full satisfaction of her part of his inheritance and of what was left in his will. The property of Hermippus fell to the Fiscus. Titiana took under the *codicilli*, and the question arose whether she would also take the lands she was to get not directly under the will, but in the event of her brother dying without issue. It was held that the *codicilli* excluded her only from what she would have taken under the will in her brother's lifetime, not from what she was entitled to only on his death. (D. 32, 27, 1.)

c. When the testator's intention is obscure or ambiguous.

Ambiguity arises from various sources, some from the snares of language, others through the negligence or uncertain views of the testator. We may divide these sources under three heads:—

I. When ambiguity arises from the language or grammatical construction adopted by the testator.

II. When the operative words are clear, but doubt is cast

upon them through some inconsistent and unnecessary statement.

III. When the ambiguity arises from conflicting dispositions of the testator.

I. Ambiguity arising from language or grammatical construction.

1. Words importing the masculine gender, include the feminine gender; but words importing the feminine gender do not include the masculine gender. (D. 50, 16, 116; D. 50, 16, 163, 1; D. 32, 93, 3.) Thus, horse includes mare (D. 32, 65, 6); "girl" does not include "boy" (D. 32, 8, pr.), nor daughter, son (D. 31, 45, pr.).

2. The past or present tense does not include futurity, but in some legacies, as of aliment, farm stock, etc., words of the present or past tense are regarded as spoken from the death of testator, not from the making of the will.

A bequest by a testator to his wife of whatever he *had* given her or bought for her use, does not include gifts made after the will. (D. 32, 33, 1.)

A legacy of release to a debtor, as "whatever he owed," does not include sums borrowed after the making of the will. (D. 34, 3, 28, 2.)

3. The conjunction "and" is often read as "or," and conjunctive terms are taken disjunctively.

"If Stichus and Dama, my slaves, be mine at the time of my death, then let Stichus and Dama be free, and have a certain farm to themselves." Stichus was sold or manumitted by the testator. Dama, although verbally conjoined with him, is entitled to his freedom and the bequest. (D. 32, 29, 4; D. 28, 7, 2, 1.)

Gaius Seius is heir for six-twelfths, Lucia Titia for three-twelfths, and others for three-twelfths. The testator charged Gaius Seius and Titia on *their* death to give to Titius and Sempronius one-half of what he left them. Both Gaius and Titia entered, and Gaius died first. Titia must at once give up what is due out of the share of Seius, and on her death what is due out of her own. Here, after *their* death, is read as after the death of each so much is to be given. (D. 36, 1, 78, 7.) But the context might show that the trust was due only on the death of the survivor. (D. 33, 2, 34, pr.)

4. The alternative conjunctions "*aut*," "*vel*," and "*sive*" have often other meanings, even conjunctive.

"I give and bequeath to my wife her ornaments or (*seu*) whatever I have got for her use." Here "or" (*sive*) is equivalent to "and." (D. 34, 2, 30.)

A woman bequeaths lands to her husband on trust, if he had children, to them after his death; if he had none, then to his or (*sive*) her next of kin, or (*aut*) even to their freedmen. This does not give the husband any power of choice, but simply indicates the order in which the classes named shall be entitled to the property. (D. 31, 77, 32.)

"If a son or daughter is born to me, let such be heir; if neither a son nor daughter is born to me, let Seius be heir." If a son and daughter are born, both are heirs, although "or" is used. But the birth of either excludes Seius. (D. 34, 5, 13, 6.)

5. The position of an adjective or adjective clause coming after several substantives may create ambiguity.

A woman made a legacy in these terms: "Quisquis mihi heres erit, Titiae vestim meam, mundum ornamentaque *muliebria* damnas esto dare." The adjective "*muliebria*" was in this instance held to apply to "*ornamenta*" only. (D. 34, 2, 8.)

"Uxori meae vestem, mundum muliebrem, ornamenta omnia, aurum, argentum, *quod ejus causa factum paratumque esset*, omne do lego." The words italicised were held to apply to each substantive, and not merely to aurum and argentum. (D. 32, 100, 2.)

6. Ambiguity from the position of a clause.

"Fundum Seianum heres meus Attio cum Dione Maevii servo dato." Here the slave of Maevius may be either joint-legatee with Attius, or may be himself bequeathed along with the Seian farm. The latter was considered to be the probable meaning of the testator, unless some particular reason existed for his making a legacy to the slave of Maevius. (D. 34, 5, 13, 1.)

7. A doubt often existed whether a condition was not meant to extend to other clauses than that with which it is immediately connected. The answer depended on the nature of the circumstances and on the context.

A testator appointed a *filiusfamilias*, Titius, one of his heirs, unconditionally, and gave a legacy to him, saying in the same will, "As I have appointed Lucius Titius heir, so I wish him to accept the inheritance, if he is released from his father's *potestas*." This condition was held not to apply to the legacy, which, therefore, could be demanded from the co-heirs. (D. 36, 2, 27, pr.)

A testator bequeathed a house to his freedmen, in order that they might dwell in it and keep up his name, and that the longest liver of them should have the whole; and he added this much in addition (*hoc amplius*), "I wish to be given to them the Sosian farm." The bequest of the farm was subject to the same restrictions as the bequest of the house. (D. 35, 1, 108.)

A freedman appointed two heirs equally, his patron and his daughter—as to the daughter on trust, for certain female slaves of the patron, on their manumission; and in default of his daughter, the freedman substituted these female slaves as his heirs. The daughter refused to enter, and these slaves entered by order of the patron as substitutes. Afterwards they were manumitted. Could they claim the half of the freedman's property? Yes, because the substitution was held to be subject to the same condition as the trust, that it was to take effect on their manumission. (D. 31, 83.)

A condition is held to be repeated when it is necessary to the validity of the subsequent legacy.

"Let my heir give Stichus my slave 5 *aurei*; and if Stichus serves my heir for two years, let him be free." Here the legacy of 5 *aurei* would be void if it were to take effect before the slave's freedom. Held, therefore, that it was due, subject to the same condition as the freedom. (D. 32, 30, 2.)

Seius was substituted as heir, and a legacy given him in the event of his not being heir; and also a legacy of 15 *aurei* was given to his wife. Held that the condition —if Seius is not heir—does not apply to his wife. (D. 31, 89, 2; D. 35, 1, 39, pr.)

"Let Stichus, if his accounts are correct, and his wife (*contubernalis*) be free." Stichus died before his accounts were settled. Held that his wife got her freedom

immediately. (D. 35, 1, 81, pr.) Julian states that she got her freedom only if she paid the balance due by Stichus, if any balance was due. (D. 40, 7, 31, 1.)

II. A second great head of ambiguity arises from the testator saying too much.

1. A sum is certain from general terms, but the testator adds precise figures that are not coextensive with the general terms.

A testator bequeathed to his wife 50 *aurei*, the same quantity as he had got with her. The real sum he had got was 40. Held that the figures were the object of the legacy, and the rest mere description. The woman, therefore, was entitled to the full sum named. (D. 33, 4, 6, pr.)

"To Lucius Titius I give and bequeath the three pounds of gold that I was accustomed to allow him in my life." What testatrix really allowed Titius was 40 *aurei* a year, and a certain weight of silver on festive days. Titius may compel the heirs to continue the allowance, although three pounds are mentioned. (D. 33, 1, 19, 2.) In this case precisely the opposite interpretation was adopted, the intention of the testatrix being to continue her allowance.

2. When an accessory is given in the form of a qualifying clause, it does not restrict the extent of the principal gift.

A bequest of all one's slaves, with their *peculium*, includes not merely those that have a *peculium*, but also those that have not. (D. 30, 52.)

A bequest of gold, with the gems and pearls in it, includes the gold that has no pearls or gems in it. (D. 34, 2, 11.)

3. An explanatory clause does not restrict the operative words.

A testator bequeathed certain articles of gold and silver to Seia on trust to give them on her death to certain of his slaves; for, he added, the usufruct of these things in your lifetime will be enough for you. The explanatory clause would make Seia a usufructuary, and so defeat the trust to give the articles to certain slaves; but it was held not to restrict the bequest of the ownership conferred directly before the explanatory clause. (D. 34, 2, 15.) If, however, the operative words had given a usufruct, and the explanatory words had disclosed a trust, the trust would have failed. (D. 7, 5, 12; D. 34, 2, 15; D. 33, 2, 25.)

A testator bequeathed to his freedmen and freedwomen his lands in the Isle of Chios, in order that they might out of the proceeds obtain the allowance of food and clothes he had made to them in his lifetime. Modestinus held that this clause explaining the object of the legacy did not restrict the operative words, and that therefore the freedmen take the land as joint-owners, so that before the legacy vests, the shares of predeceased freedmen vest in the survivors, and after the legacy vests in the heirs of deceased freedmen. (D. 34, 1, 4, pr.)

4. When to the bequest of a class of things the testator adds either sub-classes or individuals, generally the addition is treated as a superfluity, and therefore not restrictive. (D. 33, 10, 9, pr.) But the context may show that the testator added them restrictively.

A testator bequeathed a stocked farm (*fundus instructus*) with the furniture and slaves. These things are included in a legacy of stocked, farm but they do not restrict the words "stocked farm." (D. 33, 7, 12, 46.)

Seia was appointed heir, and if she became heir, a prelegacy was given her of stocked farms, with their bailiffs and the arrears of rents of tenants. Afterwards in *codicilli* he added that he wished Seia to have the farms bequeathed "just as they are stocked," with implements of husbandry, furniture, cattle, bailiffs, the arrears of tenants, and storehouses. It was clear when the testator made the *codicilli* that he had forgotten the will, and in this case the words "*fundus instructus*" were held to cover only the classes of things specially enumerated. (D. 33, 7, 20, pr.)

"My villa, *in the state in which I possessed it*, with the furniture, tables, slaves, both urban and rural, dwelling there, the wines that shall be found there at my death, and 10 *aurei*," were the object of a legacy. Although (*ita ut ipse possedi*) would be equivalent to *domus instructa*, the following words show what the testator meant, and the legacy does not include books, glass vessels, or clothes. (D. 33, 7, 18, 13.)

A testator bequeathed a stocked farm, and to the same legatee certain of the slaves attached to it by name. It was considered that the specific bequest of certain of the slaves showed, in the first place, that the testator did not think slaves were included under the designation "stocked farm;" in the second place, that he nevertheless wished to give the legatee some of the slaves attached to the farm; and in the third place, none except those specially mentioned. (D. 33, 7, 18, 11.)

A testator bequeathed to a legatee specifically two statues of marble, and then "all his marble" (*omne marmor*). There was a difference of opinion among the jurists as to the effect of this bequest. The view adopted by Labeo, Cascellius, Pomponius, and Javolenus, and in the Digest, is, that only the two statues are due, as the words "all marble" must be restricted to those named. Ofilius and Trebatius, whose opinion was overruled, said that all the marble statues, as well as those mentioned, were included in the legacy. (D. 34, 2, 1, pr.; D. 32, 100, 1.)

A legatee was charged to give food to the testator's freedmen, and afterwards the testator said, "To you I commend Prothymus, Polychronius, and Hypatius, that they may live with you, and obtain food from you." This special commendation does not take away the legacy of food from the other freedmen, but is simply a request for special regard to those named. (D. 34, 1, 5.)

A testator bequeathed generally to his freedmen and freedwomen food and house-room. He bequeathed 10 *aurei* to Basilica, one of his freedwomen, to remain at five per cent. interest with two of her freedmen until she was twenty-five, meanwhile the interest to be paid her for aliment. Held that she was not entitled to aliment under the general bequest to the freedwomen. (D. 34, 1, 16, 2.)

A testator gave an annuity, during his life, to Marcus, a man of learning. In his will he charged his wife to see that none of his friends were in want, and, moreover, to give 80 *aurei* to Marcus. Could Marcus, as one of the friends, claim the annuity in addition to the 80 *aurei*? Yes, on account of the supposed liberality of the testator to a learned man, and the smallness of the legacy, which would not have been an equivalent for the amount. (D. 33, 1, 19, 1.)

III. Ambiguity arises when the testator makes several dispositions that cannot be carried out, each in its integrity.

Where two injunctions of a testator are irreconcilable, neither is to be given effect to. (D. 50, 17, 188.) If, however, one of the injunctions is contained in *codicilli* of later date, that one is to be preferred. (C. 6, 42, 19; D. 30, 12, 3.) But in a gift of freedom, that which favours manumission, not that which is later, is preferred. Thus if a slave is ordered to be free, and afterwards bequeathed as property, the bequest is

void (D. 31, 14, pr.), unless a clear intention to revoke the gift of freedom is proved. (D. 40, 4, 10, 1; D. 40, 5, 50.)

"Let Titius, when he can, be *tutor*." "Let Titius be *tutor* if the ship comes from Asia." These conditions were contained in the same document. The latter condition must be fulfilled before Titius is *tutor; i.e.*, not the least onerous, but the most recently written condition, must be fulfilled. (D. 26, 2, 8, 3.)

"I give and bequeath Stichus to Sempronius. If Sempronius shall not manumit Stichus within a year, let the said Stichus be free." Here the legacy to Sempronius is qualified by the subsequent conditional gift of freedom. Sempronius, if he manumits Stichus within the time, becomes patron; but if he does not, Stichus is free under the will, and the testator is his patron. (D. 40, 4, 15.)

"Let Tithasus, if he ascends the Capitol, be heir." "Let Tithasus be heir." The unconditional appointment is preferred to the conditional, from the anxiety of the Roman law to prevent the failure of wills. (D. 28, 5, 67.)

1. When the conflict arises from mistake.

Sempronius Proculus made two counterparts of his will, a usual custom to preserve the will in case of one copy being lost. In one of the two counterparts the amount of legacy written to Titius was 100 *aurei*, in the other 50. Proculus held that the heir deserved most consideration, and that the legatee should take only 50. (D. 31, 47.)

2. When the same thing was bequeathed twice over to the same person, the question was whether it was intended as a repetition of the bequest, or as a double bequest.

When the same thing is bequeathed twice over in the same document from the same heir to the same legatee, the heir owes the thing only once. If it is not a specific thing that is bequeathed, but a sum or quantity, the presumption is the same, although it may be rebutted by clear and convincing evidence of the testator's intention to double the amount. (D. 30, 34, 3.)

When the same sum is bequeathed in the same will from two different heirs to the same legatee, it is held to be due separately from each, unless a contrary intention is proved of the testator. (D. 31, 44, 1.)

When a legacy is given by will, and the same amount afterwards from the same heir in *codicilli*, the burden of proving that the testator did not intend the second legacy to be additional falls on the heir, not on the legatee. (D. 22, 3, 12.)

When the same thing is given in the same will to the same legatee, but from two different heirs, one must give the thing, and the other its value. (D. 30, 53, 2.) But when a farm, part of a *dos*, was bequeathed specifically, and afterwards generally the *dos* to a wife, it was held that the farm was due only once, not twice. (D. 33, 4, 1, 14.)

When different amounts are bequeathed by the same or different instruments to the same legatee, the nature of the legacy is to be considered in determining whether the second is in addition to or in derogation from the first.

A testator freed certain slaves by will, and bequeathed them 10 *aurei* a month for maintenance. Afterwards he bequeathed to all his freedmen 7 *aurei* a month for maintenance, and 10 *aurei* a year for clothes. It was held that the second legacy rescinded the first. (D. 34, 1, 18, pr.)

Paula appointed Callinicus one of her heirs, and bequeathed 10 *aurei* to his daughter Jubentiana on her marriage. In *codicilli* she bequeathed to Callinicus 100 *aurei*, without saying *hoc amplius*. Both legacies, it was held, were due, particularly as nothing was left to his daughter by the *codicilli*. (D. 32, 27, pr.)

3. When the ownership of a thing is bequeathed, and the usufruct of it.

A farm is bequeathed to Titius, and by the same testator the usufruct of it. If the legatee chooses the ownership, the usufruct is included; if he chooses the usufruct, he does not get the ownership. (D. 33, 2, 10.)

A farm is bequeathed to Titius, and the usufruct of it to Gaius. The correct interpretation of this is, that during their lives Titius and Gaius have the usufruct jointly; after the death of Gaius, Titius or his heir is owner. (D. 33, 2, 19.)

4. A bequest may be made to two persons of things by class names, which to a certain extent may cover the same ground.

"I give and bequeath to Titia my weavers, except those I have bequeathed to another by this will. To Plotia I bequeath all the slaves born in my house, except those I have bequeathed to another." Some of the slaves answered the description of both classes; they were weavers, and also born in testator's family. These must be equally divided between Titia and Plotia. (D. 30, 36, pr.; D. 32, 99, 5.

To Titius "clothes" are bequeathed, to Titia "women's clothes." Titius gets clothes after deducting women's clothes. (D. 34, 2, 1, pr.)

To Titius a legacy of provision is given; to Gaius, of wine. Titius gets the provision left by testator, less the wine. (D. 33, 6, 2, pr.)

Stichus is manumitted by will, receiving his *peculium* (which includes a female slave) as a legacy. The testator bequeaths all his female slaves to his wife. Held that this did not include the slave contained in the *peculium*, and it was immaterial which legacy was first mentioned. (D. 33, 8, 15.)

Stichus is manumitted by will, receiving his *peculium* as a legacy. His *peculium* includes, *inter alia*, Pamphilus. Pamphilus is manumitted by will. Held that the gift of freedom should be preferred to the legacy of *peculium*. (D. 40, 4, 10, pr.)

A testator bequeathed to all his freedmen their wives and children, except those he desired to belong to his wife, or bequeathed to her individually. He afterwards bequeathed to his wife certain lands with everything on them, and slaves both rural and urban, and stewards (*actores*), excepting only those manumitted by him. Eros and Stichus managed that property to the time of testator's death (as *actores*). They were children of Dama, who was manumitted by the testator. Do Eros and Stichus therefore go to the testator's wife under the description of *actores*, or to Dama under the description of their children? From a regard to natural affection, it was held that Eros and Stichus should be given to Dama. (D. 32, 41, 2.)

A testatrix manumitted Felicissimus and Felicissima, bequeathing to them the *Fundus Gargilianus*. She bequeathed to her son Titius all that she had got from his

father and uncle. She got the *Fundus Gargilianus* from his father. Could Titius claim it, or part of it? Seeing that nothing was left the two manumitted slaves except this farm, it was held that the general words of the legacy to Titius could not deprive them of the farm specifically bequeathed to them. (D. 32, 41, 3.)

A testator, *inter alia*, manumitted his stewards, and bequeathed their *peculium* to them; to certain of his freedmen he gave legacies, and to all a bequest of food and raiment. After the will a daughter was born him, and in *codicilli* he required all the legacies to abate to the extent of a third in favour of his daughter Petina. It was held that the bequest of food and raiment did not abate, as presumably it was not beyond what was required, and therefore could not suffer abatement. (D. 34, 1, 18, 3.)

BOOK IV.

CIVIL PROCEDURE.

BOOK IV.

LAW OF PROCEDURE.

THE history of Roman Civil Procedure presents a very striking picture of the extremely slow growth of Civil Jurisdiction. In modern times, the right of the State to obedience is in theory unqualified; its absolute sovereignty is recognised as a moral and political axiom. But this authority, so familiar to us that we no more feel inconvenience from its pressure than we do from the weight of the atmosphere, would have received but scant recognition from the men that laid the foundations of Roman greatness. At the time of the XII Tables, the State did not as yet claim to decide civil disputes, although it sanctioned the use of force to bring an alleged wrongdoer before the tribunals. At an earlier period, as we may infer from the peculiarities of the oldest form of legal procedure—the *sacramentum*—even this limited authority was denied. The earliest type of judicial proceedings is a mock combat followed by a reference to arbitration. The first judges were simply arbitrators. Civil jurisdiction sprang out of arbitration. The coercive authority of the State grew out of the voluntary submission of the subject. That is the keynote to the history of Civil Procedure in Rome. The development of this theme occupies the greater portion of the present Book.

PROCEEDINGS IN A CIVIL ACTION.

PART I.—THE SUMMONS. (*In Jus Vocatio.*)

THE first step to be taken by an aggrieved party, is to bring the person of whose conduct he complains before a court of justice. Looking at this subject historically, three epochs are to be distinguished :—

First, the Law of the XII Tables. At this time the summons is a private act of the complainant, and disobedience to the summons is not an offence against the law. The whole length that the XII Tables go to is to legalise the exercise of force by a complainant to drag an unwilling defendant before the court.

Second, The Edicts of the Prætors. The summons is still a private act of the complainant, but disobedience is made a wrong, and the principle is now established that it is the duty of a citizen to be ready to answer in the courts of justice any complaint brought against him.

Third, The Imperial Constitutions. The summons is issued, on the application of a complainant, by officers of a court of justice. This change was also made the means of giving *notice* to the person sued of the wrong alleged to be done by him.

First—Summons according to the XII Tables.

The first of the XII Tables contains the provisions already enumerated. (See p. 17.)

This mode of summons continued down to the golden age of literature and the classical age of jurisprudence, and we find in Plautus, Terence, and Horace examples of the formal summons—*te in jus voco, ambula in jus, in jus eamus, sequere ad tribunal.*

Apparently, by the law of the XII Tables, the defendant, if he were the stronger, or had friends to help him, could resist arrest without exposing himself to any punishment. Moreover, force could be lawfully employed only when witnesses were called to testify to the refusal of the defendant to obey the summons.

A person on being summoned could avoid an immediate resort to the court by giving bail for his appearance. The bail was called *vindex*, and by taking upon himself the responsibility of the defendant, released him from arrest.

"For one of the better classes (*adsidui*), let a man of the better classes be a *vindex;* for a citizen that is a mere workman (*proletarius*), anyone that will." Cicero says *adsiduus* means a wealthy man (Cic. Top. 2, 10); but it is thought by some that *adsiduus* means a person that had land, and *proletarius* a man that had no land of his own.

Second—Edicts of Prætor.

The Prætor left the mode of summons as regulated by the XII Tables, but introduced the following important changes :—

I. He made it an offence for a person duly summoned to refuse to obey. (D. 2, 5, 2, 1.) A person summoned was not allowed to refuse on the ground that the court to which he was summoned had no jurisdiction. That was a plea that could be listened to only before the court itself. (D. 2, 5, 2 ; D. 5, 1, 5.)

II. He made it an offence to rescue a person summoned, or in any manner to cause his escape (D. 2, 7, 4, 2), or even to cause such delay that the complainant lost his action by prescription. (D. 2, 7, 4, pr.) A mere attempt, however, at rescue, if unsuccessful, did not entail a penalty. (D. 2, 7, 5, 2.) The amount of the penalty was the value of plaintiff's claim, as estimated by himself (D. 2, 7, 5, 1), and payment of the penalty still left defendant exposed to the original claim. (D. 2, 7, 6.)

III. In place of the *vindex*, the practice under the Prætorian jurisdiction was to have a *cautio judicio sisti*. This was either the giving of a surety (*fidejussor*), or if the complainant was satisfied therewith, a mere promise of the defendant to appear by stipulation. What was the difference between the *vindex* and the *fidejussor?* We can scarcely answer as to the degree of liability of each, but probably the *vindex* was hampered by restrictions and liabilities that made the introduction of simple sureties an improvement. In one respect we note a difference.

The Prætor ignored the distinction set up by the XII Tables between *adsidui* and *proletarii*, and required any person to be accepted as a surety who had means to answer the defendant's default. (D. 2, 6, 1.) An exception was allowed by the Prætor, in the case of persons connected closely together (*necessarii*). Thus a freedman that summoned a patron, the children or parents of a patron, or a freeman that summoned his own children, or wife, or daughter-in-law, must accept any surety that offered himself. (D. 2, 8, 2, 2.) The surety, in the event of the failure of defendant to appear on the day named before the magistrate, without good excuse (D. 2, 11, 5 ; D. 2, 11, 2, 1 ; D. 2, 11, 4, 2), must pay the value of the claim in dispute, even when it is a penalty of two, three, or four fold (D, 2, 5, 3), unless he has promised only for a particular sum. (D. 2, 8, 2, 5.)

Anyone that by himself or his agents interfered to prevent a defendant appearing in court on the day agreed upon (D. 2, 8, 8), was liable to an action for damages. (D. 2, 10, 1, pr.) The measure of damages is the loss sustained in consequence of the non-appearance of defendant, which might be the whole value of the suit, if it were lost by lapse of time. (D. 2, 10, 3.) An example of the acts so punishable was, if a person spoke an unlucky word, and so deterred the defendant from appearing, even although the blame might seem to rest rather on the defendant's own superstition. (D. 2, 10, 1, 2)

IV. The Prætor enabled a complainant to get justice when the defendant kept out of the way to avoid a summons. There were apparently two reasons why the law of the XII Tables, or rather the primitive law of Rome, did not provide a remedy for this case. In the first place, the attitude of the law was to recognise no litigants until they were actually in the presence and invoked the interference of a magistrate. The utmost length the law went was simply not to punish force, when it was exercised in accordance with the XII Tables, for the purpose of bringing a wrongdoer into court. But, in the second place, it was a characteristic of early Roman procedure, that the tribunals did not attempt to lay hold of anyone's property, but only of their person. Whatever the exact import of this may be, there is no doubt of the fact, that by the original law of Rome no magistrate gave execution against a man's property, but only against his person. The exception (*pignoris capio*) proves the rule. But if a wrongdoer kept out of the way of his adversary, the only remedy open to him was to seize the defendant's property, since he could not get at his person.

It was the Prætor that introduced execution against property. He inserted in his edict a notice to the effect that if a defendant concealed himself to evade a summons (*latitare fraudationis causa*), he would order his goods to be seized and sold. (D. 42, 4, 7, 1; D. 42, 4, 7, 13.) The concealment must be for some time. (D. 42, 4, 7, 8.)

V. Last of all, the edicts of the Prætor specify the cases where a summons could not be served.

1. Persons that cannot be summoned.

(1.) Lastly, we must know that he that summons another to court can carry through the affair by force, and drag thither him that has been summoned. By the Prætor's edict, therefore, the persons to whom deference is due (ascendants, for instance, a patron, and a patron's descendants or

ascendants) one may not lawfully summon to court without the Prætor's leave. Against him that acts contrary to this there is a fixed penalty. (G. 4, 183.)

In beginning any action, the first step proceeds from that part of the edict in which the Prætor treats of the summons to court. The first thing, indeed, is to summon your adversary to court, before the magistrate in other words that is, to lay down the law (*jus dicere*). In that part of the edict the Prætor pays such honour to ascendants and patrons, as also to patrons' and patronesses' ascendants and descendants, that their descendants and freedmen cannot lawfully summon them to court, unless they have first asked and obtained leave from the Prætor himself. If without this any one takes out a summons, the Prætor has fixed the penalty to be inflicted upon him at 50 *solidi*. (J. 4, 16, 3.)

(2.) No magistrate having the *imperium* could be summoned. (D. 2, 4, 2.) So neither they nor their dependants nor freedmen could sue on contracts; but in the case of delicts, they were allowed to sue up to the *litis contestatio*, but no further. (D. 1, 18, 16.)

(3.) Women could be summoned, but no force could be used to compel them to go into court. (C. 1, 18, 1.)

2. No man can be summoned while inside his house; but if he allows the complainant to enter, or shows himself so as to be seen from the public street, he may be summoned; but in no case can the complainant drag him out of his own house. (D. 2, 4, 19; D. 2, 4, 21; D. 50, 17, 103.) Cicero thus expresses the Roman feeling on the subject:—"What is there more hallowed, what more fortified by every sense of duty, than each citizen's home? Here are his altars, here his hearths, here his household gods; here his sacred things, his worships, his ceremonies are all contained. This refuge is so hallowed by all, that to force away any man thence is impious." (Cic. Pro. Domo. 41.)

3. A priest in the act of worship, a bridegroom during the performance of marriage, a *judex* hearing a cause, a person pleading before a Prætor, one performing funeral-rites for a parent (D. 2, 4, 2), or following a dead body (D. 2, 4, 3), or whose presence is required in a Court of Justice (D. 2, 4, 4), cannot be summoned.

Third—The Summons under the Imperial Constitutions.

When the Prætor made a neglect, or refusal to obey a summons an actionable wrong, there was no longer any necessity to drag a defendant by the neck (*obtorto collo*). Still the summons remained a private act of the aggrieved person. It would

appear that the further development of procedure in the direction of a public summons took place by the following steps:— The ancient practice of oral summons, followed by the acceptance of a *vindex*, seems to have given way in favour of a mode that may be described as a reciprocal promise of two persons having a dispute, with or without sureties, to appear on a given day before a magistrate. This was called *vadimonium*. The terms *vades* and *subvades* are said to have been contained in the XII Tables, and they have been interpreted thus: *vades*, the sureties given by defendants; *subvades*, the corresponding sureties given by complainants; for obviously it was the interest of the defendant to compel the complainant to appear, lest he should lose his time by going to the court. Gaius describes *vadimonia* as the means of securing the reappearance of parties in court after their first appearance; and it is possible that the fairness of a plan that provided for the appearance of both parties led to its use in the preliminary stage of the summons, and to the disuse of the one-sided course of giving a *vindex*. At all events, by the end of the Republic, *vadimonia* seem to have been a regular way of beginning a civil suit.

From a somewhat obscure passage in Aurel. Victor. (de Caesar, 16) we may gather that the old *vadimonia* were abolished by Marcus Antoninus, and a new system (*denuntiandae litis*) introduced. This was a step in the direction of simplicity. The complainant simply gave notice of his demand to the defendant, and a day was fixed for appearance. Probably the non-appearance of the complainant made a forfeiture of the claim, and the non-appearance of defendant doubtless entailed some penalty.

Constantine (A.D. 322) required the *denuntiatio litis* to take place before a judge (C. Th. 2, 4, 2), and notice of the demand was sent to the defendant by a public officer. (C. Th. 2, 4, 4.) A defendant wilfully disobeying the summons could be fined. The *denuntiatio litis* was probably a very formal proceeding, and like all such, liable to miscarry. It disappeared before the practice, which was fully established by the time of Justinian, of a written summons (*Libellus Conventionis*).

If a passage in a constitution of Diocletian and Maximian (C. 2, 2, 4) has not been altered by Trebonian, in accordance with a practice not unusual with him, the written summons (*libellus conventionis*) was already known in their day. Apparently the summons contained a precise statement of the

demand of the complainant, signed by himself, and requiring an answer in five days. (Vet. cujusd. Jur. Consult. 6, 2.) The period afterwards was ten days, extended by Justinian to twenty. (Nov. 53, 3, 1.) Justinian ordered that the complainant, if his claim were substantially just, should not be defeated because it varied from the grounds set forth in the summons. (C. 7, 40, 3.) The officers that served the summons were paid according to the amount of the demand.

An action for thrice the amount lies when a man has inserted a greater amount than the true one in the writ of summons, so that on this ground the *viatores*—that is, those that carry out the suits—exacted a larger sum on account of their customary doles (*Sportulæ*). Then for all the loss the defendant has suffered by reason of them he will obtain thrice as much from the plaintiff; only the thrice as much includes the simple loss he has suffered. This was brought in by a constitution of ours that shines brightly in our Code; from which it is far from doubtful that an *actio condictitia* under the statute will flow. (J. 4, 6, 24.)

This is the *condictio ex lege* which could be brought to enforce any statutory prohibition or order.

Justinian empowered the judge to refuse the summons unless the complainant gave security to prosecute the suit, or to pay one-tenth of the demand as costs to the defendant. (Nov. 112, 2.) Another enactment required complainants that have taken out a summons to proceed within two months, or pay double the loss sustained by the defendants in consequence of the delay. Thus the summons advanced from the rude form of a legalised use of force, through various intermediate stages, in which Prætors, Jurisconsults, and Emperors took part, until at length, in the reign of Justinian, it became an act of public authority, and gave the defendant formal notice of the claim made against him.

PART II.—FROM APPEARANCE TILL JUDGMENT.

First Period—COMPULSORY REFERENCE TO ARBITRATION.

First—PROCEEDINGS *IN JURE*.

A. *Legis Actiones.*

The oldest form of civil procedure in Rome—the *legis actio sacramenti*—professes to be a voluntary arbitration. It was not really voluntary; for if it were so, there could be no civil

jurisdiction; but there can be little doubt that what it was in later times in form, it was in earlier times in substance. The authority of the State in civil matters was first established when a defendant was not allowed to refuse arbitration; in other words, when the reference to arbitration was made compulsory. Such indeed appears to be the true character of the famous distinction in Roman civil procedure that existed throughout the most important period of legal history and coloured the whole law—that, namely, between proceedings *in jure* and proceedings *in judicio*. With few exceptions (see "Transition to *Cognitiones Extraordinariae*"), until the reign of Diocletian, the determination of a civil dispute involved two stages—in the first (*in jure*), the Prætor or other magistrate appointed an arbitrator, prescribing with more or less rigidity the question upon which he was to pronounce a decision; and in the second (*in judicio*), the arbitration itself took place before an arbitrator (*judex*). This division of labour, which some modern writers have shown a disposition to exalt as a highly scientific arrangement, but which may be viewed rather as an imperfect and inchoate form of civil procedure, lasted until the reign of Diocletian, who made the immense change of committing the trial of civil causes to State-paid lawyers. This step was in harmony with the whole course of development of Roman civil procedure; it was one of the steps by which the State assumed to itself the exclusive control from first to last of civil causes.

The proceedings *in jure* passed through two stages: in the earlier, the reference to arbitration was ORAL; in the latter, WRITTEN. To the first stage belong the *legis actiones;* to the second, the *formulae*. The interest of the first is purely historical; the interest of the second is more practical: to the *formula* must be traced the shape and peculiarities of much of Roman law. The phrase "*legis actio*" has given rise to much comment, for it is employed by Gaius to designate not merely proceedings that may strictly be called "actions," but proceedings to enforce judgments (*per manus injectionem*), and even proceedings of the nature of a wholly extrajudicial remedy (*pignoris capio*).

The actions the ancients had in use were called *legis actiones*, either because they were laid down by statutes, since the Prætor's edicts, by which many actions were brought in they had not yet in use, or because they were suited to the words of the actual statutes, and were therefore

observed as unchangeable equally with statutes. Hence, when a man brought an action for his vines that had been cut down in such a way that he named them vines, the answer was that he had lost his case, for he ought to have named them trees; because the statute of the XII Tables, under which an action for vines that had been cut down was open to him, spoke generally of trees that had been cut down. (G. 4, 11.)

Of the *legis actio* there were five forms,—*Sacramento* (by wager) *per judicis postulationem* (by demanding a *judex*), *per condictionem* (by formal notice), *per manus injectionem* (by laying hands on a man), and *per pignoris capionem* (by taking a pledge). (G. 4, 12.)

But all these *legis actiones* by degrees grew hateful. For the excessive subtlety of the ancients who then established the laws brought things to such a pass, that a man that made even the most trifling mistake would lose his suit. By the *lex Aebutia*, therefore, and the *leges Juliae*, these *legis actiones* were taken away, and a change effected so that we should carry on our suits by regularly-framed words, that is, by *formulae*. (G. 4, 30.) (P. 39.)

In two cases only was *legis actio* allowed—in the cases of threatened damage (*damnum infectum*) and of a trial before the *Centumviri*. Accordingly, even to this day, when a trial is to be before the *Centumviri*, the proceedings begin with the *legis actio*, called *sacramentum*, before the *Prætor Urbanus* (City Prætor) or *Peregrinus*. But as for threatened damage, no one wishes to proceed by a *legis actio*, but rather binds his adversary by a stipulation, as is set forth in the edict; and thus has a more advantageous and fuller right than by *pignoris capio*. (G. 4, 31).

Actio Sacramenti.

The proceedings in the *Sacramentum* took place before the Prætor. There remains a tradition that the *legis actiones* were celebrated in the presence of the Pontiffs (*collegium Pontificum*) (D. 1, 2, 2, 6); but within the historic period the initiation of actions belonged to the secular tribunal, first of the Consuls, and afterwards of the Prætors. Festus informs us that the word signifies the money staked as a wager, which was the cardinal feature of the proceedings; and he adds that the stakes forfeited were required and used for the bronze of the vessels employed in sacred rites.

The *actio sacramenti* was general, for in all cases for which no other action was provided by statute, an action *sacramenti* was brought. The action was as dangerous on account of an untrue oath, as at this time is the action for a fixed sum of money lent because of the *sponsio* (undertaking), in which the defendant runs a risk if he rashly denies it, and because of the answering stipulation (*restipulatio*), in which the plaintiff runs a risk if what he demands is not due. The man that was beaten made good the amount of the *sacramentum* by way of a penalty. It went to the State, and securities on that account were given to the Prætor; not as now, when the penalty of the *sponsio* and answering stipulation goes as gain to the party that wins. (G. 4, 13.)

The penalty was either fifty *asses* or five hundred; the latter in the case of

things worth a thousand *asses* or more, the former in the case of those worth less, when the action was brought *sacramento*. So the statute of the XII Tables provided. But if a man's freedom was in dispute, although as a slave he would be most valuable, yet the amount to be wagered was fixed at fifty *asses*, a provision of the same statute to favour the coming forward of persons to claim his freedom. . . . (G. 4, 14.)

I. Proceedings when the dispute was concerning the ownership of a moveable.

If the action was for a thing, then moveables and moving things, if only they were such that they could be brought or led into Court, were claimed in Court (*in jure vindicabantur*) after this fashion. The claimant held a rod; then he grasped the actual thing—the slave, for instance—and said as follows: —"This slave I say is mine *ex jure Quiritium*, in accordance with the fitting ground therefor, as I have stated; and so upon thee I have laid this wand," and at the same time laid the rod on the slave.[1] The opposing party said and did the same in like manner. After both had claimed him, the Prætor said, "Both let go the slave;" they let him go. The one that first had claimed him then asked the other, "I demand that you tell me on what ground you have claimed him;" and he answered, "I fully told my right as I laid on the wand." Then the one that first had claimed him said, "Since you have claimed him wrongfully (*injuria*), I challenge you to wager five hundred *asses*;" and the opposing party too said, "In like manner I challenge thee;" or else they named fifty *asses* as the wager. Next followed all the same as in an action against the person. Thereafter the Prætor gave an interim decision (*vindiciae*) in favour of one of them—made him, that is, the possessor in the meantime, and ordered him to give sureties to his opponent (*praedes litis et vindiciarum*), for the thing, that is, and its fruits. Other sureties also the Prætor himself used to receive from both parties for the sum wagered, which went to the State. A rod they used as if in place of a spear, a token of lawful ownership; because men used to believe those things specially theirs that they had taken from the enemy. Hence, in proceedings before the *Centumviri*, a spear is set up in front. (G. 4, 16.)

This very vivid description of the oldest civil procedure in Rome has been fortunately preserved to us from a part of the MS. of Gaius, where much is illegible. We may recognise in the proceedings as thus described several stages, of which three are stated at length.

1. The proceedings begin with a mock contest, each of the claimants laying hold of the object in dispute and claiming it. This is known as the *consertio manuum* or *vindicatio;* and the exercise of force is called by Aulus Gellius *vis civilis et festucaria.*

2. Summons to peace—"Both let go."

3. Each challenges the other to stake a sum upon the truth of his assertion.

4. After that the Prætor decides which shall have the possession of the disputed

[1] Hunc ego hominem ex jure Quiritium meum esse aio secundum suam causam, sicut dixi; ecce tibi, vindictam imposui . . . mittite ambo hominem . . . Postulo anne dicas qua ex causa vindicaveris. . . Jus feci sicut vindictam imposui. Quando tu injuria vindicavisti, D æris sacramento te provoco . . . et ego te.

property, pending the settlement of the wager by reference to a *judex*. The technical phrase is *dicere vindicias*. Up to this point there is not strictly either plaintiff or defendant; there are simply two persons quarrelling; but after the Prætor assigns intermediate possession to one of them, that one is practically made defendant, and his rival is forced into the position of plaintiff. But the person constituted possessor was bound to give sureties for the restoration of the object in dispute (*lis*), and also for the profits derived from it pending the trial (*vindiciae*), in the event of his losing his wager. The sureties were called *praedes*, and seem to have been appointed in the presence of the Prætor by oral interrogation, as in the judicial stipulation. (Varro, De Latina Lingua, 6, 74.) They were called *praedes litis et vindiciarum*.

5. The question referred to an arbitrator was, which litigant was right in his wager, *Sacramentum esse justum vel injustum*. It is presumed that the successful litigant then applied for the restoration of his stake, and if he had not possession, and was refused possession, that the Prætor would grant execution, and compel the possessor to deliver up that which was no longer *his*.

"It is impossible," says Sir Henry Maine (Ancient Law, p. 376, 4th edit.), "I think, to refuse assent to the suggestion of those who see in it a dramatisation of the origin of Justice. Two armed men are wrangling about some disputed property. The Prætor, *vir pietate gravis*, happens to be going by, and interposes to stop the contest. The disputants state their case to him, and agree that he shall arbitrate between them, it being arranged that the loser, besides resigning the subject of the quarrel, shall pay a sum of money to the umpire as remuneration for his trouble and loss of time. This interpretation would be less plausible than it is, were it not that, by a surprising coincidence, the ceremony described by Gaius as the imperative course of proceeding in a *Legis Actio* is substantially the same with one of the two subjects which the god Hephaestus is described by Homer as moulding into the First Compartment of the Shield of Achilles. In the Homeric trial-scene, the dispute, as if expressly intended to bring out the characteristics of primitive society, is not about property, but about the composition for a homicide. One person asserts that he has paid it, the other that he has never received it. The point of detail, however, which stamps the picture as the counterpart of archaic Roman practice, is the reward designed for the judges. Two talents of gold lie in the middle, to be given to him who shall explain the grounds of decision most to the satisfaction of the audience. The magnitude of the sum, as compared with the trifling amount of the *Sacramentum*, seems to me indicative of the difference between fluctuating usage and usage consolidated into law. The scene introduced by the poet as a striking and characteristic, but still only occasional, feature of city life in the heroic age, has stiffened, at the opening of the history of civil process into the regular, ordinary formalities of a lawsuit. It is natural, therefore, that in the *Legis Actio* the remuneration of the judge should be reduced to a reasonable sum, and that, instead of being adjudged to one of a number of arbitrators by popular acclamation, it should be paid, as a matter of course, to the State which the Prætor represents. But that the incidents described so vividly by Homer, and by Gaius with even more than the usual crudity of technical language, have substantially the same meaning, I cannot doubt; and in confirmation of this view, it may be added, that many observers of the earliest judicial usages of modern Europe have remarked that the fines inflicted by courts on offenders were originally *Sacramenta*. The State did not take from the defendant a composition for any wrong supposed to be done to itself, but claimed a share in the compensation awarded to the plaintiff simply as the fair price of its time and trouble. Mr Kemble expressly assigns this character to the Anglo-Saxon *bannum* or *fredum*."

II. Dispute as to ownership of an immoveable.

If a thing was such that it could not easily be brought or led into court—

if, for instance, it was a pillar, or a flock of cattle of any kind—some part of it was taken ; and to that part, as if it were the whole that was present, the claim was made. Out of a flock, therefore, one sheep or one goat was led into court, or a tuft of wool was taken from it and brought into court. Of a ship or a pillar some part was broken off. In like manner, too, if it was a farm, or a house, or an inheritance that was in dispute, some part of it was taken and brought into court, and to that part, just as if it were the whole thing that was present, the claim was made. From a farm, for instance, a clod was taken ; from a house a tile ; and if the dispute was about an inheritance, then from it equally a thing or some part of a thing was taken. (G. 4, 17.)

The idea of the *sacramentum* seems to be that the arbitration is taken up on the very spot where the quarrel arises. Hence either the judge must be taken to the land, or the land to the judge. The latter was done symbolically, and the process was technically called *deductio*. The form given by Gaius is fictitious, but in Cicero we have an account of a customary beginning (*deductio quae moribus fit*), where the parties go to the land in dispute, and there, in the presence of witnesses, make a mock combat. The Prætor in that sketch does not accompany the disputants, but the witnesses go before him to testify to the initial steps. It is not improbable that there was a still earlier age, when the Prætor himself accompanied the parties, and took part in the ceremony, which was regarded as the indispensable basis of his jurisdiction.

III. In actions in *personam.*

Upon this part Gaius is a blank, and we do not know in what manner the details of the *sacramentum* were adjusted to claims for debt or damage.

Actio per judicis postulationem.

The passage where Gaius describes this action is illegible, and the meaning of it is purely conjectural. When it was first introduced is unknown, but many infer from some expressions in the XII Tables that it existed at that time. In questions of disputed boundaries, of partition of inheritance, or of any other joint property, it is difficult to see by what straining the form of the *sacramentum* could have been employed. That proceeding led up to the question, "Am I right in saying that such and such is mine?" But the partition of a joint-estate could not be thrown into the form of so simple a question. It is therefore not improbable that the action *per judicis postulationem* may have been introduced to meet these more complex cases of doubtful right, but in the absence of information by Gaius, the suggestion must remain as a mere guess.

Condictio.

Condicere is to give formal notice (*denuntiare*) in early speech. But now by an abuse of terms we say that a *condictio* is an action against a person, in which the plaintiff alleges in his statement of claim that so-and-so ought to be given him. For no formal notice on that account is now given. (J. 4, 6, 15.)

. . . When they ought to attend to have a *judex* appointed. For *condicere* in early speech is to give formal notice. (G. 4, 17 A.)

This action was properly called a *condictio;* for the plaintiff gave formal notice to his opponent to be present to choose a *judex* on the thirtieth day. But now improperly we give the name of *condictio* to an action against a person in which our statement of claim is that so-and-so ought to be given us. For no formal notice on that account is now given. This *legis actio* was established by the *lex Silia* and the *lex Calpurnia*—by the *lex Silia* for a determinate sum of money, by the *lex Calpurnia* for every determinate thing. Why this action should be wanted, when we can bring an action for what ought to be given us *sacramento* or *per judicis postulationem*, is much questioned. (G. 4, 18-20.)

As to the *lex Silia* and the *lex Calpurnia*, see p. 62.

The use of the *Condictio* was a puzzle to Gaius, and it has continued to perplex modern writers.

Some authors think that the process by *sacramentum* took place before the Pontiffs, and that *condictio* was the first process allowed before a secular magistrate. Others suggest that it was intended to relieve the *centumviri* by relegating minor causes to a single *judex;* but, in truth, guesses of this sort are of little value. The views of Sir Henry Maine will be found at p. 256 of "Early History of Institutions." See the remarks at p. 37 of this book.

General Characteristics of the System of *Legis Actiones.*

1. The proceedings called *legis actiones* could be conducted only between Roman citizens; aliens, unless by special favour (as some Latins), could neither sue nor be sued.

2. The parties could not appear in the formalities of the *legis actiones* by agents or procurators, but must themselves perform the ceremonies. This is another characteristic of the old *jus civile*, the refusal to allow one freeman to represent another in a legal transaction.

In old times [as long as the *legis actiones* were used] no one could lawfully bring an action on another's account, except on behalf of the people or of freedom, or for a *pupillus*. The *lex Hostilia*, besides, allowed an action for theft to be brought on account of persons that were among the enemy, or away in the service of the commonwealth, or that were in the *tutela* of some person bringing the action. (J. 4, 10, pr.; G. 4, 82.)

3. The system was marked by a rigorous pedantry, in which form was everything, and substantial justice nothing.

4. Again, once an action was commenced, the claim was extinguished. (G. 4, 108.) See *postea*, *Litis Contestatio.*

B. The System of *Formulae*

Transition from the *Legis Actiones* to *Formulae.*

The defects of the *legis actiones* were serious. In the first place, only a Roman citizen could take part in them; aliens dwelling in Rome were wholly shut off. But even for citizens the system was objectionable. It required the actual presence of the parties; no attorney or agent was admitted; and the slightest error in the ceremonial vitiated the whole proceedings. As a mode of civil procedure, the *legis actiones* were cumbrous, troublesome and dangerous.

It would be interesting to know the exact steps by which the Romans advanced from their first rude forms of procedure to the written *formulae* of the golden age of Roman jurisprudence. Already among the *legis actiones* themselves an advance may be observed. The *condictio* is distinctly preferable to the *actio sacramenti.* It is simpler, for it begins at once with reciprocal wagers, and it introduces *costs*, for the sums wagered went to the party that won. Whether the *condictio* was introduced, as the language of Gaius implies, by statute, or whether, as Sir Henry Maine states, it was only regulated by the *leges Silia* and *Calpurnia*, it was simpler, and better adapted to the ends of Civil Procedure, than the *sacramentum.*

But the *condictio*, nevertheless, had all the faults of a *legis actio*—the faults of inelasticity and formalism; and it required the actual presence of the parties. The further development of Roman procedure was determined by a cause whose influence on other departments of the law has been already dwelt upon. The system of *formulae* seems to have owed its origin to the necessity the Prætors were under of devising a method of civil trial for aliens (*peregrini*). In the *legis actio*, the peculiar heritage of the Quirites, an alien had no part. But the Romans were under an absolute necessity of providing a means of determining disputes in which an alien was a party. So numerous, indeed, appear to have been the occasions on which aliens were concerned in civil cases, that the new Prætor appointed B.C. 247 was specially named *Prætor Peregrinus.* To an alien the forms of the *legis actio* were inapplicable, but the Prætor, in modifying the Roman procedure to adapt it to aliens, naturally followed

the essential features of the Roman system. Thus he did not undertake to hear and decide causes himself; he referred them to arbitrators. But these were not the Roman *judices*—the senators of Rome; they were any persons upon whom the parties agreed, generally three or five in number, and called *recuperatores*. Again, as in the *legis actiones*, the Prætor elicited from the parties the question in controversy between them; but instead of wrapping this up in the rigid forms of the *jus civile*, he was content to make out a plain written instruction to the arbitrators, informing them if they found the fact to be so-and-so, they should order the defendant to pay so-and-so. This was the essential character of the *formula in factum;* it contained no positive assertion of any right in the plaintiff, but proceeded at once from a recital of the facts constituting the complaint, to give the arbitrators power to award damages. By a very simple and ingenious variation of the *formula*, it was possible to admit an agent or attorney either for the plaintiff or the defendant. Thus, "If Dio has received in deposit a golden vase of Agerius, and refuses to give it up, let the *recuperatores* order Dio to pay to Negidius the value of the vase." By introducing the name of the attorney Negidius, Agerius was relieved from all trouble in connection with the proceedings.

In ascribing the origin of the written *formula* to the necessity of providing for aliens, there is an element of conjecture. The introduction of *formulae* took place so long before the very earliest of the legal writings that have come down to us, that we cannot affirm with certainty a precise correspondence between the steps just indicated and the actual march of events. But the facts that we do know make it certain that the account cannot be far wrong.

The next step in the history is the introduction of *formulae* in civil causes between citizens. That may have been the object of the *lex Aebutia*. At all events, there can be little temerity in hazarding the assertion that *formulae* were brought in for citizens first in the case of *actiones in personam*, and that a very considerable interval elapsed before they were allowed in *actiones in rem*. Whether this interval corresponds with the distance between the *lex Aebutia* and the *leges Juliae* is a matter of conjecture. But there is no doubt that the first *formula* admitted in causes between citizens was a simplification of the *Condictio*, which in turn may be viewed as a modification of the *sacramentum*. The cardinal difference

between them was the omission of the reciprocal wagers that formed an indispensable preliminary to the *condictio.*

The steps by which the *formula* was adapted to actions for property can be traced with certainty. In the *sacramentum*, it is worthy of remark, the question finally submitted for trial is not which of the claimants is owner of the thing in dispute, but which is right in his wager (*sacramentum esse justum vel injustum*). The question is of the truth of an assertion, not of the justice of a demand. The distinction may seem trivial, because practically the loss of the wager meant the loss of the ownership, but it is just trivial distinctions like these that are important in the history of law. The slightness of the circumstance attests the reluctance, so to speak, of the State to interfere in private quarrels. It marks the stage where the State does not yet assert a claim to civil jurisdiction.

From the *sacramentum* is but one step to trial by *sponsio* or wager.

In a *sponsio* we proceed thus. We challenge the opposite party by a *sponsio* such as this,—"If the slave in dispute is mine *ex jure Quiritium*, do you undertake (*spondes*) to give me twenty-five *sestertii?*" Next we put forth a *formula*, in which the statement of claim is that the amount thus undertaken for ought to be given us; and in this we win if we prove that the thing is ours. (G. 4, 93.)

This sum named in the undertaking is not, however, exacted. It is indeed not penal, but a preliminary to the proceedings, and its whole use is to bring the case to trial. Hence, too, the man against whom the action is makes no stipulation in turn. Further, it is named the stipulation *pro praede litis et vindiciarum* (in room of a surety for the object and its interim enjoyment), because it has come into the place of the sureties that in old times, when the *legis actio* was used, were given by the possessor to the claimant *pro lite et vindiciis:* that is, for the thing and its fruits. (G. 4, 94.)

But if the action is before the *centumviri*, we claim the amount of the undertaking, not by a *formula*, but by a *legis actio*, for we challenge the defendant *sacramento.* That undertaking is for 125 *sestertii*, because of the *lex Creperia.* (G. 4, 95.)

This account by Gaius is highly instructive. It is to be remarked that the sum of the wager is nominal; and the wager itself is introduced simply to give jurisdiction. Now in the *condictio* the wager was for a substantial sum—one-third of the amount claimed (G. 4, 171); and in the case of Interdicts and the *actio de pecunia constituta*, the Prætor, while adopting the procedure of the *condictio*, made the sum of the wager sufficiently serious to act as a penalty. (G. 4, 168.) Again, the question referred to a *judex* is not the mere truth of an

assertion, but whether the plaintiff has a right to twenty-five *sestertii*. It is a step in advance when the *judex* decides a question of legal right, although it is not the right in dispute. The recovery of property was accomplished by an action that in form was *in personam*.

In the third stage, the fiction of a wager is dropped, and the right of the plaintiff is submitted directly for the judgment of the *judex*. It is at this point for the first time we reach a true *actio in rem*.

An action for a thing is twofold; for it can be brought either by a *formula petitoria* or by a *sponsio*. If, then, it is brought by a *formula petitoria*, the stipulation called *judicatum solvi* (that what the *judex* awards shall be paid) finds a place; but if by a *sponsio*, that which is called *pro praede litis et vindiciarum*. A *petitoria formula* is one in which the plaintiff alleges in his statement of claim (*intentio*) that the thing is his. (G. 4, 91-92.)

Examples of the *petitoria formula* will presently be given; at this point it is enough to mark its general character. There would seem to be little doubt that the three stages marked by the terms *sacramentum*, *sponsio*, and *petitoria formula* followed each other in historical order. In stating the procedure that could be followed in suing for an inheritance, Cicero mentions the *legis actio*, and as an alternative the *sponsio* with its special sureties (*pro praede litis et vindiciarum*), but he does not mention the *petitoria formula*. (Cic. in Verr. 2, 1, 45.) In the time of Gaius, however, an inheritance could be recovered by the *formula petitoria*. (D. 5, 3, 3; D. 5, 3, 10.) *Formulae* appear to have been applied to actions for inheritance later than the *petitoria formula* to the recovery of property, for, of this latter, instances are given by Cicero.

(A.) The *Formula* in an *Actio*.

I. Proceedings to obtain a *formula*.

It was a peculiarity of the Roman summons, during the Republic, that the plaintiff was not required to state his demand until he had the defendant in the presence of the Prætor. The first proceeding before the Prætor was to announce to defendant the particular *formula* that he thought suitable to his case. This was called *editio actionis*. (D. 2, 13, 1, pr.) This statement did not conclusively bind the plaintiff, who could vary his claim up to the time that he got his *formula*. (C. 2, 1, 3.) The formal request presented to the Prætor was called *postulatio actionis*. (D. 3, 1, 1, 2.)

At this stage the only defence open to the defendant was such an objection as did not rest on a denial of any of the facts alleged by the plaintiff. If the dispute between the parties involved a mere question of law, and not of fact, there was no necessity to refer the case to a *judex;* and the Prætor, having stated the law, could give effect to it by the exercise of his

authority. But if the dispute involved a controversy as to any facts as well as law, the Prætor gave a *judex*, and specified in writing the question he was to try, and the nature of the judgment he could pronounce. When the *formula* was given, the proceedings before the Prætor terminated. It was this point in the proceedings that was called the *litis contestatio*.

Litis contestatio.—In the course of a litigation, however short, events may alter the position of the parties with reference to the subject-matter of the lawsuit. Thus, if the question is one of possession, the defendant may lose the possession before judgment is given. Again, the time of prescription may expire. It may thus happen that according to the facts as they existed when defendant was first summoned, a judgment ought to be given for the plaintiff; but according to the facts as they are found to exist at the time when judgment is given, the judgment ought to be for the defendant. From which time should the judgment speak? The fair rule is that a plaintiff should not be prejudiced by what may occur pending the course of the lawsuit. For the purpose of judgment, the facts upon which the decision proceeds should be the facts as they existed at the time when the lawsuit began.

But at what moment may a lawsuit be said to begin? Naturally, in a mature system of civil procedure, it is the issue of the summons. The summons is the first step and commencement of the suit. But a Roman action was not regarded as beginning with the summons. It began, speaking of the period under review, only when the *formula* or written reference was made out by the Prætor. The commencement of the action—the *litis contestatio*—was thus the last act that occurred *in jure*. (D. 5, 1, 39, pr; D. 5, 1, 28, 4.) This rule, apparently so unfair and capricious, is characteristic of the mode in which the Roman civil procedure grew up. At first the State gave a complainant no help in bringing a defendant into court. It sanctioned the use of force by complainants, but it did nothing more. At this stage the beginning of an action could not be taken as earlier than the first, which would often also be the last appearance of the parties before the Prætor. But that is not all. A careful examination of the proceedings in the *sacramentum* explains why the last and not the first appearance of the parties before the Prætor should have been taken as the real commencement of the action. It was only after the stakes were laid that the Prætor decided to which of the combatants

he would assign the possession of the disputed property, pending the result of the trial. That being done, the way was clear for the appointment of a *judex* to determine which of the parties had falsely claimed the ownership. It is the appointment of a *judex* to try the question that forms the turning-point. Up to this time there are simply two private individuals quarrelling; now the State intervenes, commands peace, and provides for the settlement of the dispute. There is no longer a private quarrel; there is a lawsuit. Witnesses are conveyed before the Prætor, who go before the referee and testify, in case of dispute, to the exact terms of the reference. Hence the name *contestari litem.*

The meaning of the *litis contestatio* thus becomes intelligible for the period of the *legis actiones.* But it may be urged that under the subsequent system of written references (*formulae*) the summons ought to have been taken as the commencement of the action. Logically, no doubt it was so; but the transition from the earlier system was so gradual, and indeed to some extent the two systems went on so long side by side, that we need not be surprised that under the system of *formulae* it was still the last act *in jure*, the drawing up of the written reference to arbitration (*formula*) that was deemed the starting-point of the litigation.

ADJOURNMENTS.—Another significant indication of the voluntary origin of Roman jurisdiction is that originally, if a complaint was not finished at one sitting, the Prætor, it seems, had no power to compel the reappearance of the defendant. The plaintiff had no resource but again to summon and drag back the defendant. The first assertion of authority by the Prætor indicates the feebleness of the State. He does not assume the right to call back the defendant, but he makes him promise to come back, so that if he fails, he breaks rather a free promise of his own than the command of the Prætor.

When the opposing party has been summoned to court, unless the business is ended that day he must enter into recognisances (*vadimonia*); that is, promise that he shall present himself on a fixed day. (G. 4, 184.)

Recognisances are entered into in some cases simply—that is, without giving sureties; in some cases with sureties; in some cases with an oath; sometimes with the further addition of *recuperatores*—that is, that if he does not present himself he shall forthwith be condemned by the *recuperatores* in the amount of the recognisance. This is diligently pointed out case by case in the Prætor's edict. (G. 4, 185.)

In the case of an *actio judicati* or *actio depensi*, the recognisance

required will be for the amount thereof. But if it is on any other ground, the recognisance to be promised will be for the amount the plaintiff, after being sworn not to trump up a case (*non calumniae causa*), demands; provided, however, it is not to be more than half the value, nor more than one hundred thousand *sestertii*. If, therefore, the case is for a hundred thousand *sestertii*, and is not an action for money awarded by a *judex* or actually paid out, the recognisance to be given will be for not more than fifty thousand *sestertii*. (G. 4, 186.)

For meaning of *actio depensi*, see p. 570.

The persons, further, that without the Prætor's leave we cannot with impunity summon to court, we cannot bring under obligation to us in recognisances against their will, unless we go to the Prætor and he allows it. (G. 4, 187.)

II. *Formulae in factum conceptae.*

The *formula in jus concepta* contained an express assertion of the duty of the defendant (*i.e.*, the right of plaintiff); the *formula in factum concepta* merely stated the facts that justified an award, and specified, either generally or with limitations, the amount of the award.

Those *formulae* in which a right is stated we call *in jus conceptae* (framed so as to state a right). Such are those in which our statement of claim is that something is ours *ex jure Quiritium*, or ought to be given us, or that the defendant ought to settle with us for loss he has inflicted as a thief. In these the statement of claim (*intentio*) belongs to the *jus civile*. (G. 4, 45.)

All others we call *in factum conceptae* (framed so as to state a fact); in them, that is, no such statement of claim is framed, but at the beginning of the *formulae* the act done (*factum*) is named, and the words are added by which the *judex* is given power to condemn or to acquit. Such is the *formula* a patron uses against a freedman that summons him to court contrary to the Prætor's edict. It runs thus: "Let there be *recuperatores*. If it appears that such and such a patron by such and such a freedman of such and such a patron, contrary to the Prætor's edict, was summoned to court, then *recuperatores* condemn that freedman to pay that patron ten thousand *sestertii*. If it does not appear, acquit him." All the other *formulae*, too, that have been put forth under the title concerning summoning to court, are *in factum conceptae;* for instance, against him that when summoned to court has neither come nor given a *vindex;* and again, against him that has carried off a man summoned to court; and countless other *formulae* in force of that kind are put forth in the Prætor's list (*album*). (G. 4, 46.)

In some cases the Prætor puts forth *formulae* that state either a right or a fact; as in the case of deposit and of free loan. The former *formula* is framed thus: "Let there be a *judex*. Whereas Aulus Agerius deposited with Numerius Negidius a silver table, now in dispute, whatever it appears on that account Numerius Negidius ought in good faith to give or do for Aulus Agerius, that, *judex* condemn Numerius Negidius to give or do for Aulus Agerius, unless he gives up the table. If it does not so appear

acquit him." This is a *formula* framed to state a right. But the *formula* framed as follows: "Let there be a *judex*. If it appears that Aulus Agerius deposited with Numerius Negidius a silver table, and that by the fraud (*dolo malo*) of Numerius Negidius it has not been given back to Aulus Agerius, whatever turns out to be the value of the article, that sum of money, *judex*, condemn Numerius Negidius to pay to Aulus Agerius. If it does not so appear, acquit him," is framed to state a fact. Like these are the *formulae* in the case of a free loan (*commodatum*). (G. 4, 47.)

The form "unless he gives up" was said to constitute an *arbitraria actio*.

Some actions besides we call *arbitrariae*, depending, that is, on the discretion (*arbitrium*) of the judge. In them, unless the defendant makes amends to the plaintiff at the judge's discretion—gives up, for instance, the thing, or produces it, or pays, or surrenders the slave in a case of wrong-doing (*ex noxali causa*)—he must be condemned. Actions of that kind are found both for a thing and against a person. For a thing—as the *Publiciana*, the *Serviana* about a tenant-farmer's property, and the *quasi-Serviana*, called also *hypothecaria* (the mortgage action). Against a person —as in the actions for what has been done under the influence of fear or fraud; or, again, in the action to claim what has been promised at a fixed place. The action for production also depends on the judge's discretion. In these and all other like actions the judge is allowed to estimate as is fair and right, according to the nature of each thing for which the action is brought, how amends ought to be made to the plaintiff. (J. 4, 6, 31.)

See pp. 263, 447, 585.

III. *Formulae in jus conceptae.*

1. In case of *actiones in personam*.[1]

The chief parts of *formulae* are these:—the *demonstratio*, the *intentio*, the *adjudicatio*, the *condemnatio*. (G. 4, 39.)

(1.) The *demonstratio* is that part of the *formula* which is inserted to point out the thing in dispute; this part for instance: "Whereas Aulus Agerius sold Numerius Negidius a slave;" and this again, "Whereas Aulus Agerius with Numerius Negidius deposited a slave." (G. 4, 40.)

Quod Aulo Agerio a Numerio Negidio pugno mala percussa est. (Mos. et Rom. Legum Collat. 2, 6, 4.)

---

[1] *Judex esto: Quod Aulus Agerius Numerio Negidio hominem vendidit,*
Si paret Numerium Negidium Aulo Agerio sestertium x milia dare oportere,
Judex Numerium Negidium Aulo Agerio sestertium x milia condemna;
Si non paret, absolve.

Judex esto: Quod Aulus Agerius apud Numerium Negidium hominem deposuit,
Quidquid paret Numerium Negidium Aulo Agerio dare facere oportere
Judex Numerium Negidium Aulo Agerio condemnato;
Si non paret, absolve.

Quod Numerius Negidius sibilum inmisit Aulo Agerio infamandi causa. (Mos. et Rom. Legum Collat. 2, 6, 5.)

These examples show the degree of precision required in the statement. Thus it was not necessary to specify which had struck the blow. It was the duty of the Prætor (*cognitio prætoris*) to fix the statement with reasonable certainty. (Mos. et Rom. Legum Collat. 2, 6, 3.)

(2.) The *intentio* (statement of claim) is the part of the *formula* in which the plaintiff defines what he wants; this part for instance,—"If it appears that Numerius Negidius ought to give Aulus Agerius ten thousand *sestertii*;" or again this, "Whatever it appears Numerius Negidius ought to give or do for Aulus Agerius." (G. 4, 41.)

(3.) The *condemnatio* (condemnation) is the part of the *formula* in which the *judex* is allowed power to acquit or to condemn; this part for instance, "*Judex*, condemn Numerius Negidius to pay Aulus Agerius ten thousand *sestertii*. If it does not so appear, acquit him;" or again this,—"*Judex*, condemn Numerius Negidius to pay Aulus Agerius ten thousand *sestertii* only. If it does not so appear, acquit him;" or again this,—"*Judex*, condemn Numerius Negidius to pay Aulus Agerius," and so on, provided there be not added "ten thousand *sestertii* only." (G. 4, 43.)

The condemnation that is put in the *formula* is either for a determinate sum of money or for an indeterminate sum. It is for a determinate sum in the *formula* by which we demand a determinate sum; for in that the lowest part runs thus: "*Judex*, condemn Numerius Negidius to pay Aulus Agerius ten thousand *sestertii*. If it does not so appear, acquit him." A condemnation for an indeterminate sum of money has a twofold meaning. There is one that is expressly limited, *cum taxatione* as it is commonly called, when we demand something indeterminate. There the lowest part of the *formula* runs thus: "In that, *judex*, condemn Numerius Negidius to pay Aulus Agerius ten thousand *sestertii* only. If it does not so appear, acquit him." The opposing one is unlimited, as when we demand anything that is ours from the man that possesses it—that is, if we bring an action for a thing or for its production; for there it runs thus: "Whatever turns out to be the value of the article, that sum of money, *judex*, condemn Numerius Negidius to pay Aulus Agerius. If it does not so appear, acquit him." (G. 4, 49-51.)

The *judex* in the matter, if he condemns the defendant, must condemn him in a determinate sum, although no determinate sum is put in the condemnation. He ought further to take heed, if a determinate sum is put, that he condemn the defendant in a sum neither greater nor less by one sesterce; for otherwise he makes himself liable as if the cause were his own (*litem suam facit*); and again, if a limit (*taxatio*) is put, that he does not condemn the defendant in a sum greater than the limit; for if he does, in like manner again he makes himself liable as if the cause were his own. To condemn him in a less sum, he is, however, allowed; and if the condemnation is indeterminate, he can condemn him in any sum he pleases. (G. 4, 52.)

(4.) The *adjudicatio* is the part of the *formula* in which the *judex* is allowed to adjudge the thing to one of the parties to the action. If, for instance, the action is one between co-heirs *familiae erciscundae* (for sharing the inheritance), or between partners *communi dividundo* (for dividing the joint property), or between neighbours *finium regundorum* (for determining the

bounds), then this part of the *formula* runs thus: "As much as ought to be adjudged, *judex*, adjudge to Titius or Seius." (G. 4, 42.)

All those parts are not, however, found at once in every *formula*, but some are found, and some are not found. Certainly the statement of claim is sometimes found alone, as in the *formulae* preliminary to proceedings (*praejudiciales*); that, for instance, in which the question is whether a man is a freedman, or how much a dowry is, and many others. But the *demonstratio*, *adjudicatio*, and *condemnatio* are never found alone, for the *demonstratio* does not take effect without a statement of claim or a condemnation. A condemnation or an *adjudicatio*, again, without a statement of claim, has no force; therefore they are never found alone. (G. 4, 44.)

Actions preliminary to proceedings (*praejudiciales*) seem to be for a thing (*in rem*). Such are the actions in which the question is, whether a man is free or a freedman, or about recognising offspring as one's own. Of them, generally speaking, one only has a statutory cause; that, namely, in which the question is whether a man is free; all the others are substantially due to the Prætor's jurisdiction. (J. 4, 6, 13.)

2. In the case of *actiones in rem.*

In an action *in rem* a formula has only an *intentio* and *condemnatio*. The *demonstratio* is a statement with a certain amount of exactness, specifying the investitive fact upon which the plaintiff relies in maintaining the duty—*dare facere oportere*. Without the *demonstratio*, the *intentio* would scarcely convey any distinct idea, and certainly would fail to tie the plaintiff to any particular grievance. But in a suit where property is in question, the designation of the land or other property is sufficient to enable the defendant to meet the claim. Moreover, the question is not how did the plaintiff acquire the property in question, but whether it is his.

Or this again,—If it appears that the slave Stichus belongs to Aulus Agerius *ex jure Quiritium*. (G. 4, 41.)[1]

IV. Equitable Defences—*Exceptiones*, *Praescriptiones*, *Replicationes*.

A special inconvenience of the *legis actiones*, viewed as a system of pleading, was, that the question in dispute must be referred in the narrowest and strictest form without any regard to equitable considerations. But when the *formula* was intro-

[1] Si paret, *hominem* (*Stichum*) *ex jure Quiritium Auli Agerii esse.*

L. Octavius judex esto;

Si paret fundum Capenatem quo de agitur, ex jure Quiritium P. Servilii esse, neque is fundus arbitrio suo P. Servilio restitutur. (Cic. in Verr. 2, 2, 12.)

Quanti ea res est, tantam pecuniam Numerium Negidium Publio Servilio condemnato; si non paret, absolve. (G. 4 (41), 52.)

duced, the Prætor could impose conditions on a plaintiff, not warranted by the strict letter of the law, but required by justice.

1. Nature, objects, and form of Equitable Defences.

Next let us look narrowly to *exceptiones* (equitable defences). They have been provided for the sake of persons that have to defend themselves against an action, for it often happens that a man is liable by the *jus civile*, and yet it is unfair that he should be condemned by the *judex*. (J. 4, 13, pr.; G. 4, 115-116.)

If, for instance, I stipulate for a sum of money from you on the ground that I am about to pay it over to you as a loan, and I do not pay it over, it is certain the money can be claimed from you; for you are bound to give it, since you are liable under the stipulation. Yet it is unfair that you should be condemned on that account. It is held, therefore, that you ought to defend yourself by the *exceptio doli mali* (on the ground of fraud). If, again, I agree with you not to demand from you what you owe me, none the less I can at strict law demand it, alleging that you ought to give it; for an obligation is not taken away by an agreement between the parties. But it is held that if I demand it I ought to be repelled by the *exceptio pacti conventi* (based on an agreement). (G. 4, 116.)

In those actions, too, that are not against a person, such defences have a place; when, for instance, you compel me by fear or induce me by fraud to give you some *res mancipi* by a formal conveyance. If, then, you demand the thing from me, an *exceptio* is given me, by which, if I prove you acted so as to terrify or deceive me, you are repelled. (G. 4, 117.)

Some *exceptiones* the Prætor has in his edict set forth; others he grants to suit the case after inquiry. All these either owe their existence to statutes, or what take the place of statutes, or have been handed down as based on the jurisdiction of the Prætor. (G. 4, 118.)

Every *exceptio* is so framed as to run counter to what the defendant affirms. If, for instance, the defendant affirms that the plaintiff is doing something fraudulent—demanding money, for instance, that he never paid over—the *exceptio* is framed thus: "If in that matter nothing has been done or is being done by fraud on the part of Aulus Agerius." If, again, it is alleged that the money is being demanded contrary to agreement, the *exceptio* is framed thus: "If between Aulus Agerius and Numerius Negidius there has been no agreement that the money should not be demanded." In all other cases, in fine, it is usually framed in like manner. The reason is that every *exceptio*, though it is a defence, is inserted in the *formula* so as to make the condemnation conditional. Its effect, in other words, is, that the *judex* is to condemn him against whom the action is brought, only if the plaintiff did nothing fraudulent in the matter in dispute; and again, that the *judex* is not to condemn him unless no agreement was come to that the money should not be demanded. (G. 4, 119.)

Division of Equitable Pleas—Peremptory and Dilatory.

Exceptiones are said to be either peremptory or dilatory. They are peremptory if they take effect for ever and cannot be evaded. Instances of this are the defences that something was done through fear or fraud, or contrary to a statute or *Senatus Consultum;* or again, that the case has been

decided or brought before a *judex;* or again, that an agreement has been come to providing that the money shall in no case be demanded. They are dilatory, again, if they do harm for a time—if, for instance, the agreement come to provides (say) that the money shall not be demanded within five years, for at the end of that time the *exceptio* has no place. A like *exceptio* is that the claim is being divided (*litis dividuae*), or that some matter remains over (*rei residuae*). If, for instance, a man demands part of a thing, and within the same Prætor's term of office the rest, he is set aside : this *exceptio* is called *litis dividuae.* If, again, a man that had several actions against the same defendant proceeded with some, but put off others that they might come before other judges, and then within the same Prætor's term of office proceeded with those he put off, he is set aside by this *exceptio*, called *rei residuae.* (G. 4, 120-122.)

Dilatory *exceptiones* may be due to considerations not only of time but of person. Instances are those relating to a *cognitor;* as when a man that by the edict cannot make such an appointment brings an action through one, or when a man that has the right appoints a *cognitor* that cannot undertake the office. If an *exceptio cognitoria* can be brought against him, then, if he is such that he cannot lawfully appoint a *cognitor*, he can bring the action himself; if, again, the *cognitor* cannot lawfully undertake the office, he has unrestrained power to bring the action by another *cognitor* or by himself in person, and in this way as well as in that evade the *exceptio.* But if he disregard it, and bring the action through a *cognitor*, he loses his case. (G. 4, 124.)

When failure to use a plea is fatal.

A man against whom a dilatory *exceptio* can be brought, must observe to put off his action. If not, and if it is actually used to bar his action, he loses his case. For after the time at which, if the matter had not been taken up, he could evade it, he has no longer remaining any power to bring an action when the matter has once been brought to trial and cut off by the *exceptio.* (G. 4, 123.)

If a peremptory *exceptio* has by mistake not been used by the defendant, he is restored to his rights as unimpaired (*restitutio in integrum*), in order that he may still make use of it. But if it is a dilatory *exceptio* that he has not used, whether he can be so restored is questioned. (G. 4, 125.)

Replications.

Sometimes it happens that an *exceptio* that at first sight seems good in law would unfairly harm the plaintiff. When this is so, another addition is needed to aid the plaintiff. It is called *replicatio*, because by it the force of the *exceptio* is unfolded and undone. If, for instance, I agree with you not to demand from you the money you owe me, and then afterwards we make an agreement to the contrary, that is, that I may demand it; and if then I bring an action against you, and you take this exception to it, that you ought to be condemned to pay me only if there has been no agreement that I should not demand the money,—then I am wronged by the *exceptio pacti conventi;* for none the less this remains true, even although we afterwards made an agreement to the contrary. But it is unfair that I should be shut out by the *exceptio;* a *replicatio* therefore arising out of the later agreement is given me [in this way,—" If there was no after agreement that the money might be demanded "]. (J. 4, 14, pr.; G. 4, 126.)

Again, if a banker pursues a man for the price of a thing sold by auction, and has thrown in his way the *exceptio* that the buyer is to be condemned only if the thing he bought has been delivered to him, that is an *exceptio* good in law. But if it was stated beforehand at the auction that the thing would not be delivered to the buyer before he paid the price, the banker may help himself by such a *replicatio* as this,—"Or if it was stated beforehand that the thing would not be delivered to the buyer unless the buyer first paid the price." (G. 4, 126 A.)

Sometimes, also, it happens that the *replicatio* in turn, although at first sight good in law, would unfairly harm the defendant. When this is so, an addition is needed to aid the plaintiff. It is called *duplicatio* (doubling). (J. 4, 14, 1; G. 4, 127.)

If it in turn at first sight seems good in law, but for some reason unfairly harms the plaintiff, again an addition on the other side is needed to aid the plaintiff. It is called *triplicatio* (tripling). (J. 4, 14, 2; G. 4, 128.)

The use of all these additions, sometimes going even further than we have said, was brought in by the variety of business affairs. (G. 4, 129.)

Praescriptiones.

Let us see also about the *praescriptiones* that have been received on behalf of the plaintiff. (G. 4, 130.)

That they are so called from the fact that they were written first (*praescribuntur*) before the *formulae* is more than manifest. (G. 4, 132.)

Often, indeed, under one and the same obligation, something ought to be furnished us now, something in future; as when we have stipulated for a fixed sum of money to be paid every year or every month. For when some years or months are ended, the money for this time ought to be furnished; but for future years, too, the obligation is certainly understood to be contracted, though as yet it is not to be performed. If, then, we wish to claim what ought to be furnished, and to bring it to trial, but to leave the future performance of the obligation in uncertainty, it is necessary to bring our action with this *praescriptio*,—"Let that only come into trial whose day of payment is now come." But if not, and if we proceed without this clause, by the *formula*, namely, by which we demand an indeterminate sum, in which the statement of claim is framed in these words,—"Whatever it appears Numerius Negidius ought to give or do for Aulus Agerius,"—then the whole obligation—that is, the future one as well—we thus bring to trial. Further, since the joining issue (*litis contestatio*) extinguishes it, no action remains over for us, if we should afterwards wish to bring an action for the further performance. Again, if, for instance, we are bringing an action arising out of a purchase (*ex empto*), that a farm should be given us by a formal conveyance, we ought to use such a *praescriptio* as this,—"Let the matter to be tried be the mancipation of the farm." The result is, that afterwards, if we wish unhindered possession (*vacua possessio*) of it to be given us, we can bring an action for its delivery either *ex stipulatu* or *ex empto*. But if we use no such *praescriptio*, then the obligation for all such rights by the use of the indeterminate action, "Whatever on that account Numerius Negidius ought to give or do for Aulus Agerius," is extinguished on joining issue; so that afterwards, if we wish to bring an action for delivery of the unhindered possession, no action remains over for us. (G 4, 131-131 A, as restored.)

In our day, as we have pointed out above, they all proceed from the plaintiff. In old times, however, some were put in as answers on behalf of the defendant. Such was the *praescriptio*,—"Let the matter go to trial if it does not prejudge the inheritance." This has now been transformed into an *exceptio*, and finds a place when the claimant of an inheritance by another kind of procedure would prejudge the inheritance; as, for instance, by demanding the things singly; for it would be unfair to prejudge it. (G. 4, 133.)

The statement of claim in the *formula* determines the person to whom what is due ought to be given. To the master certainly ought to be given what a slave stipulates for. But the *praescriptio* raises a question of fact, and it ought to be true according to its natural meaning. All we have said of slaves we shall understand to be said also of the rest of the persons subjected to our power. (G. 4, 134-135.)

We must note further, that if we are bringing an action against the man himself that promised us something indeterminate, the *formula* is so put forth for us as to have a *praescriptio* inserted in it in place of a *demonstratio*, thus:—"Let there be a *judex*. Whereas Aulus Agerius stipulated for an indeterminate amount from Numerius Negidius, with respect to that only whose day of payment is now come, whatever on that account Numerius Negidius ought to give or do for Aulus Agerius," and so on. But if the action is against a security or a surety (*sponsor aut fidejussor*), it is usual to have a *praescriptio*:—as to the position of the security, thus: "Let that alone be tried respecting which Aulus Agerius stipulated in regard to Lucius Titius for an indeterminate amount, on account of which Numerius Negidius is security, whose day of payment is now come;"—as to the position of the surety—"Let that alone be tried for which Numerius Negidius pledged his honour (*fide sua esse jussit*) to an indeterminate amount on behalf of Lucius Titius, whose day of payment is now come." Next the *formula* is thrown in. (G. 4, 136-137.)

V. Set-off. (*Deductio, compensatio.*)

The *exceptio* was directly related to the cause of action, and contained a statement of some fact that made it inequitable that the plaintiff should succeed. *Set-off* rests upon the less urgent ground of convenience. If A. owes 20 *aurei* to B., and B. owes 18 *aurei* to A., it is most convenient and fair that B. should not be allowed to recover 20 *aurei* from A., but only the balance after deducting his own debt. But there is no injustice in refusing to allow a set-off, because the defendant has the right to proceed by cross-action against the plaintiff. Accordingly, the principle of set-off was not fully recognised until the reign of Marcus Aurelius. Gaius gives us the law as it stood prior to that time. As to *compensatio* under Justinian, see pp. 1017, 1018.

1. Set-off in proceedings *bonae fidei*.

Set-offs when brought up often make a man obtain less than was due to

him. Now in proceedings *bonae fidei* (equitable), free power is allowed the *judex* to fix the value that ought to be given up to the plaintiff on the ground of what is fair and right. In this, then, there is included the power to take an account of what it appears the plaintiff ought to furnish in turn on the same ground, and to condemn the defendant to pay the balance. (G. 4, 61, as restored.)

Actions are in some cases *bonae fidei*, in others *stricti juris* (of strict law). Those *bonae fidei* are these,—from purchase, from sale, from letting on hire, from taking on hire, from managing business, from mandate, from deposit [from *fiducia*], from acting for a partner, from acting as *tutor*, from free loan, from giving a pledge, the actions *familiae erciscundae* and *communi dividundo* [and any *actio praescriptis verbis*], the action put forth *praescriptis verbis de aestimato*, and also the one that is available as the result of an exchange, and the demand for an inheritance. Up to our own time, indeed, it was still uncertain whether this last was to be numbered with the proceedings *bonae fidei* or not. But a constitution of ours has plainly classed it among them. (J. 4, 6, 28; G. 4, 62, as restored.)

The *judex* in all these proceedings is not, however, enjoined by the actual words of the *formula* to take account of a set-off. But since this seems only agreeable to the nature of the proceeding as *bonae fidei*, it is believed to be included in his duty. (G. 4, 63.)

2. Cases in which set-off was allowed—*Compensatio, Deductio.*

The case is different with regard to the action by which a banker takes proceedings. He is forced to take in the set-off, and to bring his action so as to embrace it in the words of the *formula*. A banker, therefore, from the beginning allows a set-off, and in his statement of claim alleges that so much less ought to be given him. If, for instance, he owes ten thousand *sestertii* to Titius, and Titius twenty thousand to him, his statement of claim runs thus:—"If it appears that Titius ought to give him ten thousand *sestertii* more than he himself owes Titius." (G. 4, 64.)

By the edict again, a *bonorum emptor* (purchaser of an insolvent estate) is ordered to make a deduction before bringing his action, so (that is) that his opponent shall be condemned to pay only the balance after deducting what the *bonorum emptor* owes him in turn, on account of the insolvent that has defrauded him. (G. 4, 65.)

Comparison of *Compensatio* and *Deductio.*

Between the set-off that meets the banker, and the deduction that is thrown in the way of the *bonorum emptor*, there is this difference: To make up a set-off, that only is called in that is of the same kind and nature; money, for instance, is set-off against money, wheat against wheat, wine against wine; so much so indeed, that some hold wine cannot in every case be set off against wine, nor wheat against wheat, but only if it is of the same nature and quality. But to make up a deduction, there is called in what is not of the same kind; if, then, the *bonorum emptor* demands money from Titius, and owes Titius corn or wine in turn, he deducts its value from the money, and takes proceedings for the rest. To make up a deduction again, there is called in what is due at a future time; to make up a set-off, this only that is due at the present time. Besides, an account of the set-off is put

down in the statement of claim. Thus it happens that if, after allowing the set-off, the banker states a claim too large by one sesterce, his case fails, and he therefore loses his case. But a deduction is put down in the condemnation, and there no risk is incurred by him that claims too much, and especially as the *bonorum emptor*, when he brings his action, although he brings it for a determinate sum of money, yet frames his condemnation for an indeterminate sum. (G. 4, 66-68.)

VI. Variance. (*Petere plus vel minus.*)

One of the inconveniences of dividing a civil trial between the Prætor and a *judex* was when a variance occurred between the facts as disclosed at the trial, and the facts upon which the *formula* was constructed. Two errors were possible; the plaintiff might ask more than he was entitled to, or less.

One may demand too much in four ways :—in respect of the thing, of the time, of the place, or of the circumstances (*causa*). In respect of the thing, as if one were to demand, instead of ten thousand *sestertii* that are due him, twenty thousand; or if he that owns a thing in part were to state in his claim that the whole thing, or a larger part of it, was his. In respect of time, as if one were to demand performance before the time, or before fulfilment of the condition. In respect of place, as if what has been promised to be given at a fixed place were to be demanded at another place without mentioning the former place. For example, if a man has stipulated, "Do you undertake to give ten thousand *sestertii* at Ephesus? I undertake to give them," and then withdrawing all mention of Ephesus, states his claim at Rome unconditionally thus :—"If it appears that Aulus Agerius ought to give ten thousand *sestertii* to Numerius Negidius,"—he is understood to demand too much, because by an unconditional statement of claim he takes from the promiser the advantage he would have if he paid at Ephesus. At Ephesus, however, he can rightly demand it unconditionally, that is without throwing in the place. In respect of the circumstances, also, too much may be demanded; as when a man in his statement of claim takes away the debtor's election that he has by right of the obligation. If, for instance, a man stipulates thus :—"Do you undertake to give ten thousand *sestertii* or the slave Stichus?" and then demands one or other of these alone, he demands too much. Even although he demands what in fact is less, yet he is held to demand too much, because his opponent can sometimes furnish more easily what is not demanded. A like case is when a man stipulates for the kind and then demands one species of it—stipulates, for instance, for purple generally, and then demands Tyrian specially. Nay, even although he demands the cheapest, the rule of law is the same because of the principle we have just stated. The rule of law is the same also if one stipulates for a slave generally, and then demands one by name—Stichus, for instance, although the cheapest. Therefore, as the stipulation itself is framed, so also ought the statement of claim in the *formula* to be framed. (G. 4, 53-53 A, as restored.)

It is plain, also, that if a man states a claim for one thing instead of another he runs no risk, and he can bring his action anew, because with the

property the old action as well remains : as when a man that ought to demand the slave Stichus demands Eros ; or when a man states in his claim that a thing ought to be given him under a will, and it was due to him under a stipulation ; or if a *cognitor* or procurator states in his claim that the thing ought to be given him. (G. 4, 55.)

The effect of a variance differed according to the part of the *formula* in which it was found. The most dangerous part was the *Intentio.*

1. Variance in the *Intentio.*

If a man embraces too much in his statement of claim (*intentio*), the case falls through ; that is, he loses his property, and is not restored by the Prætor to his unimpaired rights, except in certain cases, in which the Prætor by his edict comes to give aid ; as when a man under twenty-five makes a slip because of his age, or a man over twenty-five, if a strong reason came in for some mistake the law will recognise. (G. 4, 53, as restored.)

EXCEPTION.—This is sufficiently plain, that in *formulae* for an indeterminate sum too much cannot be demanded : because when no determinate amount is demanded, but whatever it shall appear the opponent ought to give or do is stated in the claim, no one can claim too much. The rule of law is the same also if an action for an indeterminate part of a thing is granted ; as when an heir demands such a part of the farm in dispute as shall appear to be his. An action of this kind is usually granted in very few cases. (G. 4, 54.)

To state a claim for too much is indeed, as we have said above, dangerous ; but it is lawful to state a claim for too little. For the remainder, however, no action is allowed within the same Prætor's term of office. He that does bring such an action is shut out by an *exceptio ;* and it is called *litis dividuae* (against dividing a claim). (G. 4, 56.)

2. Variance in the *Condemnatio.*

If in the condemnation more is demanded than ought to be, the plaintiff runs no danger. The defendant, too, even after accepting an unfair *formula*, is restored to his rights unimpaired, that the condemnation may be lessened. But if less is put down than ought to be, the plaintiff obtains only what he has put down, for the whole matter is brought into the trial ; he is tied down finally by the condemnation, and the *judex* cannot go beyond it. The Prætor, too, gives no restoration to rights on that side ; he comes to the aid of defendants more readily than of plaintiffs. We speak, of course, with the exception of men under twenty-five ; when men of that age make a slip in any matter, the Prætor comes to their aid. (G. 4, 57.)

3. Variance in the *Demonstratio.*

If in the *demonstratio* too much or too little is put down, nothing is brought on for trial, and so the matter remains untouched. This is the meaning of the saying that by a false *demonstratio* no action is lost. There are some, however, that think too little may rightly be embraced in it ; that if a man perchance bought Stichus and Eros, he is to be held right if he draws up his *demonstratio* thus :—"Whereas I bought of you the slave

Eros," and that then, if he pleases, he can bring an action for Stichus in another *formula* of sale. The reason is that it is true, they say, that seeing he bought two, he bought each singly. This was assuredly Labeo's view. But if he that bought one brings an action for two, his *demonstratio* is false. The same is true in the case of other actions also, as free loan and deposit. (G. 4, 58-59.)

We find in certain writers that in an action of deposit, and in fine, in all the other actions in which condemnation brands a man with ignominy (*infamia*), that he that puts more than he ought in his *demonstratio* loses his suit. A case is, if a man that has deposited one thing alleges in his *demonstratio* that he has deposited two or more; or if a man that has been struck on the face with the fist alleges in his *demonstratio*, in an *actio injuriarum*, that some other part of his body was struck. Whether we ought to believe this to be the truer view, we shall seek out with great care. Now there are two *formulae* for deposit, one framed to state a right, and one to state a fact, as we have remarked above. In the *formula*, that is framed to state a right, only at the beginning the matter in dispute is stated in the *demonstratio*, then it is named, and next the contention at law is brought in by these words, "Whatever it appears he ought on that account to give or do for me." In the *formula* framed to state a fact, at once in the beginning, as if it were a statement of claim, the matter in dispute is named in these words, "If it appears that such and such a man deposited with such and such another such and such a thing." Assuredly, therefore, we ought not to doubt that if a man in the *formula* framed to state a fact names more things than he deposited, he will lose his suit, because he is held to have put down too much in his statement of claim. (G. 4, 60.)

(B.) Procedure in Interdicts.

An examination of the cases where the remedy was by *interdictum* and not by *actio*,[1] shows that nearly all interdicts were remedies for rights that could be vindicated in no other way, while the interdicts *Uti Possidetis* and *Utrubi* were the remedies for Prætorian ownership, and *Quorum Bonorum* for Prætorian inheritance.

In procedure by interdict there was the same distinction between *jus* and *judicium* that existed in the case of the *actio* properly so called. It was not a rapid summary process in the hands of the Prætor, but in every respect imitated the ordinary procedure.

It remains to look narrowly into interdicts. In certain cases, then, the

[1] The following interdicts may be referred to:—*de libero homine exhibendo*, p. 186; *de liberis exhibendis et ducendis*, p. 221; *de vi et vi armata*, p. 250; *Quod vi aut clam*, p. 252; *de glande legenda*, p. 254; *de itinere actuque privato*, p. 424; *de rebus sacris*, p. 317; for prædial servitudes, pp. 423-424; *de superficie*, p. 430; *Salvianum* and *Quasi Salvianum*, p. 448; *Uti Possidetis* and *Utrubi*, p. 365 sq.; *Quorum Bonorum*, p. 886.

Prætor or Proconsul interposes his supreme authority (*principaliter*) to put an end to disputes. This he does chiefly when the parties are contending for possession or quasi-possession. In short, he either orders something to be done, or forbids it to be done. The *formulae* of the words which he frames and uses in the matter are called decrees or interdicts. (J. 4, 15, pr.; G. 4, 138-139.)

For the meaning of *principaliter*, see p. 41.

Decrees (*decreta*) are the Prætor's commands that something be done; as, for instance, when he enjoins something to be produced or given up. Interdicts are prohibitions from doing something; as, for instance, when he enjoins no violence to be used to a possessor untainted in title, or forbids something to be done in a sacred place. Hence, all interdicts are called either for restitution, for production, or for prohibition. (G. 4, 140.)

It is not the case, however, that when he has ordered something to be done, or forbidden something to be done, the business is at once carried through. The parties go before a *judex* or *recuperatores*, and there, by putting forth *formulae*, the question is raised whether anything has been done in defiance of the Prætor's edict, or whether what he ordered to be done has not been done. Sometimes the action involves a penalty, sometimes not; the former, if carried on by a *sponsio;* the latter, as when an arbiter is demanded. Under interdicts of prohibition, indeed, the usual procedure always is by *sponsio*; under interdicts for restitution or production the procedure is sometimes by a *sponsio*, sometimes by the *formula* called *arbitraria* (discretionary). (G. 4, 141.)

Of the order and issue of interdicts in old times it is idle in our day to speak, for wherever the law is laid down in the exercise of special authority (*extra ordinem*), as is the case with all proceedings now-a-days, there is no need to grant an interdict, but the case is judged without interdicts exactly as if a *utilis actio* had been granted by reason of an interdict. (J. 4, 15, 8.)

In considering this topic the reader will find it an advantage to recur to the passages already given on the subject of Possession, pp. 357-359.

I. Procedure in Simple Interdicts.

Simple interdicts are those in which from the very commencement of the proceedings there is a plaintiff and a defendant. They are prohibitory, exhibitory, or restitutory.

1. Simple Prohibitory Interdict.

In this case the procedure in the time of Gaius was solely by *sponsio* or wager. (G. 4, 141.)

2. Exhibitory and Restitutory Simple Interdicts.

Gaius informs us that in this case there was a choice of procedure, either by way of *sponsio* or by an *arbitraria formula*. The latter was viewed as an indulgence, and was, therefore, undoubtedly posterior in origin to the *sponsio*.

But he that wishes to demand an arbiter ought to observe to make the demand at once before going out of court—that is, before departing from the Prætor; for to those that are late in their demand no favour will be shown.

If, therefore, he does not demand an arbiter, but goes out of court in silence, the case is carried on to its issue at the risk (of a penalty). (G. 4, 164-165.)

(1.) Trial by Wager (*sponsio*).

For the plaintiff challenges his opponent by a *sponsio* to show that he has not failed, contrary to the Prætor's edict, to produce or give up the thing. He again answers his opponent's *sponsio* by a stipulation in turn (*restipulatio*). The plaintiff next sets forth a *formula* of the *sponsio* to his opponent, and he in return that of the stipulation to the plaintiff. But the plaintiff throws in at the end of the *formula* for the *sponsio* another proceeding also for giving up the thing or producing it, so that if he wins in the *sponsio*, unless the thing is produced or given up to him. . . . (G. 4, 165.)

(2.) Direct Formula (*arbitraria formula*).

After setting forth the kinds of interdicts, we must next look narrowly into their order and issue. Let us begin with the simple interdicts. If then an interdict for restitution or production is granted—as, for instance, that possession is to be restored to him that has been cast out by force, or that the freedman is to be produced whose patron wishes to give him notice of services he is to render—there is sometimes no risk to be run in carrying the case through to its issue; sometimes there is. For if he demands an arbiter, the defendant receives the *formula* called *arbitraria* (discretionary). It is so called because if in the discretion of the *judex* anything ought to be given up or produced, then he produces or gives it up without a penalty, and is thus acquitted. But if he neither gives it up nor produces it, he is condemned to pay what it is worth. The plaintiff also incurs no penalty for proceeding against one that need not either produce or give up anything; unless, indeed, he is met by a *judicium calumniae* claiming one-tenth part of the value of the cause. Proculus certainly held that such a proceeding ought to be forbidden to one that has demanded an arbiter, as if by this very fact he is to be held to confess that he ought to give up or produce the property. But the law in use by us is different; and rightly so. For a man asks for an arbiter, not as an admission, but as the more modest form of litigation. (G. 4, 161-163.)

From what Gaius tells us, there is little difficulty in perceiving that the procedure in interdicts was exactly similar to the procedure in actions. In the time of Justinian, we are told that there was no substantial difference between interdicts and actions. These facts suggest the question, was there ever in Roman law any difference between *interdictum* and *actio* except in name? There appears to be little evidence, if any, for the view so long maintained, that interdicts were a kind of *interim* injunctions or summary process. Indeed, in the case of the interdicts *uti possidetis* and *utrubi*, it will presently appear, the procedure, so far from being summary, was exceedingly complicated.

The Prætor, besides modifying, limiting and expanding the

actions that descended from the *jus civile*, created entirely new remedies for rights that the *jus civile* did not recognise. When he introduced a new right *in rem*, he was necessarily compelled to give a remedy, and that remedy was called *Interdictum*, or in some cases *Decretum*. When he introduced new rights *in personam* he called his remedy an action ; as the *actio de pecunia constituta*, *actio commodati*, etc. This assertion will be found to be almost perfectly exact ; but there is an exception to it that is worthy of notice. The *Actio Serviana* was entirely due to the Prætor, and it was called an *actio*, although it was to vindicate a right *in rem*. It contrasted with the *Interdictum Salvianum*, which was a purely possessory remedy. The exception might be explained in various ways ; but it is sufficient to remark that the *actio Serviana* was not introduced until a period when the word *interdictum* was beginning to loose its exclusiveness. There appears to be no instance of a remedy for a right *in personam* being called Interdict.

In creating new remedies the Prætor naturally followed the procedure of the civil law ; but it is a characteristic of the spirit that prompted his interference, that he followed the least cumbrous and inconvenient of the *legis actiones*. He imitated the *condictio*, not the *sacramentum ;* for there can be no doubt that in the beginning every interdict was by *sponsio*, and that the wager was real, not fictitious. So far was this process from being simple and summary, that we are told that recourse to interdicts was full of technical dangers. (Frontinus, 2, 44.) The form of the pleading seems rather curious. By an interdict the Prætor professed to order a defendant to restore a thing of which he had obtained possession by violence ; the defendant affirmed that he had restored it ; in point of fact, he had not, and the question really sent for trial before the *judex* or *recuperatores* was whether he was under any obligation to do so. (Cic. pro. Caec., 8.)

At first all interdicts began with a *sponsio*, and the result was to impose a penalty upon the unsuccessful litigant. In the case of the simple, prohibitory interdicts, such as those concerning rights in public or sacred things, the defendant was sued for committing a past wrong ; and it was not considered an object to get rid of the penalty. The old form of trial was therefore kept up in the time of Gaius without change. But when the object of the interdict was the restitution or production of property, the plaintiff ought to be satisfied if he recovered

the property without insisting upon a penalty. Hence before the time of Gaius, an alternative mode of trial was allowed: the parties were allowed to omit the *sponsio*, and raise the question at issue directly in a *formula*. After the change made by Diocletian, the old system seems to have fallen into disuse, and *utiles actiones* of the usual sort were granted for interdicts. (J. 4, 15, 8.) This change may be compared with the history of the action *in rem*. An action for property descending from the *jus civile* passed through three stages—the *sacramentum*, the *sponsio*, and the *petitoria formula*. The actions given by the Prætor omitted the first stage, but followed the older system, first with the *sponsio*, and afterwards by the *arbitraria formula*.

The distinction between *interdictum* and *actio* appears, therefore, to have only a historical significance. The words do not indicate any real difference in procedure, they testify merely to a historical fact; namely, that certain rights *in rem* were created by the Prætor. Sometimes the word *petitio* is opposed to *actio*. *Petitio* is a civil, *interdictum* a Prætorian, action; and if the words be so used, *actio* would be restricted to actions *in personam*.

II. Procedure in Double Interdicts.

In simple interdicts, there are from the outset a plaintiff and a defendant; in double interdicts there are two claimants, neither of whom at the beginning is plaintiff, and neither defendant. Examples of double interdicts are the *uti possidetis* and *utrubi*. In these the Prætor imitates the procedure in the *actio sacramenti*. In that oldest form of procedure the first step is a sham fight; the Prætor calls upon the parties to make peace, and after a preliminary inquiry orders one of them to have interim possession, and thereby drives the other into the position of plaintiff. Unfortunately, the portion of the MS. of Gaius that describes the procedure in double interdicts is imperfect and partly illegible; but enough can be made out clearly to show that the Prætor, in controversies regarding the right of possession, most closely, and indeed slavishly, followed the remarkable proceedings of the most ancient form of real actions. The inferences to be drawn from this parallelism have been elsewhere stated, and need not here be repeated (pp. 373-4.)

But if an interdict is demanded, after it is granted the Prætor's first care is, that while the suit is going on they shall refrain from force. In the possession of one or other of them, therefore, the thing is settled for the time

by putting up its fruits meanwhile to auction ; provided always that he gives security to his opponent by a stipulation for these. Its power is this : if the *judex* afterwards should come to decide against him, he must make good the fruits meantime, and the price for which he bought them. For between opposing parties that vie with one another as to the price, when the contention is in the bidding for the fruits meantime, no doubt because it is for the interest of each to be interim possessor, the Prætor sells possession for the time to the higher bidder. Afterwards the one challenges the other by the *sponsio*, " If, in defiance of the Prætor's edict, you use force to me while in possession," and both mutually make an answering stipulation to meet the *sponsio*. Or when the two stipulations have been joined, one *sponsio* is made between them, and again one answering stipulation to meet it. This is easier, and therefore more usual. (G. 4, 166, as restored.)

Next, when the *formulae* of all the stipulations and answering stipulations that have been made have been put forth by both, the *judex* before whom the proceedings in the matter are taking place inquires into this, which the Prætor embraced in his interdict ; which of them, namely, was in possession of the farm or the house at the time the interdict was granted, neither by force, nor by stealth, nor by sufferance. After the *judex* has searched out that, and has decided, say, in my favour, he condemns my opponent in the amounts of the *sponsio*, and of the answering stipulation that I made with him ; and in accordance with this acquits me from the *sponsio* and answering stipulation that were made with me. More than this, if the possession rests with my opponent because he won in bidding for the enjoyment meantime, unless he gives up possession to me, he is condemned in the proceeding called *Cascellianum* or *secutorium* (the sequel). (G. 4, 166 A.)

Therefore he that won in bidding for the fruits meantime, if he does not prove that the possession belongs to him, is ordered to pay the amount of the *sponsio* of the answering stipulation, and of the bidding for the fruits meantime by way of a penalty, and besides to give up possession ; and more than this, he gives back the fruits that he has gathered in the meantime. For the amount of the bidding for the fruits meantime is not the price of them, but is paid by way of a penalty, because one tried to keep back during all this time the possession that was another's, and to obtain the power to enjoy it. (G. 4, 167.)

But if he that was beaten in the bidding for the fruits meantime does not prove that the possession belongs to him, he owes by way of penalty only the amount of the *sponsio* and of the answering stipulation. (G. 4, 168.)

We must note, however, that it is free to him that has been beaten in bidding for the fruits meantime to pass by the stipulation for the fruits, and just as by the proceeding called *Cascellianum* or *secutorium* he tries to recover possession, so to bring an action for the fruits, and for the bidding for the fruits meantime. For this a special proceeding is employed, called *fructuarium* (for the fruits), on account of which the plaintiff receives security that what has been adjudged will be paid. This proceeding, too, is called *secutorium*, because it follows on winning the *sponsio ;* but it is not likewise called *Cascellianum*. (G. 4, 169.)

But because some when the interdict was granted refused to take the rest of the steps under the interdict, and therefore the matter could not be got clear, the Prætor has prepared certain interdicts called secondary, because

they are granted only in the second place. The object and effect of these interdicts is that the party failing to comply with the requirements of the interdict procedure,—as by declining to offer (the conventional) violence, or to bid for the fruits, or to give security for the *fructus licitatio*, or to be a party to the *sponsiones*, or makes default in defending the *judicia sponsionum*,—must, if he is in possession, surrender possession to the other party, or if he is not in possession, abstain from molesting the possessor. Therefore, although on the merits he might have succeeded in the interdict *Uti possidetis* had he not been in default, by this secondary interdict the possession is transferred to his adversary. (G. 4, 170.)

This paragraph is given in accordance with Studemund's revision. It thus appears that if one of the parties declined to take the necessary steps to bring the issue of the right of possession to a decision, his opponent could apply for a *secundarium interdictum*, whereby judgment for possession was granted in his favour.

(c.) Special Provisions for terminating Lawsuits.

I. Admissions. *Confessio in jure.*

A voluntary admission of the plaintiff's claim by the defendant made it unnecessary to resort to a *judex*, and had, although at one time there seemed to be some doubt on the point, the same effect as a judgment by a *judex*. (D. 46, 2, 6, 2; D. 42, 1, 56; C. 7, 16, 24; C. 4, 13, 5.) The plaintiff is enabled at once to proceed to execution. (C. 7, 53, 9; Paul. Sent. 2, 1, 5.)[1]

A *confessio* must be an admission of the right of the plaintiff, as well as of the facts supporting the claim. (D. 42, 2, 5.)

If the defendant admitted the cause of action, but disputed the amount claimed as damages, the case must go before a *judex;* not, however, for trial, but solely to estimate damages.[2] (D. 42, 2, 8; D. 2, 14, 40, 1; D. 9, 2, 25, 2.) In several actions it was the interest of the defendant to make this admission, to save himself from the penalty of double damages. Thus a defendant sued under the *lex Aquilia* for damage to property is exposed to a penalty of double the amount of loss, unless he admits the wrong done before the Prætor. (J. 4, 6, 19; J. 4, 6, 26.) So also in *actio judicati, actio depensi, actio legatorum per damnationem relictorum.* (G. 4, 171.)

II. Interrogations. *Interrogatio in jure.*

It might often happen that a plaintiff had suffered a wrong,

---

[1] *Confessio pro judicato habetur.* (D. 42, 2, 1.)

[2] Formula reconstructed by Savigny—

Quod Numerius Negidius in jure confessus est fundum Cornelianum Aulo Agerio se dare oportere;

Quanti is fundus est, eum condemna.

while it might be uncertain which of two or more persons was answerable to him. From this arose the practice of trying preliminary issues (*praejudicia*) before going into the merits of the case. From the strictness of the rules regarding variance between the *formula* and the evidence before the *judex*, and even when no danger was to be apprehended from this source, it was highly convenient that questions relating, for example, to the personal *status* of the defendant should be put before the Prætor. Hence the practice of putting interrogations at this stage of the proceedings, and founding upon them a special modification of the *formula*. The answer to the interrogatory was an admission (*confessio*), and it was embodied in the *formula*. Hence the so-called *actio interrogatoria*. Savigny has reconstructed such a *formula* applicable to a question of inheritance.[1]

The nature of the topics where interrogatories might be put may be gathered from the following examples :—

Is the defendant heir to plaintiff's debtor? and if so, what is his share of the inheritance? (D. 11, 1, 1, pr.; D. 11, 1, 5; D. 11, 1, 9, 3.)

Is the defendant owner of the slave that has done the injury complained of? (D. 11, 1, 8; D. 11, 1, 5.)

Is the defendant owner of the animal that has done the mischief (*pauperies*)? (D. 11, 1, 7.)

Has the defendant any *peculium* of the slave whose contract has been broken? (D. 11, 1, 9, 8.)

Is the defendant the owner of the house or structure that threatens to fall; and if so, whether wholly or in part? (D. 11, 1, 10.)

Is the defendant in possession of the land in dispute? and if not of the whole, of how much? (D. 11, 1, 20, 1.)

Is the defendant a minor, or under the age of puberty? (D. 11, 1, 11, pr.)

The defendant might be interrogated by the plaintiff as well as by the Prætor. (D. 11, 1, 21; D. 11, 1, 9, 1.) If the defendant answered, his answer might be taken as conclusive against him. (D. 11, 1, 11, 2.) If he refused to answer, his silence was construed as an admission. (D. 11, 1, 11, 4.) Thus if he is sued as sole heir, he cannot dispute the fact before the *judex* if he refuses to answer before the Prætor. If the defendant answers falsely, as by saying that he is heir for one-fourth only when he is really heir for one-half, the plaintiff is not bound by his answer, but may sue him as heir for the whole amount. (D. 11, 1, 11, 3; D. 11, 1, 13, pr.) If, however, the

[1] *Quod Numerius Negidius interrogatus respondet se esse Seii heredem ex semisse, Si paret Seium Aulo Agerio centum dare oportere, Judex Numerium Negidium in quinquaginta condemna.*

defendant alleges inability to answer, he suffers no prejudice and a preliminary issue is tried to decide the point (*praejudicialis actio*.) (D. 11, 1, 6, 1.) Apparently, also, a defendant had liberty up to the *litis contestatio* to answer the interrogation, even after a first denial. (D. 9, 4, 26, 5.) If the admission proved to have been rash and unfounded, the defendant might, on application to the Prætor, have it cancelled (D. 42, 2, 7), if the error was an error of fact, and not of law (D. 42, 2, 2; C. 1, 21, 2, 1), and did not arise from gross negligence. (D. 11, 1, 11, 1; C. 2, 18, 3; D. 11, 1, 11, 8.) Such a revocation was not, however, granted when the object of the confession was to avoid double damages.

Although it is anticipating somewhat, it may be convenient here to advert to the fate of the interrogatory action under the latest form of procedure. There can be no doubt, from the circumstance that a whole title is given up in the Digest (D. 11, 1) to interrogatories, that these still played a part in judicial procedure under Justinian. But the *interrogatoria actio*, the special *formula* sent to a *judex* as a fruit of the interrogation, was no longer in use. The judge had power to put interrogatories, and practically the same consequence followed as under the old system. They were now made part and parcel of the proceedings in a trial. Such seems to be the best rendering of a text (D. 11, 1, 1, 1) which has given rise to considerable diversity of interpretation.

III. Decisory Oaths. (*Jusjurandum in jure.*)

An affirmation confirmed by oath was occasionally a means of facilitating a trial or determining a case. (D. 12, 2, 1.) Such an oath could be made with effect only when it was given in answer to the demand of an adversary. An oath volunteered by a party had no efficacy. (D. 12, 2, 3, pr.) This mode of terminating litigation was viewed by the law in a somewhat peculiar light. The reference to the oath of an adversary was considered of the nature of a bargain or compromise, a new contract upon which either party could proceed. (D. 12, 2, 2; D. 12, 2, 26, 1.) Thus if the oath were favourable to the party who swore, he could repel any future action on the subject thereby settled by an equitable defence of agreement; if it were unfavourable, his adversary could sue him in an action in which the only question to be tried would be, whether the defendant had sworn as alleged. (D. 12, 2, 9, 1.) As a result of this view, it seems to follow that there was no remedy,

except a new trial, for perjury (D. 12, 2, 31); and, indeed, from the nature of the case, it may be inferred that an oath was never put until all other means of evidence were exhausted. (D. 12, 2, 31.) Another consequence was, that no one could take an oath who could not make a contract; as, *e.g.*, a *pupillus* without the *auctoritas* of his tutor. (D. 12, 2, 17, 1; C. 4, 1, 4.) Hence, too, a person interdicted (*e.g.*, a *prodigus*) could not put an adversary to his oath, because he could not himself take the oath. (D. 12, 2, 35, 1.) Those only can offer, and take the oath, who can contract with each other. (D. 12, 2, 9, 6; D. 12, 2, 25.)

When an adversary was put to his oath, he must take it in the precise terms in which it is offered. Thus, if one asked the other to swear "by God," and he swore "by my head" (D. 12, 2, 3, 4), or "by my children's head" (D. 12, 2, 4), the oath had no validity. (D. 12, 2, 33.) In a constitution of Justinian (A.D. 529) we have the ceremony of touching the Scriptures as one of the forms of swearing. (C. 4, 1, 12, 5.) The oath was usually taken in court, but it might be made at home if the party were sick or a person of high rank. (D. 12, 2, 15.)

Examples of questions referred to oath:—

1. That a certain property in dispute is mine. (D. 12, 2, 9, 7.)
2. That a certain property does not belong to plaintiff. (D. 12, 2, 11, pr.)
3. That a given sum is due to the person swearing. (D. 12, 2, 9, 1; D. 12, 2, 14.)
4. That the adversary is not in my *potestas*. (D. 12, 2, 3, 2.)
5. That I am not a freedman of my adversary. (D. 12, 2, 13, pr.)
6. That I did not rob (D. 12, 2, 28, 5) or steal. (D. 12, 2, 13, 2.)
7. That he sold me a thing for 100 *aurei*. (D. 12, 2, 13, 3.)
8. That there was no *peculium*. (D. 12, 2, 26, 1.)

Second—PROCEEDINGS *IN JUDICIO*.

I. Liability of *Judex*.

It remains to look narrowly into the duty of the *judex*. The very first thing he ought to observe is this, not to judge otherwise than is laid down by the statutes, by the constitutions, and by custom. (J. 4, 17, pr.)

If a *judex* makes himself liable in a case by a wrong decision (*litem suam fecerit*), it is not strictly an obligation *ex maleficio* that he seems to incur. But it is not an obligation arising from contract, and there is understood to be wrong-doing on his part, although it may be only through want of judgment. He seems, therefore, to be liable *quasi ex maleficio*, and will have to bear such penalty in the matter as shall seem fair to the sense of duty of the *judex* that tries him. (J. 4, 5, pr.)

A *judex*, if required by the formula either to give plaintiff a definite sum or to acquit defendant, who gives plaintiff a different sum, makes the cause his own, and must make good the loss. (G. 4, 52.)

In like manner, if the reference permits a *judex* to condemn defendant up to a

certain amount, and not beyond, if he gives more, the defendant may reclaim the excess from the *judex*. (G. 4, 52.)

A fortiori, the *judex* was liable for damages if he acted in bad faith (*dolo malo*), and gave judgment through favour, animosity, or bribery. (D. 5, 1, 15, 1.)

II. Whether a case was referred to a *judex*, *arbiter*, *recuperatores*, or *centumviri*, the same procedure seems to have been adopted. Prior to the use of *formulae* the reference was oral, and had to be attested by witnesses, whence the term *litis contestatio*. From Gaius we have a fragment that explains some of the terms used in connection with the proceedings before the *judex* while yet the reference was oral.

. . . They came to receive a *judex*. Afterwards, when they came back, a *judex* was given them not before the thirtieth day. This was done through the *lex Pinaria*; for before that statute a *judex* was given at once. This we have understood from the foregoing, that if the action was for less than 1000 *asses*, they used to contend with a *sacramentum* of 50 *asses*, not of 500. After a *judex* had been given them, however, they gave formal notice to one another to come before him the next day but one (*comperendinus dies*). Then when they came before him, before they fully plead their case in his hearing, they used to set the matter forth to him shortly, and as if by way of index. This was called *causae conjectio* (throwing the case together), as being the gathering together (*coactio*), so to speak, of their case into short compass. (G. 4, 15.)

The means by which the presence of the parties before a *judex* was secured, was anciently the *vadimonium*, of which mention has already been made.

III. Procedure under the *Formula* system.

When the parties appeared before the *judex* or other referee, the first step was a brief statement of the nature of the question referred, followed, if there were two pleaders, by a longer harangue stating the facts of the case. There does not seem to have been any rigid order observed in the examination of witnesses or the production of written documents. The witnesses were examined on oath. (Pro Rosc. 15.) If the referee were not satisfied with the evidence produced, he could require a statement from either party on oath. (D. 12, 2, 31; C. 4, 1, 3.) Also it seems that either party, if his evidence were deficient, could put the other to his oath, as he could do before the Prætor. (D. 22, 3, 25, 3.) After the evidence was concluded, the parties or their pleaders summed up their case, which was then ripe for judgment. If the referee had not made up his mind, he could adjourn the case, and have it argued again before him (*litem ampliare*).

Provision was made in the XII Tables for adjournments. "If the *judex* or either of the litigants is hindered by serious disease let the day of trial be put off."[1] In later times other reasons were admitted as ground of adjournment, either for the production of evidence, or even when one of the litigants had suffered a bereavement, as by the death of a child, parent, wife, etc. (D. 5, 1, 3.)

The referee could, if he thought fit, take the opinion of the magistrate on a point of law, but not on a question of fact (D. 5, 1, 79, 1), such as the amount of damages that ought to be given. (D. 50, 17, 24.)

A referee could not give judgment except in the presence of both parties. (C. 7, 43, 7.) In the earliest times their presence was secured by giving sureties (*vades*); so that non-attendance, unless excused, exposed a party to the loss of the penal sum promised. But this method was imperfect; it failed to bring about a termination of the litigation. Hence in later times a more direct and summary process was adopted through the intervention of the court.

When a plaintiff failed to appear before the *judex*, under the old system he forfeited his sureties (*vadimonium desertum*); and under the later procedure he was said to be *in eremodicio*. The defendant on appearing obtained first one summons, and then another (D. 5, 1, 68), and after a delay of not less than ten days, a third and final (D. 5, 1, 69) order (*peremptorium edictum*), stating that, notwithstanding the absence of the plaintiff, the cause would be heard and decided. (D. 5, 1, 70; D. 5, 1, 71.) If the judge thought fit, the preliminary summonses could be dispensed with, and a peremptory order issued at once. (D. 5, 1, 72.) It did not follow that judgment should be pronounced against the absent plaintiff; if his case were good, the judge could decide in his favour. (D. 5, 1, 73, pr.) If a person that has applied for and obtained a peremptory edict, should himself fail to appear (in person or by his agents), the proceedings are stopped, but may be begun again *de novo*. (D. 5, 1, 72, 2.)

A defendant wilfully neglecting to appear after a peremptory edict is said to be *contumax*. (D. 42, 1, 53, 1.) Judgment could be pronounced in his absence, without appeal. (D. 42, 1, 54.) As in the case of the plaintiff, the peremptory edict or

[1] *Si judex alterve ex litigatoribus morbo sontico impediatur; judicii dies diffusus esto.*

summons was generally the third, but might be the first and only one. (Paul, Sent. 5, 5 A, 7.)

A referee was not bound to decide in a case if the evidence left his mind in a state of doubt; upon taking an oath that neither party had made out their case to his satisfaction (*sibi non liquere*), he was discharged (Aul. Gell. 14, 2); and the parties were obliged to have recourse to another *judex* if they were dissatisfied. Another case might arise, where after the *litis contestatio* the defendant discharged the claim of the plaintiff. Could the *judex* take notice of this?

A question remains that we must look into, whether, if before the matter is adjudged on, the defendant, after receiving the appointment of a *judex*, satisfies the plaintiff, it agrees with the duty of the *judex* to acquit him, or rather to condemn him, because at the time he received the appointment of a *judex* he was in such case that he ought to be condemned. Our teachers think he ought to acquit him, and that it makes no difference what the nature of the proceeding was. This is the common saying that Sabinus and Cassius held all proceedings might lead to an acquittal (*absolutoria*). But the authorities of the opposing school. . . . . As regards proceedings *bonae fidei*, however, they hold the same opinion, because no doubt in these proceedings the duty of the *judex* is unrestrained. The same opinion also they hold with regard to actions for a thing, because there, too, it falls within the very duty of a *judex* that the defendant, if he gives up the thing, ought to be acquitted. Of the same nature, too, are some actions against a person. . . . . (G. 4, 114.)

It remains to call attention to this; that if, before the matter is adjudged on, the defendant satisfies the plaintiff, it agrees with the duty of the *judex* to acquit him, although at the time he received the appointment of a *judex* he was in such case that he ought to be condemned. This is the saying once common, that all proceedings may lead to an acquittal. (J. 4, 12, 2.)

The judgment ought to be pronounced in the regular manner, on pain of being null and void. (C. 7, 45, 4.) Both sides must have enjoyed an opportunity of being heard. (C. 7, 57, 5.) The judgment must be pronounced orally to the parties, and could not be delivered in writing. (C. 7, 44, 1.) The usual custom was, that after the parties were heard the *judices* retired, and dictated their judgment to a clerk, and afterwards came out and read it to the parties (*breviculum*). (C. 7, 44, 2.) At first judgments must be in the Latin language (D. 42, 1, 48), but Arcadius and Honorius permitted them to be given in Greek. (C. 7, 45, 12.)

If there is more than one referee, all must be present when judgment is pronounced (D. 42, 1, 37), but a majority of votes was sufficient to support the judgment. (D. 42, 1, 39.) If the

referees are equally divided, judgment is for the defendant in all cases, except a suit in which liberty is involved, in which case the judgment is to be in favour of freedom (D. 42, 1, 38); and a suit to upset a will on the ground of undutifulness, in which case the will is to be supported. (D. 5, 2, 10.)

Lapse of suit for non-prosecution.

All proceedings either exist by statutory right (*judicia legitima*), or fall within the power (*imperium*) (of a magistrate). (G. 4, 103.)

Statutory proceedings are those that in the city of Rome, or within the first milestone from it, are received between Roman citizens and before one *judex*. They under the *lex Julia judiciaria*, unless adjudged on within a year and six months, die out. This is the common saying, that under the *lex Julia* a lawsuit dies in a year and six months. (G. 4, 104.)

Actions that fall within the power of a magistrate are those brought before *recuperatores*, and that are received before one *judex*, when an alien comes in either as *judex* or as a party to the action. In the same case are all those that are received beyond the first milestone from the city of Rome, whether between Roman citizens or between aliens. These proceedings are said to fall within a magistrate's power, because they take effect so long as he that enjoined them is in power. (G. 4, 105.)

There can, however, be a proceeding under a statute that is not yet statutory; and on the contrary, not under a statute, and yet statutory (*legitimum judicium*). If, for instance, under the *lex Aquilia* or *Ollinia* or *Furia* an action is brought in the provinces, the proceeding will fall within the power of a magistrate. The rule of law is the same if at Rome we bring an action before the *recuperatores* or before a single *judex* when an alien comes in. On the contrary, if on grounds on which an action is granted us by the Prætor's edict, a proceeding is received at Rome before one *judex*, to which all the parties are Roman citizens, it is statutory. (G. 4, 109.)

Lex Ollinia is probably a mistake of a copyist.

IV. New Trials.

The decision of a referee did not in itself conclusively draw after it an order for execution, even at a time when no appeal could be brought. A plaintiff that had got judgment in his favour was obliged to go back to the Prætor with the judgment in his hand, and to ask his authority for proceeding further upon it. An opportunity was thus afforded a defendant of calling in question the justice of the decision on various grounds, and thus it might happen that the Prætor refused to give any effect to an erroneous judgment. In like manner, if a defendant succeeded before a referee, the plaintiff might in certain cases treat the decision as null and void, and proceed once again to the Prætor to get a new *formula* and another *judex*.

The *judex* ought to take care that in any case, as far as he finds it possible, he is to give his decision for a determinate sum of money or thing, even if the action before him is brought for an amount that is indeterminate. (J. 4, 6, 32.)

A judgment that the defendant should pay the sum demanded with usual interest (not specifying at what rate) is null and void (C. 7, 46, 3 ; D. 42, 1, 59, 2), unless where the rate of interest was a recognised quantity. (C. 7, 46, 1.)

Grounds of nullity.

1. When the judgment has been pronounced, owing to an error of law appearing on the face of the judgment it is wholly void ; if the error of law does not appear on the face of the judgment, it cannot be upset except in the regular course of appeal. (D. 49, 1, 19 ; C. 1, 21, 3 ; C. 2, 10, 3 ; C. 7, 52, 2.)

A person is required to be a *tutor*, and he pleads as an excuse that he is beyond the age of compulsory service. The referee, however, held that no excuse was admissible. His decision is null and void without appeal. (*Quum de jure constitutionis, non de jure litigatoris, pronunciatur.*) If, however, the referee admitted age as a ground of excuse, but held that the *tutor* had not proved himself beyond the proper age, his judgment could be upset only by regular appeal. (D. 49, 8, 1, 2.)

In a testamentary suit, a referee supported a will on the ground that a boy under fourteen could make a will. The decision is null. (C. 7, 64, 2.)

A judge condemned a defendant in the amount claimed, with a sum in addition that represented compound interest. But compound interest is illegal. Nevertheless, as the judgment did not bear this fact in its face, it was valid, unless upset on appeal. (D. 42, 1, 27.)

2. If a judgment has been given on the strength of false documents, and the falsity has been proved in criminal proceedings, it is held void. (C. 7, 58, 3.) The same result followed, according to a rescript of Hadrian, when judgment was obtained by a conspiracy of bribed witnesses. (D. 42, 1, 33.) But a new trial could not be had merely on the ground of the discovery of new written evidence (C. 7, 52, 4), unless the documents had been abstracted by the adversary (C. 2, 4, 19), or the Exchequer (*Fiscus*) was the plaintiff. (D. 42, 1, 35 ; D. 49, 14, 2, 8.)

3. A judgment was null and void if it exceeded the terms of the reference (D. 50, 17, 170 ; C. 7, 48, 1), unless with the consent of the litigants. (D. 5, 1, 74, 1.)

4. A judgment is null and void if the referee has accepted a bribe. (C. 7, 64, 7.)

5. A judgment is void, as we have seen, if not pronounced in open court in proper form (C. 7, 45, 6), or if either party is absent excusably, as by illness, or absence on State service (D. 5, 1, 75 ; D. 42, 1, 60 ; C. 7, 43, 4), or if the defendant is dead (D. 49, 8, 2, pr.), or insane. (D. 42, 1, 9.)

Second Epoch—EXTRAORDINARY PROCEDURE.

(A.) Proceedings from Appearance till Judgment.

The proceedings from appearance of parties to judgment after the great change made by Diocletian, abolishing the distinction between *jus* and *judicium*, may be considered under the following heads :—

I. Transition from the *Ordo Judiciorum.*
II. Outline of Proceedings.
III. The *Litis Contestatio.*
IV. Pleading and Defences (*exceptiones*).
V. Set-off.
VI. Variance.

I. Transition from the *Ordo Judiciorum.*

In a great many proceedings of an executive character, the Prætor was compelled to hear evidence, and pronounce a decision without any reference to a *judex*. Thus in proceedings for the execution of judgments, or to enforce the rules of procedure, the Prætor acted without *judices*. But in such cases the object of the Prætor was not to determine a dispute between litigants, but to give effect to judgments, or to secure the working of the machinery of the law. There were cases, however, under the Republic, where the Prætor sat as judge, and heard evidence, with a view to determine the rights of private individuals. Thus, by a *restitutio in integrum* he could make void a bargain made by a minor under twenty-five, when any advantage had been taken of him, or he had lost by the transaction. In like manner, he interfered even for persons beyond twenty-five, when in consequence of the fraud, violence of one party, or the innocent error, excusable absence, old age, or *minima capitis deminutio* of the other, a person had been unjustly deprived of a legal right, or unjustly saddled with a legal duty (*restitutio in integrum est redintegrandae rei vel causae actio.*) (Paul, Sent. 1, 7, 2.)[1] The Prætor in giving this relief (which he did only when no other remedy by *actio* or *exceptio* was available, D. 4, 4, 16, pr.) heard the parties and the necessary evidence without sending the case to a *judex*. (*Causa cognita.*) (Paul, Sent. 1, 7, 3.) For examples see Index, *Restitutio in integrum.*

[1] Nam sub hoc titulo [de in integrum restitutionibus] plurifariam Prætor hominibus vel lapsis vel circumscriptis subvenit ; sive metu, sive calliditate, sive aetate, sive absentia inciderunt in captionem (D. 4, 1, 1), sive per status mutationem, aut justum errorem (D. 4, 1, 2) : item inquit Prætor, si qua alia mihi justa causa videbitur, in integrum restituam. (D. 4, 6, 26, 9.)

Again, in a certain number of controversies regarding land (of which Frontinus enumerates fifteen), about twelve were tried with the aid of a professional class (Surveyors), whose opinion was binding on the judge. (*Mensores. Agrimensores.*)

But it was not until the empire that any serious inroad was made on the system of reference to a *judex*. Almost the first days of the Empire witnessed the birth and rapid growth of *fideicommissa*. Claudius added two special Prætors for this important branch of litigation. It is worth observing that the jurisdiction was confined entirely to the magistrates, and that no reference of a cause of that nature was made to a *judex*. (G. 2, 278; J. 2, 23, 1.) In contradistinction from the ordinary procedure by reference to a *judex*, these proceedings were termed *Cognitiones Extraordinariae* or *Persecutiones* (as opposed to *Actio, Petitio, Interdictum*). (D. 50, 16, 178, 2; G. 2, 278.)

This example was followed in the new branches of law created under the Empire. Thus the recovery of *honoraria* was allowed only by the new process, while by the action of mandate no fee could be recovered. (D. 50, 13, 1, 1.) The same procedure was prescribed for complaints by slaves against their masters (p. 186), and for the obligations imposed on children and parents of mutual support. (D. 25, 3, 5.)

Constantine (A.D. 342) relieved suitors from the technical snares of the *formula*. Nevertheless, the old formal demand of an action (*impetratio actionis*) continued to be kept up until the reign (A.D. 428) of Theodosius II. (C. 2, 58, 1). Its place was taken by the written summons (*libellus conventionis*), which in a far better way informed the defendant of the nature of the complaint against him. Finally, in A.D. 294, Diocletian abolished the *judicia*, and enacted that all causes should be heard entirely by the magistrates.

II. Outline of Proceedings.

When the parties came before the judge, the plaintiff was bound to state his complaint and demand, and the defendant could urge those defences that the law allowed him. The parties were not bound to follow the distinctions of the old *formulae*, but in substance the discussion that took place to elicit the exact nature of the dispute between them differed but little from the lines of the *formulae*. There was, however, no written *formula;* the discussion was oral, and the substance of it recorded by the clerks of court (*officiales*). (C. 7, 62, 32, 2.) After the preliminary discussion, which ended in a

settlement of the issue to be tried (C. Th. 2, 18, 1), witnesses were produced and speeches made as formerly *in judicio.*

III. The *Litis Contestatio.*

Under the *formula* system the *litis contestatio* was the last act *in jure* before the parties proceeded to the *judex;* but when the distinction between *jus* and *judicium* no longer existed, at what point is the old *litis contestatio* supposed to exist? It would appear that even before Diocletian, the *litis contestatio,* in the case of the extraordinary proceedure, was rather at the beginning of the pleadings than at a point that would coincide with the issue of the *formula.* (C. 3, 9, 1.) From a constitution of Justinian we learn that it was after the statement of the plaintiff and counter-statement of the defendant. (C. 3, 1, 14, 1.) This scarcely, if at all, differs from the period of the *litis contestatio* under the *formula* system. What is interesting, and is clearly proved, is, that the service of the summons was not the *litis contestatio,* or legal commencement of the suit. Justinian enacted that after service of the summons twenty days should be allowed for the appearance of defendant to make a *litis contestatio* (Nov. 53, 3, 2), and that plaintiff must proceed to the same point within two months. (Nov. 96, 1.) Thus, even at the last stage of development, the Roman law of procedure bears indelible traces of its origin. The suit does not begin with the summons, even now that the summons is issued by order of a judge, but at a point in the proceedings that to the eye of reason is arbitrary, although it is explained by the history of Roman law. Under the *legis actio sacramenti,* the procedure began with a simulated reference to arbitration. One man asserts a claim against another, who denies the claim; and both agree that whatever the claim is it shall be given up in consideration of the reference to arbitration. The whole meaning and essence of such a reference is, that the parties agree to the extinction of the original claim. But for that, a reference would be the beginning, instead of the end, of a controversy. No man would consent to go to arbitration, assuming he was not compelled to do so, if, in the event of the reference in any manner failing to give satisfaction, the original dispute were to be revived. At all events, the Roman law starts with the rule, that a reference to arbitration absolutely extinguishes the original cause of action.

The case was different in old times with the *legis actiones.* Once an action had been brought on any matter, no further action upon it could be

brought at strict law. And *exceptiones* in those times were not in use at all as they are now. (G. 4, 108.)

1. The first and principal effect, then, of the *litis contestatio*, is to extinguish the cause of action.

An obligation may be taken away, further, by joining issue in an action (*litis contestatio*), provided the action is statutory. The obligation in chief is then dissolved, and the defendant begins to be liable by reason of joining issue. If he is condemned, then joining issue is at an end; and he begins to be liable by reason of the judgment. This is what the old writers mean when they say that the debtor is bound, before issue is joined to give, after issue is joined to be condemned, after condemnation to do what the judgment ordains. (G. 3, 180.)

But if it is by a statutory proceeding (*legitimum judicium*) that an action is brought against a person by the *formula* that has its statement of claim under the *jus civile*, afterwards no action can be brought at strict law on the same matter, and therefore the *exceptio* is superfluous. But if the action is for a thing, or is *in factum*, none the less an action can afterwards be brought, and therefore the *exceptio* is needed that the case has been judged or brought before a *judex*. (G. 4, 107.)

In the case of an *actio in personam* with a *formula in jus concepta*, the action was to enforce an obligation, and the grant of a *formula* operated as a *novatio* of the obligation. On the other hand, in an *actio in rem* or an *actio in personam* with a *formula in factum concepta*, no obligation was alleged and no *novatio* took place.

Hence it is that if I demand a debt by a statutory proceeding, I cannot afterwards bring an action for that very right; for the statement of claim that the thing ought to be given to me is useless, because after issue is joined it no longer ought to be given me. It is not so if I bring an action that falls within a magistrate's power, for then the obligation lasts none the less, and I can therefore bring an action afterwards by that very right; but I ought to be set aside by the *exceptio* that the case has been judged (*rei judicatae*) or brought before a *judex* (*rei in judicium deductae*). Which proceedings are statutory, and which fall within a magistrate's power, we will tell in the next book of our Commentaries. (G. 3, 181.)

For this distinction, see p. 1010.

If an action that falls within a magistrate's power is carried through, whether it is for a thing, or against a person, or by a *formula* framed to state a fact, or by one that has its statement of claim framed to state a right, afterwards none the less at strict law an action on the same matter can be brought. An *exceptio*, therefore, is necessary, that the case has been judged or brought before a *judex*. (G. 4, 106.)

2. Judgment is to be given with reference to the state of facts at the time of the *litis contestatio*. Thus, although *usucapio* ran till judgment, virtually it was stopped at the *litis contestatio* (p. 268).

3. Performance by defendant of demand after the *litis contestatio* did not always entitle him to absolution from the judge. (G. 4, 114.)

Thus the sale of a slave liable for a delict after the *litis contestatio*, even to the plaintiff, did not avoid condemnation. (D. 9, 4, 37.)

4. A penal or other action that cannot be brought against the heirs of a wrongdoer, after the *litis contestatio* lies against the heirs. The reason seems to be that, inasmuch as the original claim no longer exists, but has been given up, in consideration of a promise to obey the judgment, the claim is really transformed into a species of debt, and all heirs are liable for the debts of their predecessors. (D. 44, 7, 58; D. 46, 2, 29; D. 50, 17, 67.)

In like manner, a *popularis actio*, after the *litis contestatio*, becomes, as it were, a private claim of the plaintiff; and if he dies, the action may be continued by his heirs.

5. If an action were brought concerning property, it became a *res litigiosa*, and incapable of alienation to a person cognisant of the fact.

If, again, you knowingly buy a farm about which an action is pending from the man that is not in possession of it, and demand it from the man that is, you are met by the *exceptio*, and so in any case set aside. (G. 4, 117.)

IV. Pleading under the new system.

Although the *formula* was superseded, yet the language and the ideas it introduced remained. So also Justinian continues to speak of *exceptio*, although equitable pleas do not require to be specially pleaded. In the older system, if a defendant went before the *judex* without an *exceptio* in the *formula*, he could not plead his equitable defence; but now all actions are on the footing of the *bonae fidei* actions, in which no defence need be pleaded until the parties are before the *judex*. An *exceptio* now means nothing more than a ground of defence to an action.

In like manner, if a debtor takes the oath tendered him by his creditor that he ought to give nothing, he still remains bound. But since it is unfair that a question of perjury should be raised, he defends himself by the *exceptio* that he has taken the oath. In actions for a thing *exceptiones* are equally necessary. If, for instance, the possessor takes the oath tendered by the claimant that the thing is his own, and yet none the less the claimant brings a *vindicatio* for the same thing, an *exceptio* is in place; for although it may be true, as he alleges in his statement of claim, that the thing is his, yet it is unfair that the possessor should be condemned. If, again, an action of either kind is brought against you, none the less for that the right of action lasts; and therefore, in strict law, an action can be brought against you afterwards for the same thing. But you ought to have the help of the *exceptio rei judicatae* (that the case has been judged already). (J. 4, 13, 4-5.)

Perpetual and peremptory *exceptiones* are those that always bar the way against those that take proceedings and put an end to what is in dispute. Such is the defence, that the act was done through fear or fraud; or, again, that an agreement was come to providing that the money should in no case be demanded. Temporary and dilatory *exceptiones* are those that for a time do harm, and grant a delay for a time; as, for instance, that an agreement was come to providing that no action could be brought within a fixed time, say five years. For at the end of the time the plaintiff is not hindered from following up his property. Those, therefore, that when they wish to bring an action within the time find an *exceptio* thrown in their way, whether based on agreement or some other like one, ought to put off the action, and to bring another after the time is come; indeed, this is the very reason why these *exceptiones* are called dilatory. But if not, and if they brought the action within the time, and had it barred by the *exceptio*, then in old times they could not obtain anything in that proceeding because of the *exceptio*, and could bring no action after the time was come; because they rashly brought the matter to judgment, and so used it up, and in this way they often lost their case. In our day, however, we do not wish this to go on so strictly, and resolve that he that dares to bring a suit before the time of the agreement or the obligation shall be subject to the constitution of Zeno, which that most sacred lawgiver put forth concerning those that in respect of time demand too much. If, therefore, the time either that the plaintiff himself, of his own accord, granted as a favour, or that the nature of the action involves is being set at nought, then they that have suffered such a wrong are to have twice as much; and after the time is over, they are not to take up a lawsuit unless they have received all the expenses of the one before. Thus plaintiffs, thoroughly frightened by such a penalty, will be taught to observe the time for lawsuits. (J. 4, 13, 8-10.)

V. Set-off.

Set-offs, when brought up, often make a man obtain less than is due to him. For on the ground of what is right and fair, account is taken of what he in turn ought to make good to the plaintiff in the same case; and for the remainder the defendant may be condemned, as has already been said. (J. 4, 6, 39.)

In proceedings *bonae fidei* the judge is allowed unrestricted power to estimate how much in fairness and equity ought to be given up to the plaintiff. This includes the power of taking into account as a set-off anything the plaintiff in turn ought to make good, and of condemning the defendant to pay only the balance. Even in proceedings at strict law, under a rescript of the late Emperor Marcus, if the *exceptio* by which the plaintiff was met was fraud, set-off was brought in. But a constitution of ours has brought in more widely the set-offs that rest on manifest right, and has allowed them to lessen the actions at strict law, whether for a thing or against a person, or of any other sort whatever, with the exception of the action of deposit alone. That an action of deposit should be met by a claim for set-off, we believed sufficiently undutiful: and it was excepted that no one might, under the pretext of a set-off, be fraudulently hindered from recovering what he deposited. (J. 4, 6, 30.)

1. No sum can be set-off unless it is due by the plaintiff (*actor*) to the defendant (*reus*). (C. 4, 31, 9.) But a surety sued for the debt of the principal debtor can set-off any sum due by the plaintiff either to himself or to the principal debtor. (D. 16, 2, 5.)

2. The debt must be such as would support an action or an equitable defence (*exceptio*). In this way a *naturalis obligatio* may be set-off (p. 455).

3. A debt, to be set-off, must be actually due. A sum payable at a future day by plaintiff cannot be set-off to a sum payable at once by the defendant. (D. 16, 2, 7.)

4. No debt can be set-off unless it is either undisputed by the plaintiff or susceptible of easy proof (*liquidum*). (D. 16, 2, 8.) If the alleged debt is difficult to prove, there is no advantage in having a set-off; it would be just as easy for the defender to bring a cross action.

5. A debt, to be set-off, must be certain and determinate. Thus, if the plaintiff owes the defendant alternatively a sum of money or a slave, there can be no set-off until the choice is made, and it appears which is due. (D. 16, 2, 22.)

6. The debt must have some relation to the amount claimed before it can be set-off. Thus no set-off is allowed in an action *ex commodato*. (C. 4, 23, 4.) Generally the question to be settled in allowing or refusing a set-off was, whether it was more convenient that the claim should be referred to one judge and one trial, or that the defendant should bring a cross action and try his claim separately.

VI. Variance.

If a man, when he brought an action, embraced too much in his statement of claim—more, that is, than belonged to him, his case fell to the ground; that is, he lost his property, and did not readily obtain from the Prætor a restoration to his full rights. If, indeed, he was under twenty-five, just as in other cases, after inquiry, aid was given him if the slip was due to his youth; so in this case, too, aid was usually given him. No doubt, if a case of mistake recognised by law came in so strong that even men of the firmest character might have made a slip, aid was given him although over twenty-five; as, for instance, when a man demanded a legacy entire, and thereafter *codicilli* were brought forward, by which either a part of the legacy was taken away or legacies were given to certain persons besides, that made the plaintiff's demand exceed the three-fourths to which, according to the *lex Falcidia*, the legacies were brought down. (J. 4, 6, 33.)

All this was once in use. But afterwards a statute of Zeno's and one of ours narrowed such use. If too much in respect of time is demanded, the constitution of Zeno of blessed memory (*divinae memoriae*) tells what ought to be resolved on. But if it is too much in respect of amount or in any other way that is demanded, then let the plaintiff be punished by being condemned to pay thrice the amount at stake, as we said above. (J. 4, 6, 33 E.)

If the plaintiff embraces too little in his statement of claim—less, that is, than belonged to him; if, for instance, when ten *aurei* were due him, he claims that five ought to be given him, or when the whole farm is his, claims half as his—he runs no risk in his action; for the judge, under a constitution by Zeno of blessed memory, none the less condemns the opposite party in the same proceeding to pay the balance. (J. 4, 6, 34.)

If one states in his claim one thing instead of another, it is held that he runs no risk. In the same proceeding, when the truth is ascertained, we allow him to correct his mistake. An instance is, when one that ought to demand the slave Stichus demands Eros, or when one declares in his state-

ment of claim that something ought to be given him under a will, and it is due under a stipulation. (J. 4, 6, 35.)

(B.) COSTS.

In a mature system of law, a person that makes an unjust claim, or resists a just claim, is regarded as inflicting a distinct wrong, and as bound to pay compensation, the measure of which is well described by the term "costs." The best rule on this subject is, that while success affords a fair presumption of rightness, the judge should be allowed to make such exceptions as justice may require.

It can be no matter of surprise to anyone that follows the growth of Roman law that the early law contained no provision for costs. It is true that in the *sacramentum* the loser forfeited his stake, but not to the winner; the lost stake represents the payment of the fees of court. By various steps, however, the Romans at last arrived at a sound system.

I. Penalties attached to a suit improperly defended.

1. Now we must note that, by the old law, men were hindered from lightly going on to a lawsuit, by a pecuniary penalty or the sanctity of an oath, and these devices are still used by the Prætor. Against a party, for instance, that denied liability in certain cases, an action for twice the amount is established; as, for instance, in an action on account of a debt due by judgment (*actio judicati*), or of money paid for another (*actio depensi*), or of injurious damage, or of legacies left in the form *per damnationem*. (G. 4, 171.)

2. Wager. (*Sponsio.*)

In certain cases one is allowed to make a judicial wager (*sponsio*), as for a determinate sum of money that has been lent, or for money that has been settled on (*pecunia constituta*); in a former case for a third of the sum, but in the latter for a half. (G. 4, 171.)

To them must be added interdicts (p. 1000).

3. Oath of defendant.

But if no risk is imposed on the defendant either of a judicial wager or of an action for twice the amount, and if the action is not at once, even from the beginning, for more than the amount simply, the Prætor allows the plaintiff to exact an oath that the defendant's denial is not in order to trump up a case. Hence, since heirs and those that are held to be in the position of heirs never incur an obligation for twice the amount, and since also against women and *pupilli* the penalty in a judicial wager is not usually enforced, the Prætor orders them only to take the oath. (G. 4, 172.)

In some cases from the very beginning the action is for more than the amount simply; in the case of *furtum manifestum*, for instance, it is for fourfold; of *furtum nec manifestum*, for twofold; of *furtum conceptum* and

oblatum for threefold. In these cases, and in certain cases besides, whether one denies or confesses liability, the action is for more than the amount simply. (G. 4, 173.)

4. Changes by Justinian.

Now we must note that the upholders of our laws have taken great care to keep men from lightly going into lawsuits, and we have the same anxiety. This can be done chiefly by restraining the rashness both of plaintiffs and of defendants, sometimes by a money penalty, sometimes by the awe of an oath, sometimes by the fear of infamy. (J. 4, 16, pr.)

An oath, for instance, under a constitution of ours, is tendered to all that are sued. The defendant, indeed, cannot make use of his allegations without first swearing that it is in the belief that he has a good defence that he comes to deny what is charged. Against those that deny liability in some cases an action for twice the amount is established, as when an action is brought on account of wrongful damage, or of legacies left to places worthy of veneration. Sometimes, again, even from the very beginning, the action is for more than the amount simply, as in the case of *furtum manifestum* for fourfold, of *nec manifestum* for twofold. In these cases, and in certain cases besides, whether one denies or confesses liability, the action is for more than the amount simply. (J. 4, 16, 1.)

Justinian enacted in A.D. 530 that in all causes, whether decided in the presence of both or in the absence of one of the parties, the judges should condemn the defeated litigant to pay costs to the victor, estimated on oath by the victor according to the usual allowance; and if the judges neglected to do so, they could be compelled to pay the costs themselves. (C. 3, 1, 13, 6.)

II. Penalties attached to the improper bringing of a suit.

Plaintiffs are restrained from trumping up charges (*calumnia*) sometimes by the proceeding so called, sometimes by that called *contrarium*, sometimes by an oath, sometimes by demanding a stipulation in turn. (G. 4, 174.)

1. The proceeding called *calumniae* (for trumping up a charge) is in place against any action. It is brought for a tenth of the amount in question, or against interdicts for one-fourth. (G. 4, 175.)

2. The proceeding called *contrarium* (opposition) is established in certain fixed cases. It may be brought, for instance, to meet an *actio injuriarum;* or if an action is brought against a woman on the ground, as alleged, that when sent into possession on behalf of her unborn child she fraudulently transferred possession to another; or again, if one brings an action on the ground, as alleged, that when sent into possession by the Prætor he has been refused admission by some one else. Against an *actio injuriarum* it is given for a tenth; against the other two for a fifth. (G. 4, 177.)

This is a severer mode of restraint than the proceeding called *calumniae.* In that no one is condemned to pay a tenth unless when he knew that his action was not righteous, but began it to harass an adversary, and in hope of a victory rather from mistake or unfairness on the judge's part than from the truth of his case; for *calumnia* lies in a man's intention.

as theft does. But in the proceeding called *contrarium* the plaintiff is condemned in any event if he has not maintained his case, although there was some opinion that led him on to believe he was right in bringing the action. (G. 4, 178.)

3. The penalty of a stipulation in turn (*restipulatio*) is usually enforced in certain cases, and as in the proceeding called *contrarium* the plaintiff is condemned in any event if he has not maintained his case, and no inquiry is made whether he knew that he was not right in bringing the action. For by the penalty of a stipulation in turn the plaintiff is condemned in any event. (G. 4, 170.)

It is free to him against whom the action is brought to meet it either by the proceeding called *calumniae*, or by exacting an oath that the action is not a trumped-up one (*calumniae causa*). (G. 4, 176.)

In every case, then, in which an action can be brought by the proceeding called *contrarium*, the proceeding called *calumniae* also is in place. But by one proceeding or the other alone is one allowed to bring an action. On this principle, if the oath that the charge is trumped-up is exacted, then as the proceeding called *calumniae* is not granted, so that called *contrarium* ought not to be granted either. (G. 4, 179.)

Sometimes if a demand is made of a plaintiff with the penalty of a stipulation in turn, then neither is he met by the proceeding called *calumniae*, nor is he brought under the awe of an oath. As for the proceeding called *contrarium*, it is plain that in these cases it is not in place. (G. 4, 181.)

4. Changes by Justinian.

The plaintiff also is restrained from trumping up a charge, for he, even, under a constitution of ours, is compelled to take an oath that he is not. On both sides also the advocates come under an oath—a point embraced in another constitution of ours. All this was brought in on account of the old action called *calumniae*, now fallen into disuse, because it fined the plaintiff one-tenth of the amount in dispute, a thing we nowhere find done. But instead of this there have been brought in the oath aforesaid, and the rule by which a man that shamelessly will go to law is forced to pay all damages and costs of the suit to the opposite party. (J. 4, 16, 1.)

In some proceedings the persons condemned are branded with ignominy —in the case of theft, for instance, of robbery, or of *injuria* and fraud [*fiducia*]; *tutela*, mandate, deposit if the actions are direct not cross actions; and again, in the case of partnership, which is a direct action on both sides, and in that proceeding, therefore, any one of the partners, if condemned, is branded with ignominy (*infamia*). But in cases of theft, robbery, *injuria*, or fraud, not only those actually condemned are branded with ignominy, but those also that come to a compromise. [So it is written in the Prætor's edict], and rightly; for it makes the greatest difference whether one comes under an obligation because of an offence or because of a contract. [In that part of the edict, further, it is expressly provided that a man sued in the proceeding called *contrarium*, or again a man that has come in on behalf of a debtor, a *tutor* for instance, or a *cognitor*, is not to labour under ignominy. A man, therefore, that is sued as a surety is not; for he is condemned on behalf of another.] (J. 4, 16, 2; G. 4, 182.)

(c.) Procurators and Advocates.

We have seen that no agent could be admitted in the solemn formalities of the *legis actio*, in accordance with the general rule that no one could take anything by a solemn formality except the person that performed it.

We must note now that anyone can bring an action, either in his own name or in another's,—as, for instance, as procurator, *tutor*, or curator. (J. 4, 10, pr.; G. 4, 82.)

How *tutores*, again, and curators are appointed, we have told in the first book of our Commentaries. (J. 4, 10, 2; G. 4, 85.)

Inconvenience very far from trifling was caused by the fact that in another's name no one could lawfully bring or meet (*excipere*) an action. Men began, therefore, to go to law by means of procurators. For disease, and age, and necessary journeys, and many other causes as well, often hinder men from being able to follow out their own affairs themselves. (J. 4, 10, pr.)

Gaius explains to us in what manner agents were introduced through the procedure by *formulae*.

A man that brings an action in another's name, frames his statement of claim in the principal's name, but changes this into his own in the condemnation. If, for example, Lucius Titius brings an action for Publius Maevius, his *formula* is framed as follows:—"If it appears that Numerius Negidius ought to give 10,000 *sestertii* to Publius Maevius, *judex*, condemn Numerius Negidius to give 10,000 *sestertii* to Lucius Titius. If it does not so appear, acquit him."[1] If, again, the action is for a thing, his statement of claim is that "the thing belongs to Publius Maevius *ex jure Quiritium*," and this he changes in the condemnation into his own name. (G. 4, 86.)

On the opposite party's side, if anyone comes in against whom the action is set on foot, the statement of claim is that the principal ought to give, but in the condemnation this is changed into the name of the person that has accepted the proceedings. But if the action is for a thing, the person against whom the action is brought does not appear in the statement of claim, whether it is in his own name or in another's that he comes into the proceedings; for the statement of claim is simply this, that the thing is the plaintiff's. (G. 4, 87.)

Difference between *Cognitor* and Procurator.

A *cognitor* is brought in as a substitute in an action by using certain fixed words in presence of the opposite party. The plaintiff appoints the *cognitor* in this way:—"Whereas I am demanding a farm" (say) "from you, for that matter I appoint you Lucius Titius as *cognitor*." The defendant, again, speaks thus:—"Since you are demanding a farm from me, for that matter I appoint Publius Maevius *cognitor*." It may be done by the plaintiff speaking thus:—"Whereas I wish to bring an action against you, for that matter

[1] *Si paret Numerium Negidium Publio Maevio sestertium X milia dare oportere, judex, Numerium Negidium Lucio Titio sestertium X milia condemna. Si non paret, absolve.*

I appoint a *cognitor*," and by the opposite party speaking thus,—"Since you wish to bring an action against me for that affair, I appoint a *cognitor*." It makes no difference whether the *cognitor* is appointed in his presence or in his absence; but if appointed in his absence, he will be *cognitor* only if he knows of his appointment and undertakes the duty. (G. 4, 83.)[1]

There are no fixed words by which a procurator is brought into a suit in room of another. By a mandate alone he may be appointed, and that without either the presence or the knowledge of the opposite party. Nay, there are some that think a man must be held to be a procurator if only, though no mandate has been given him, he comes to the business in good faith, and gives security that the principal will ratify what he does. Although, therefore, he does not produce his mandate, a procurator is admitted; because often a mandate at the beginning of an action is kept in the dark, and afterwards is displayed before the judge. (G. 4, 84.)

When an agent must give security.

1. In Actions *in rem*.

(1.) For Plaintiff.

Let us see now what are the cases in which the man against whom an action is brought, or the man that brings it, is forced to give security. (G 4, 88.)

As to securities, one way was adopted by antiquity, another has been embraced in practice by recent times. (J. 4, 11, pr.)

The man that brought an action for a thing, if he made the demand in his own name, was not forced to give security. (J. 4, 11, pr.; G. 4, 96.)

Even if the action is brought by a *cognitor*, no security is required either from him or from his principal, because there is a fixed and set form of words by which a *cognitor* is brought in as a substitute in room of the principal, and he is therefore deservedly regarded as a principal. (G. 4, 97.)

But if a procurator brought an action for a thing, he was ordered to give security that the principal would ratify what he did, because there was a danger of the principal taking proceedings a second time in the same matter. [This danger did not come in if the action was brought by a *cognitor*; because for any matter in which a man has brought an action by a *cognitor*, he has no further right to bring an action, any more than if he had done so at first himself.] (J. 4, 11, pr.; G. 4, 98.)

Tutores and curators were by the words of the edict bound to give security, the same as procurators. But sometimes when they brought an action they were let off giving security. (J. 4, 11, pr.)

(2.) For Defendant.

If, therefore, in early times the action was for a thing, the possessor was forced to give security [for it seemed fair that as he was allowed to possess a thing to which his right was doubtful, he should guarantee by a security that if he were beaten, and did not give up the thing, or the value set on it in the

[1] *Quod ego a te verbi gratia fundum peto, in eam rem Lucium Titium tibi cognitorem do*; adversarius ita: *quandoque tu a me fundum petis, in eam rem Publium Maevium cognitorem do.* Potest, ut actor ita dicat: *quod ego tecum agere volo, in eam rem cognitorem do*; adversarius ita: *quandoque tu mecum agere vis, in eam rem cognitorem do.*

action, the plaintiff might have the power to bring an action against either him or his sureties]. This security was called *judicatum solvi* (that what is adjudged will be paid). How it came to be so called may easily be understood; for one stipulated that what was adjudged should be paid to him. Much more was a man, if sued in an action for a thing, compelled to give security if he accepted proceedings on behalf of another. (J. 4, 11, pr.; G. 4, 89-90.)

2. Actions *in personam.*

(1.) For Plaintiff.

All this was so if the action was for a thing. If, however, it was against a person [and we ask when security ought to be given], on the plaintiff's side all observances were exactly those we have spoken of in an action for a thing. (J. 4, 11, 1; G. 4, 100.)

(2.) For Defendant.

On all these points the practice observed in our day is different. When a man is sued in an action, either for a thing or personally in his own name, he is not compelled to give any security for the amount at issue, but only for his own person, that he will remain in the power of the court up to the end of the suit. Sometimes this is committed to his promise on oath; this they call guarantee by oath (*juratoria cautio*). Sometimes he is forced to give his bare promise or security according to his quality and standing. (J. 4, 11, 2.)

On the defendant's side, if anyone came in on behalf of another, he must in any case give security; because no one is believed to be a fit defender in another's case without giving security. [If, indeed, the action is against a *cognitor*, the principal is ordered to give security; but if against a procurator, then the procurator himself. The rule of law is the same with regard to the *tutor* and the curator.] (J. 4, 11, 1; G. 4, 101.)

But if it was in his own name that anyone accepted proceedings in an action against a person, he was not forced to give security that what was adjudged should be paid (*judicatum solvi*). [In certain cases this is usually given; these the Prætor himself points out. The reason for giving such securities is twofold; it is given either because of the kind of action, or because of the person since he is suspected. It is because of the kind of action in an action for what is adjudged or paid on one's behalf, or in an action involving a woman's character. It is because of the person, when the action is against a man that has failed, or whose goods have been taken possession of, or posted for sale by his creditors, or if the action is against an heir the Prætor thinks an object of suspicion.] (J. 4, 11, 1; G. 4, 102.)

Agents under the Extraordinary Procedure.

A procurator may be appointed without any set form of words, and though the opposite party is not present, and more than that, often without his knowledge. Anyone, indeed, to whom you entrust your case to manage or defend, is understood to be your procurator. (J. 4, 10, 1.)

Agency passed through three periods; in the first, no agent was allowed, except in two or three cases; in the second, an agent could be substituted in court by certain solemn words (*cognitores*); and lastly, without any formality by an ordinary mandate (*procuratores*). These last alone remain under Justinian, and after the introduction of the Extraordinary Procedure.

Rights and Duties.

A. Between the Agent and the other Litigant.

I. Duties of Procurator of Plaintiff.

1. No person can sue for another without showing that he is authorised to sue.

All this appears more openly and most perfectly in the daily practice of the courts in the lessons to be learned from actual cases. This procedure, we resolve, shall hold not only in this royal city, but also in all our provinces, even although from want of skill the forms now followed may perhaps be different. For it is necessary that all the provinces should follow the head of all our States—that is, this royal city, and the rules it observes. (J. 4, 11, 6-7.)

Exceptions.—Certain persons can sue on behalf of others without showing any express authority, as a husband for a wife (C. 2, 13, 21), a son for a father (C. 2, 13, 12); so parents for children, brother for brother, patrons for freedmen, and relations by marriage for one another (*affines*). (D. 3, 3, 35, pr.) But such persons cannot sue against the wishes of the principal, even by offering security *de rato*. (D. 3, 3, 40, 4.)

2. An agent must give security (*satisdatio de rato*) that the principal will endorse his action, unless under certain circumstances.

But if it is through a procurator that a suit is either brought in or taken up in the character of plaintiff, unless a mandate is entered in the court records, or the principal in the suit in person confirms in court his character of procurator, the procurator is compelled to give security that the principal will confirm what he does. The same practice is to be observed if it is a *tutor* or curator or other such person that has undertaken the guidance of others' affairs, that is bringing an action against any through a third person. (J. 4, 11, 3.)

3. The duty expressed by the word *defendere* is to do that which the principal himself, if suing in his own person, would do. Having once assumed the position of agent, one must go on unless released or removed by the authority of the judge. (D. 3, 3, 35, 3.) Thus he ought to make answers to interrogatories issued on the part of the defendant. (D. 3, 3, 39, pr.)

II. Duties of Procurator of Defendant.

1. Anyone can act as agent for a defendant without express authority. (C. 2, 13, 12.) If not authorised, he must give security.

But when a man is sued, if indeed he is ready on the spot to appoint a procurator, he can either come himself into court and confirm his procurator in that character by giving security in the set form of stipulation that what is adjudged shall be paid (*judicatum solvi*); or he may stay out of court and put out a security by which he becomes surety for his own procurator, for all the clauses in the security that what is adjudged shall be paid. Herein he is compelled to agree to a mortgage of his property, whether he promises in court or gives security outside it, so as to bind both himself and his heirs. Another guarantee or security, moreover, must be put out for himself personally, that at the time sentence is pronounced he will be found in court, or that if he does not come his surety will give all that is contained in the condemnation, unless there is an appeal. But if the defendant from any reason whatever is not present, and some one else is willing to undertake the defence, no difference between actions for a thing and against a person is to be introduced, and he can do so if only he furnishes security for the amount at issue, that what is adjudged shall be paid. No one, indeed, according to the old rule, as has already been said, is understood to be a fit defender in another's case, unless he gives security. (J. 4, 11, 4-5.)

The stipulation *judicatum solvi* must be given at the beginning of the suit (C. 2, 57, 1); it included three clauses, *de re judicata, de re defendenda, de dolo malo.* (D. 46, 7, 6.) The first clause provides that the agent shall pay whatever sum is adjudged, the agent being entitled to the same indulgences as the principal debtor. (D. 46, 7, 1; D. 3, 3, 51, 1.) The second clause, *de re defendenda*, provides that the agent shall take all proper steps for the conduct of the action (*recte defendi*). (D. 5, 1, 63.) By this clause the agent bound himself to proceed with the cause even if the defendant could not be summoned (as a consul, D. 46, 7, 12), or became insane (D. 46, 7, 3, 8) or insolvent (D. 3, 3, 76.). Under the third clause, the agent bound himself to refrain from malicious injury to the subject-matter of the dispute. (D. 46, 7, 19, 1.)

2. The agent must take all proper steps to conduct the suit.

If the agent himself gave security, he could not be compelled to carry on the litigation to judgment; he could stop when he pleased, and leave the case undefended; but he lost the sum promised, and his sureties could be sued for it, if the plaintiff had required sureties. (D. 3, 3, 45; D. 3, 3, 44.) If, however, not the agent but the principal defendant gave security, the

Prætor compelled the agent to act. (D. 3, 3, 8, 3.) But even in this case the agent was allowed to withdraw if there was any adequate excuse. (D. 3, 3, 6; D. 3, 3, 14; D. 3, 3, 5.) Even, however, with the best excuse, an agent was compelled to go on if his refusal would expose the plaintiff to injury. (D. 3, 3, 12.) Such questions, however, were in a peculiar degree questions for the discretion of the Prætor, according to the circumstances of the case. (D. 3, 3, 13; D. 50, 17, 85, 2.)

B. Between a Litigant and his Agent.

The relation between a litigant and his agent was governed by the rules of mandate. The agent was appointed to conduct the proceedings up to judgment (*in litem*); to that he was limited, and could not, therefore, give a discharge. Hence, if a defendant offered to pay the money due before the *litis contestatio*, the judge ordered the money to be deposited in a temple; and if the case were carried further, he acquitted the defendant. (D. 3, 3, 7, 3.) Again, if the agent did not properly fulfil his mandate, he had no claim to compensation for his outlay, according to the general rule governing mandate. (D. 3, 3, 43, 4; C. 2, 13, 5.)

Investitive Facts.—The investitive fact was either mandate, or such facts as would constitute the agent a *negotiorum gestor*. One party cannot have more than one agent, the appointment of a second operating as a recall of the first (D. 3, 3, 31, 2): parties conjoined in a suit, having separate interests, could employ separate agents. (D. 3, 3, 42, 6; D. 3, 31, 1.)

Certain persons were not allowed to act as procurators.

There are further dilatory *exceptiones* arising from the status of the person, such as those taken to a procurator; as when one wishes to carry on an action through the agency of a soldier or a woman. Soldiers are not allowed to take proceedings as procurators, not even for a father or a mother or a wife; no, not even under a sacred rescript. Their own matters they may look after without any offence against discipline. But the *exceptiones* that in old times were arrayed against procurators because of the infamy either of the principal that appointed them, or of the procurator himself, are, as we have clearly seen, not at all common in trials. We have, therefore, enacted that they shall entirely cease, lest disputes as to them should spin out the discussion of the actual matter at stake. (J. 4, 13, 11.)

The defence of another was considered a duty fit only for men. (C. 2, 13, 18.) Thus a woman could not act as agent for her husband even in his absence; a woman could sue only when her own interest was concerned. (C. 2, 13, 4; Paul, Sent. 1, 2, 1.) But daughters were allowed to act for their parents, if these were ill or aged, and

if they could get no one else to act for them. (D. 3, 3, 41.) The objection could not be taken after the *litis contestatio*. (D. 3, 3, 57, 1; C. 2, 13, 13.)

A slave could in one case only act as agent—to bring the interdict *unde vi* on behalf of an absent master. (C. 8, 8, 1.)

Divestitive Facts.—Procurators, in one respect, however, were exempted from the rules of mandate; an agent, even after the death of his principal, could carry on the lawsuit to its termination. (C. 2, 13, 23.) The reason may be found in the *formula* given by Gaius. It was the name of the agent, not of the principal, that was introduced in the *condemnatio*. The *formula* was in effect this: "if A. owes money to B., the *judex* shall condemn A. to pay the amount to C." What happened to B. after the *formula* was given became thus entirely irrelevant to the judgment that the *judex* could alone pronounce. The agent became, in a sense, the litigant (*quasi dominus litis*). (C. 2, 13, 23.) This idea survived the use of *formulae*, and the rule was established that although before the *litis contestatio* a litigant could change his agent as often as he pleased, yet after that event the agent could not be changed. (D. 3, 3, 16.) This stringent rule was inconvenient. While the formula system was in force, the only way that an agent could be changed, once his name was down in the *formula* (*i.e.*, after the *litis contestatio*), was by the proceeding of *restitutio in integrum*—by going back to the Prætor, and, on making out an adequate case, obtaining a new *formula*. Under the extraordinary procedure this proceeding was unnecessary, but still no change was allowed, except by the authority of the judge, after hearing the reasons *pro* and *con*. (D. 3, 3, 17; C. 2, 13, 22.) If, however, the agent had interfered without the express mandate of the principal, the principal had a right, without showing reasons, to dismiss him, and take up the suit himself. (D. 3, 3, 27.)

Advocates (*Advocati*).

The parties to a suit could either conduct their causes themselves, or employ advocates to do so.

A contract made between a client and advocate with respect to his remuneration was void. (D. 3, 1, 9, 3.) But an advocate could accept a *honorarium*, in later times fixed at 100 *aurei*. (D. 50, 13, 1, 12.) These fees could not, however, be recovered by the heirs of an advocate. (D. 50, 13, 1, 13.) If the advocate failed to plead a cause for which he accepted a *honorarium*, he

was obliged to return it if it was his fault (C. 4, 6, 11), but otherwise not. (D. 19, 2, 38, 1.)

Every advocate before beginning his pleading was required to take an oath not to pervert justice through excessive zeal for his client. (C. 3, 1, 14, 1.)

PART III.—EXECUTION OF JUDGMENTS.

A. Proceedings to determine the Existence of a Judgment Debt.

The judgment of a *judex* may be regarded as in a sense the natural termination of a Roman Civil Trial. The suit begins in a feigned quarrel, and the judgment determining which is right and which wrong may be said to dispose of it altogether. But suppose a defendant refuses to obey a judgment. In this case the proceedings take a new departure. The successful plaintiff must again seize the defendant and take him before the Prætor, this time to prefer not his original cause of complaint, but a new one,—that the defendant refuses to satisfy the judgment given against him. Hence, without much impropriety, the new proceedings are called an "action," whereas in modern systems of law it would be erroneous to speak of the steps taken in execution of a judgment of a court as in any reasonable sense a new action. But in the Roman law, under the so-called Ordinary Procedure, the judgment was not the judgment of a court; it was the judgment of a private individual, as referee or arbitrator. There was nothing unreasonable, therefore, in requiring a plaintiff to satisfy the Prætor that the judgment was right, before that magistrate would assist him with the coercive authority of the State. Accordingly, just as in the first instance, the complainant went before the Prætor and asked him to interpose his authority to terminate a dispute by giving a *judex;* so, if the defendant disputed the judgment of the *judex*, the plaintiff must again go before the Prætor to prove the legality of the judgment, and on proof thereof to obtain the assistance of the State to compel the obedience of the defendant. We can thus understand why the proceedings taken in execution of a judgment were called "*actio*," not merely under the earliest form of procedure (*actio per manus injectionem*), but under the latest (*actio judicati*). What gives greater colour to the use of the word is, that a judgment

was not the only ground upon which such an action could be moved, but the same proceedings could be taken in cases where no judgment had been given.

I. *Actio per manus injectionem.*

The action *per manus injectionem* (by laying hands on a man) might equally be brought in cases where this proceeding was provided for by any statute; as in the case of a man judged a debtor, by the statute of the XII Tables. The action was of this sort:—the man that took proceedings spoke thus:—"Whereas you have been judged, or condemned, to me in ten thousand *sestertii*, which hitherto you have not paid, I, therefore, because of that debt of ten thousand *sestertii* judged due, lay hands on you,"[1] and at the same time he grasped some part of his body. The man judged a debtor was not allowed to shake off his hand and to take proceedings (*lege agere*) to defend himself, but he gave a substitute (*vindex*), who used to conduct his case for him; or if he did not, he was led by the plaintiff to his house, and was put in chains. (G. 4, 21.)

The object of the proceedings is to legalise arrest. It is not the magistrate that executes the judgment; it is the plaintiff that seizes the defendant, and appeals to the magistrate for support. The defendant is obliged, if he cannot satisfy the judgment, to go away as a prisoner with the plaintiff. A provision is, however, made for the case where a defendant disputes the fact of any judgment having been given, or alleges that the judgment exceeded the powers of the *judex*, or was flagrantly illegal (*sententia nullius momenti*), or that judgment had been satisfied. (D. 42, 1, 4, 6.) The defendant is allowed to defend the action, not in person, but by a substitute (*vindex*). It is impossible not to be struck with the similarity of these steps to the proceedings in a suit for freedom. Naturally a slave claiming freedom was not allowed to sue by himself; but why should a freeman whose freedom was attacked be unable to defend himself, and be compelled to go into slavery unless he got some one willing to take upon himself the risks and costs of the litigation? Whatever may have been the reason, the rule is the same when a judgment creditor demands the person of his debtor as a slave, on the ground that the judgment has not been satisfied. The debtor must find a substitute (*vindex*), who thereby makes himself responsible for the payment of the debt, if it should prove that there was a valid judgment.

Mr Poste suggests that in default of appearance, in pro-

[1] *Quod tu mihi judicatus sive damnatus es sestertium X milia quae ad hoc non solvisti ob eam rem ego tibi sestertium X milium judicati manum injicio.*

ceedings under the XII Tables, the plaintiff could at once proceed *per manus injectionem.* This cannot, however, be relied on as certain.

The proceedings by arrest had the advantage of being speedier than a submission to arbitration, and we accordingly find that the convenience of the remedy caused it to be extended to certain other cases, where a special obloquy attached to the non-payment of debt.

Afterwards certain statutes on certain other grounds granted *manus injectio* against certain persons as if they had been judged debtors (*pro judicato*). The *lex Publilia*, for instance, granted it against a man for whom a surety had paid out money, if within the next six months after the money had been paid out for him he did not pay the surety. The *lex Furia de sponsu* (on suretyship) also granted it against him that had exacted from a surety more than his proportionate part. And in short many other statutes in many cases granted such a proceeding. (G. 4, 22.)

There were other statutes, too, that in many cases in which actions were granted against certain persons, established certain proceedings *per manus injectionem*, but simple, not, that is, as if one were judged a debtor. The *lex Furia testamentaria* (on wills), for instance, granted it against the man that had taken more than five hundred *asses* on account of legacies, or as a gift in prospect of death, unless, indeed, he was excepted from the statute, and so might lawfully take more. The *lex Marcia*, also, against usurers, settles that if they have exacted usury, the proceeding against them for its return shall be *per manus injectionem.* (G. 4, 23.)

Under these statutes, and any other like ones, when proceedings were taken, the accused might lawfully shake off the hand and defend himself at law. For the plaintiff in the actual *legis actio* did not add this word "as if judged a debtor," but named the ground on which he proceeded, and spoke thus :—"Because of that I lay hands on you." Those, however, that were granted a proceeding as if a man were judged a debtor, named the ground on which they proceeded and brought it in thus :—"Because of that I lay hands on you as if judged a debtor." I am not indeed unmindful that in the form under the *lex Furia testamentaria* the word "as if judged a debtor" (*pro judicato*) is inserted, although not in the actual statutes. But this seems to be done on no principle. (G. 4, 24.)

Afterwards by the *lex* (? *Vallia*), with the exception of the man judged a debtor, and of him for whom a debt had been paid, all the others against whom proceedings were taken *per manus injectionem* were allowed to shake off the hand and to take proceedings to defend themselves. The man judged a debtor, therefore, and the man for whom money was laid out, were bound even after this statute to give a security (*vindex*), and if they did not give one, were led to the plaintiff's house. (G. 4, 25.)

II. *Actio Judicati.*

All this, therefore, was always observed so long as the *legis actiones* were in use. Hence in our times the man against whom an action for a debt due under a judgment or for money paid out is brought, is compelled to give security that the debt due under the judgment shall be paid. (G. 4, 25.)

As a rule, in the *actio judicati*, no question of fact could be in issue between the parties ; if the defendant urged that the judgment was null or void, the Prætor determined the question in accordance with law. But if the defendant urged that he had satisfied the judgment, an issue of fact was raised, the determination of which was probably referred to a *judex*. For after judgment either the defendant may have paid the sum due, or the plaintiff may have released him. The form of release was by mancipation (*imaginaria solutio per aes et libram*). (G. 3, 174.)

The change mentioned by Gaius from the *actio per manus injectionem* consisted in the substitution of a surety (*cautio judicatum solvi*) for a *vindex*.

1. By and against whom the *actio judicati* may be brought.

Only the actual plaintiffs or defendants, not their agents, can sue or be sued in this proceeding. An agent cannot enforce the judgment he has obtained (although the condemnation stated that the money was to be paid to him), but if the principal became insolvent, he could apply for payment of his expenses out of the proceeds of the judgment. (D. 3, 3, 30.)

So neither can an agent for a defendant be required to satisfy the judgment, unless he undertook the defence without the authority of the defendant (D. 42, 1, 4), or was the real defendant (*procurator in rem suam*). (D. 3, 3, 61.) It may be brought by and against the heirs of the parties. (D. 42, 1, 6, 3.)

2. The object of the action was to obtain payment of the amount contained in the judgment, but in special cases the defendant could require the plaintiff to be content with adequate sureties. (D. 42, 1, 4, 3.)

In the time of Gaius, the defendant, if condemned, had to pay twice the amount of the judgment (G. 4, 171), although from the omission of this case in the corresponding section of Justinian (J. 4, 6, 23), we may infer that the penalty of double damages had fallen into disuse.

After the time allowed for payment, interest at 5 per cent. was exigible (C. 7, 54, 1), beginning after four months from the date of the judgment in the time of Justinian ; or if an appeal was allowed, from the dismissal of the appeal. (C. 7, 54, 2.) Interest was allowed only on the principal debt, not on the interest, if any, given by the judgment, according to the rule that compound interest (*usurae usurarum*) was unlawful. (C. 7, 54, 3.)

3. When the *actio judicati* could be brought.

The time allowed for payment of a judgment debt was by the XII Tables thirty days, extended afterwards to two months, and finally by Justinian to four months. (C. 7, 54, 3.) But the magistrate had a discretionary power to hasten or delay the time according to circumstances. Thus in judgments for aliment no delay was allowed. (D. 42, 1, 2.)

B. Proceedings to Enforce Judgments for Property.

In the proceedings for recovery of property under the *legis actiones*, the form of judgment was to the effect that one of the parties was right in saying he was owner. In effect, the judgment determined the question of ownership. It followed that the possessor, if judgment was given against him, wrongfully held what belonged to another; and if he refused to go out, might be ejected by the force at the command of the magistrate. Under the *formula* system the question of ownership resolved itself into a pecuniary condemnation, but one can scarcely doubt that, in the last resort, if the money were not paid, the owner would be put in possession of his own. At all events, under the so-called Extraordinary Procedure, an owner on establishing his title was put in possession by the armed intervention of the State (*manu militari*). (D. 6, 1, 68).

C. Proceedings to enforce Judgment Debts.

The simple, and as it seems to us, obvious mode of executing a judgment, is to seize the property of the debtor and sell it. For reasons that do not appear on the surface, this plan did not occur to the early Romans, and was not indeed employed until a late period in the Empire. The only way of compelling satisfaction of a judgment debt, known to the early Roman law, was to seize the debtor as a slave. Hence a strange anomaly. It must have seemed either an extraordinary stretch of tyranny, or rank sacrilege, to touch a man's property, but to seize his person, and keep him as a slave, appeared the most natural thing in the world. The first known process of execution was thus directed against the person of the debtor. By a natural transition, the Roman law passed to execution by sale of the universal succession of a debtor, and, last of all, to the sale of particular pieces of property.

First Epoch—Execution against the Person.

Aulus Gellius gives an account of the old process of enforcing debt. We have seen from Gaius that a debtor was allowed thirty days to discharge a judgment debt before he could be arrested. If he did not pay, or find a *vindex* to dispute the judgment, he was carried off by the creditor in chains. At this point the debtor was said to be *addictus*, in arrest, but not in slavery; for if released, he did not become a freedman. He retained his status as freeborn (*ingenuus*). After being assigned (*addictus*) to the creditor, the debtor was kept in chains for sixty days. During this period, on three successive market days (*nundinae*), the creditor was required to bring his debtor before the Prætor and proclaim the amount of the debt, to give an opportunity to his friends to discharge the debt and release him. On the third occasion the debtor was killed, and his body divided among the creditors, or he was sold into slavery beyond the Tiber. The words of the XII Tables have been given, p. 18.

Aulus Gellius remarks on the exceeding barbarism of the XII Tables in sanctioning the killing of debtors, and dividing their bodies among their creditors. So Quintilian speaks of it as a law that had fallen into desuetude. Both Tertullian and Dio Cassius refer to the same tradition. Many authors have felt unable to believe that the account is correct. It is not merely that the remedy is cruel, but that it is absurd. We can scarcely conceive a state of society where men should entertain such a consuming hatred of debtors, as to be satisfied with nothing less than their lives. However that may be, it is certain that the ordinary remedy, within the historical period, was not by killing a debtor, but by keeping him as a slave.

The execution of judgments, by seizing the person of the debtor, may be compared with the surrender by a master of a slave that has committed a delict (*noxalis deditio*). When a slave, a son *in potestate*, or a wife *in manu*, committed a theft, or damage, or other injury, the master, father, or husband respectively were bound to pay compensation or give up the offender. The offender was surrendered by mancipation, and was held *in mancipio* by the aggrieved party. If, however, an injury were done by the master himself, practically the same alternative was presented to him; he must either pay compensation, or be taken as a slave. The idea is the same, and there is but little difference even in the form. Originally there was no distinc-

tion between slavery and *mancipium*, as we may gather from the name *mancipia*, often applied even in the Digest to slaves. Moreover, one of the explanations, and not the least probable of *nexi*, is, that they were freemen who sold themselves as security for debt. Nor is it difficult to understand why a debtor should be taken as a slave. The reason is simply this, that if he would not pay he must work. Free labour was not an institution of ancient society, and the only type that the law could follow was that of slavery or *mancipium*.

Another circumstance deserves attention. Throughout the proceedings described to us by Gaius and Aulus Gellius, it is not the Prætor, as representing the State, that takes the initiative; it is not his officers that arrest the debtor. It is the creditor that seizes the debtor, and calls upon the Prætor to sanction the arrest. From first to last, the law interferes only to moderate the severity of creditors; to take precautions in the interest of debtors, so that no man may seize another and keep him as a slave on a false pretext of debt. The proceedings are essentially a private act of force legalised and restrained by law. Just as the summons, in its first stage, was purely a private act, in which the law simply made the exercise of force lawful, so in the execution of a judgment the law goes no further than to refuse to shield a debtor from his creditor. It says in effect, the law cannot give you protection against the arrest of your creditor, so long as a judgment remains against you unsatisfied.

About B.C. 326-313 an act was passed commonly called *lex Poetelia Papiria*, abolishing the *nexum*, and from this date probably we may reckon the rule of law that liberty is inalienable. Whether this law, which put an end to the voluntary alienation of personal freedom, also extinguished its involuntary alienation through the execution of judgment debts, is uncertain; a passage from Varro appearing to indicate that the latter change was reserved to the time of Sulla. However that may be, it is certain that during the later Republic a debtor could not be taken as a slave to satisfy a judgment debt. The imprisonment of the debtor in a public prison took the place of his reduction to slavery. (C. 7, 71, 1.) It was an offence (*injuria*) to prevent food and bedding being taken to an imprisoned debtor (D. 42, 1, 34), but we find no trace of an obligation on the part of the creditor to find him food, from which it may with some probability be suspected that the

imprisoned debtor was bound to maintain himself. Finally, Constantine (A.D. 320) abolished imprisonment for debt, unless the debtor were contumacious. (C. 10, 19, 2.)

Second Epoch—Bankruptcy, or Sale of a Debtor's Universal Succession.

Festus (p. 70) observes that a free person given *in mancipio* to another is *capite deminutus*. His new master became his universal successor. But there were two kinds of universal succession—to the living and to the dead. A universal succession to the dead was taken, so to speak, for a moment of time. All that the deceased owned, all that he owed at the time of his death, passed to his universal successor. But a universal succession to the living had two faces, one looking to the past and summed up in the moment of the succession, the other looking to the future. The universal successor of a living person obtained not only everything up to the moment of the succession, but all that the person he succeeded to could ever subsequently acquire. This was the case in succession by mancipation: a person given *in mancipio* not only lost all his existing rights, but was disabled from acquiring any new rights. It swept away at one stroke both the past and the future of the debtor. Now the great point in favour of a debtor, by making him a bankrupt or selling his universal succession, was, that while taking away the past, it left him the future.

This change was due to the Prætor, who found ready to his hand a model to follow in the ancient *sectio bonorum*. The State, for its own objects, felt no scruple in selling out a man, although it did not venture to touch a man's property merely to satisfy a private debt. The words *sectio, sectores*, seem to have been applied from the circumstance that the purchaser sold the goods that he had bought in smaller quantities. (Festus, p. 337.) The *sectio* was the purchase of the universal succession to a person condemned or proscribed. The purchaser acquired the Quiritarian ownership of all the property belonging to the proscribed, the sale taking place under the spear (*sub hasta*), the symbol of Quiritarian ownership.

He again that has bought a man's goods at a State sale, has set forth for him an interdict of the same sort, called *sectorium;* because *sectores* is what those are called that deal in goods bought at a State sale. (G. 4, 146.)

A. Bankruptcy against the Will of the Bankrupt.

I. *Missio in possessionem. Venditio Bonorum. Actio Rutiliana.*

1. When a debtor departs from the jurisdiction, leaving no one to act for him, or conceals himself to avoid legal proceedings, he is sold up. (G. 3, 78.)

The execution of a judgment debt by arrest and enslavement of the debtor was a very strong measure when it could be employed, but it was exposed to the drawback that the debtor, by avoiding his creditor, might deprive him of all remedy. Just as the old law of summons made no provision for the case of deliberate concealment, so in the execution of a judgment debt the debtor was safe if he kept out of the way of the creditor. The creditor could not touch his property. The old law, while thus extravagantly severe against impecunious debtors who had not the means of evading process, was impotent against solvent debtors, if they could avoid a personal encounter with their creditor. It was with the last evil that the Prætor dealt. When a debtor kept out of the way, he granted his creditors an entry on his property (*missio in possessionem*). This step was of the nature of an arrest of property. It cut off the debtor from all right to enjoy his property (D. 42, 4, 7), and gave the creditors a right of control and management. (D. 42, 5, 8, 1.) The creditors had a right to grant receipts to the debtors of the estate (D. 50, 16, 56), and to the inspection of documents, but not to take copies. (D. 42, 5, 5.) Once in possession (D. 13, 7, 26, 1), the creditors had the right of mortgagees only, not of owners. (D. 13, 7, 26, pr.) The arrest is maintained until the debtor finds security to contest the claim of the creditor. (D. 42, 5, 33, 1.) The creditors must account for all the income that they may or ought to have obtained (D. 42, 5, 9, 6), and they are entitled to the expenses. (D. 42, 5, 9, 3.)

In like manner, too, the purchaser of the goods proceeds on the fiction that he is heir. But in some cases it is usual to proceed in another fashion—namely, by taking his statement of claim from the person of the man whose goods he has purchased, and then changing the condemnation into his own person. The effect of this is to condemn his opponent to pay him, on the score that the things belonged to the insolvent, or that the debt was due to the insolvent. This form of action is called *Rutiliana;* because it was drawn up by the Praetor Publius Rutilius, who is said to have brought in also the forced sale of goods (*bonorum venditio*). (G. 4, 35.)

2. The Sale.

If it is a living man whose goods are being sold, the Prætor orders them to be kept in possession, and notices to be posted during thirty successive

days; but if it is a dead man, fifteen. Afterwards he orders the creditors to meet, and out of their own number to elect a manager (*magister*); a man, that is, through whom the goods are to be sold. If, then, it is a living man whose goods are being sold, he orders the terms of sale to be prepared within ten days, if a dead man within five days; and within forty days more in the case of a living man, or twenty more in the case of a dead man, he orders the goods to be made over to the buyer. The principle on which the forced sale of goods is by the Prætor's orders more slowly completed in the case of living men is, that for living men care must be taken that they should not readily suffer forced sales of their goods. (G. 3, 79.)

Theophilus (J. 3, 12, pr.) gives some additional particulars. The first step taken by the creditors was to get the custody (*possessio*) of the debtor's goods. Next, after a delay of thirty days, they select one of their number, called a *magister*, whose name is submitted to the Prætor. After his appointment, he causes a notice to be issued in these words:—"So and so, a debtor of ours, has committed an act of bankruptcy; we, his creditors, are selling his property; let anyone that wishes to buy come forward." After certain days a third application was made to the Prætor to authorise a sale and settle the dividend, the sale being in this form, that the purchaser offered the creditors a certain proportion of their debts; as, for example, one-half. After this authority was obtained, another delay was allowed, and finally the buyer was vested in the universal succession of the bankrupt by the adjudication of the Prætor.

This forced sale released the debtor from all past debts. In respect of any cause of action arising before the *missio in possessionem*, the debtor could neither sue nor be sued, unless he had acted fraudulently against his creditors. In this case he was subjected to an action as a punishment. (D. 42, 8, 25, 7; G. 1, 155.) But the debtor, although released from his debts, was henceforth infamous (Cic. pro Quint. 15; G. 2, 154; C. 2, 12, 11), and was not allowed to defend any suit unless he could find sureties. (G. 4, 102.)

Rights and liabilities of the purchaser.

Neither to a *bonorum possessor* nor to a *bonorum emptor* (purchaser of an insolvent estate) does property pass with full rights; it becomes his only *in bonis*. His *ex jure Quiritium* it can become only after it is acquired by *usucapio*. Sometimes, however, the purchasers of insolvent estates cannot acquire by *usucapio*,—if namely. . . . . (G. 3, 80.)

Again, debts due to the man whose the goods were, or debts he himself owed, neither the *bonorum possessor* nor the *bonorum emptor* in strict law owes or has owed him. In all matters, therefore, they both take proceedings, and are sued by *utiles actiones*, which we will put forth lower down. (G. 3, 81.)

The buyer enforced his rights to the property of the bankrupt by an interdict. (G. 4, 145.)

II. *Curatores bonorum distrahendorum.*

By a *Senatus Consultum* a different mode of proceeding was instituted in the case of persons of high rank—a senator or his

wife. A curator instead of a *magister* was appointed, for the purpose of avoiding a loss of *existimatio*. (D. 27, 10, 5.) The curators took possession of the property of the debtor, and sold it in lots as might be most convenient, the debtor being released only to the extent to which the assets went. The universal succession of the debtor was not disposed of, and thus his *existimatio* was untouched. In the case of other persons the creditors could resort to whichever method they pleased. (D. 27, 10, 9.) The curator was appointed by a magistrate of the highest rank. (D. 42, 7, 2, 4.) Several curators might be appointed, in which case each could sue or be sued for all. (D. 42, 7, 2, 2.) After Diocletian, the old system of appointing *magistri* went out, and curators were appointed in every case.

There were before the aforesaid kind of succession other kinds also of universal succession. Such was the sale of goods brought in for selling, with many roundabout formalities, the goods of a debtor. It was in place when the ordinary procedure (*judicia ordinaria*) was in use; but when later times used the extraordinary procedure, then with the ordinary procedure the sales of goods, too, died away. Creditors are now allowed by the judge, in virtue of his office, to take possession of the goods, and to dispose of them as they think advantageous. All this will more perfectly appear in our larger book, the Digest. (J. 3, 12, pr.)

B. Bankruptcy on the application of the Bankrupt (*Cessio Bonorum*).

The Prætor did not interfere to mitigate the lot of the debtor who was unable to pay, although he interfered in favour of the creditor whose debtors could, but would not pay. That amelioration of the civil law seems to have been too much for his power, and accordingly we find relief first given by legislation, probably in the early days of the Empire. The introduction of bankruptcy as an alternative to personal arrest and imprisonment is ascribed to a *lex Julia*. (G. 3, 78.)

Let us look also to the kind of succession that is open to us under the sale of goods of an insolvent. Men's goods are sold either when they are alive or when they are dead. When they are alive, as in the case of those that go into hiding to defraud their creditors, and being absent do not defend themselves; or in the case of those that surrender their goods under the *lex Julia;* or again, in the case of debtors under a judgment after the time that is allowed them to get the money ready, partly under the statute of the XII Tables, partly under the Prætor's edict, is now past. When they are dead, as when it is certain that they have no heirs, nor *bonorum possessores*, and that no other lawful successor is in existence. (G. 3, 77-78.)

It is not known whether this enactment is due to Julius Cæsar or to Augustus, but if to the latter, it was probably as a general measure following up a precedent set by the former. When Cæsar was Consul (B.C. 48), he obtained an enactment that debtors, many of whom were ruined by the civil war, should get rid of their debts by transferring their property to their creditors at the price it would have fetched before the war. The *lex Julia* permitted a debtor to surrender his property to his creditors in lieu of execution against his body. (C. 7, 71, 1.) The *Tabula Heracleensis* declares a person incapable to sit in the Curia who has made a surrender of his estate. That table is very probably a municipal law of the time of Julius Cæsar. Such surrender, moreover, did not entail infamy (C. 2, 12, 11), but it did not release the debtor from liability, if he could afterwards pay without leaving himself in want. (D. 42, 3, 4.)

Against a man, too, that has surrendered his goods to his creditors, if he afterwards acquires anything that yields a suitable profit, fresh proceedings may be taken by his creditors; but only for what he is able to do, since it would not be humane to condemn for the entire amount of his debts a man despoiled of his fortune. (J. 4, 6, 40.)

Hence a small allowance made to a bankrupt for his maintenance could not be seized by his creditors. (D. 42, 3, 6; C. 7, 72, 3; D. 42, 3, 4, 1.) The surrender might be made in presence of the Prætor, but that was not necessary. (D. 42, 3, 9.) At first certain formalities were required (C. Th. 4, 20, 2), but in later times it was enough if the debtor signified in any manner his wish to surrender his estate to his creditors. (C. 7, 71, 6, pr.) The debtor could even after that interpose, and by paying his debts in full save his estate from being sold. (D. 42, 3, 5.)

Beneficium quinquennalium.—Debtors sometimes petitioned the Emperor that an election should be given to their creditors, either to give a respite for five years or to accept a bankruptcy. The person or persons that held the greatest amount of debt decided which course should be adopted. If the amount of debt is equally divided, that half which has a majority of debtors is to decide. If the number of creditors also is equal, their request is to be granted. (C. 7, 71, 8.)

c. Alienations and Acquittances in Fraud of Creditors.

If, again, to defraud his creditors, a man delivers anything to some one else, after his goods have been taken possession of by the creditors under a decision of the President, the creditors themselves are allowed to rescind

the delivery and to demand the thing; that is, to allege that the thing was not delivered, and therefore remained among the debtor's goods. (J. 4, 6, 6.)

Two questions have to be considered—(1) What is an alienation or acquittance in fraud of creditors? and (2) To what extent has the creditor a remedy?

1. An alienation in fraud of creditors comprehends any act or forbearance by which a debtor diminishes the amount of his property divisible among his creditors, but not a forbearance by which the debtor simply fails to add to his property. (D. 50, 17, 134.)

Every alienation of property or contract (D. 42, 8, 1, 2), and every acquittance of a debt or pledge (D. 42, 8, 3), even to an intended husband as a dowry, was a diminution of the goods. (D. 42, 8, 10, 14.)

A debtor making default so as to suffer the loss of his action, or neglecting to sue until the time of prescription runs out, or losing a servitude by non-use, is said to diminish the goods divisible among his creditors. (D. 42, 8, 3, 1; D. 42, 8, 4.)

A debtor refuses to enter on a solvent inheritance. This is not a forbearance diminishing his assets. (D. 50, 16, 28; D. 42, 8, 6, pr.)

A debtor emancipates his son that he may succeed to a solvent inheritance in his own right. This is not a forbearance diminishing assets within the meaning of the edict. (D. 42, 8, 6, 3.)

Payment of debts is not a subtraction from the assets of the debtor within the purpose of the edict,[1] unless the object of the payment is to give a fraudulent preference to one of the creditors. (D. 42, 5, 6, 2.)

A debtor surrendered an inheritance according to the *Senatus Consultum Trebellianum*, without reserving the fourth, to which, under that enactment, he was entitled. This is not an acquittance within the meaning of the edict. (D. 42, 8, 20.)

A husband, to defraud his creditors, repaid his wife, on divorce, her dowry, before the time had elapsed when he was compelled to do it. The wife must repay the loss sustained by the creditors of the husband in consequence of the dowry being repaid before the time. (D. 42, 8, 17, 4; D. 42, 8, 10, 12.)

A creditor discovers his debtor running away, and takes from him the sum due. If this is before the decree giving the creditors possession, the creditor may retain what he has got; but if after, he must share alike with the other creditors. (D. 42, 8, 10, 16; D. 42, 8, 6, 7.)

2. The alienation or acquittance must be made with the intention of diminishing the assets available for the creditors generally, and it must also have the effect intended. (D. 50, 17, 79; D. 42, 8, 10, 1.)

If the alienation or acquittance is made without valuable consideration, the act is rescinded, even if the person in whose

[1] *Nihil dolo creditor facit qui suum recipit.* (D. 50, 17, 129.)

favour it is made is wholly innocent of the fraud; but if it is for valuable consideration, it is not upset, unless the person in whose favour it is made knows that it is in fraud of creditors. (D. 42, 8, 6, 8; C. 7, 75, 5.) If there is a second alienation, made by a fraudulent purchaser to a person ignorant of the fraud, the new purchaser cannot be ousted. (D. 42, 8, 9.)

Lucius Titius, being in debt, conveyed all his property to his freedmen, who were at the same time his natural children. Although the intention of Titius was simply to benefit his children, and not to defraud his creditors, still, as he knew that he had creditors, and that he alienated all his property, he must be considered to have intended to defraud them. Hence the children must give up the property to the creditors, although they were not aware of the fraud. (D. 42, 8, 17, 1.)

An heir pays legacies under a will. It is then discovered that enough does not remain for the creditors of deceased. The creditors can revoke the legacies. (D. 42, 8, 6, 13.) But the legatees can be sued only for what remains to them of the legacies at the time the action is brought. (D. 42, 8, 6, 11.)

A father-in-law gives to his son-in-law a dowry, and thereby reduces his assets. The son-in-law cannot be sued by the creditors, unless he knew the alienation was made to defraud them, because he is in the position of a purchaser for valuable consideration. He probably would not have married without a dowry; but if the wife gets the dowry, as upon a divorce, she can be sued by the creditors, because, in respect of her, her father's gift is gratuitous, even if she is ignorant of the father's insolvency. (D. 42, 8, 25, 1.)

Remedies for Fraudulent Alienations.

1. *Actio Pauliana.*

(1.) This action may be brought *by* creditors, but not by the debtor himself or his heirs (C. 7, 75, 4), *against* a person cognisant of the fraud, although he has ceased to possess the property (D. 42, 8, 25, 1); and also against anyone who has in his possession any property of the debtor without valuable consideration, even if innocent of the fraud. (D. 42, 8, 25, 2.) It lies also against the bankrupt himself, although upon this point there was once a difference of opinion. (D. 42, 8, 25, 7.) The action lies also by and against the heirs of these parties respectively. (D. 42, 8, 10, 25.)

(2.) The object is to restore the property with all its produce and every increment (*causa*). (D. 42, 8, 10, 19; D. 42, 8, 25, 4.) But the defendant may deduct his expenses. (D. 42, 8, 10, 20.)

2. *Interdictum Fraudatorium.*—The distinction between this and the former is not known. It has been suggested that it was the remedy given to the *bonorum emptor*, as the universal successor of the bankrupt; but there are difficulties in the text (D. 42, 8, 10, pr.) in the way of accepting this explanation.

3. *Actio Pauliana in factum.*

If a person has lost possession of anything fraudulently conveyed to him, or has been fraudulently acquitted of a debt, the remedy is the *actio in factum.* (D. 42, 8, 14; D. 42, 8, 17.) In the latter case, the object of the action is to restore the obligations that have been cancelled. (D. 42, 8, 10, 22.)

The action lies for one year absolutely (D. 42, 8, 6, 14), and after that only for so much as the defendant has retained. (D. 42, 8, 10, 24.)

Third Epoch—Execution against Property.

The earliest form of execution of judgment debts was the seizure of the debtor, and making him a slave. The execution,

moreover, remained an act of private vengeance, regulated and controlled by the Prætor. The first attempt of the Prætor to get directly at the property of a debtor was in the case of those that fraudulently evaded the process of the court, and his mode of proceeding was by making the debtor a bankrupt. This entailed the loss of the debtor's political rights. The debtor became infamous. Finally, when curators were appointed, the sale of the debtor's universal succession was avoided ; the curators sold his property in lots, and thus saved his legal character (*existimatio*). When a person was willing to pay his debts, but unable, he could, from the beginning of the Empire, make a voluntary surrender of his property, and thus escape the stigma of infamy, but he got only a qualified discharge from his creditors.

So far the Roman law provides two modes of enforcing judgment debts—imprisonment and bankruptcy. These ways were practically sufficient, because if a debtor concealed himself so that his creditors could not catch him to imprison him, he could be made a bankrupt. In cases, however, where a debtor was able to pay, the proceedings by imprisonment or bankruptcy were an indirect mode of compulsion only, and there was wanted some simpler and easier method by which the creditor could pass by the person of his debtor and obtain payment out of his property. At length, in the time of the Emperor Antoninus Pius, judgment debts were enforced directly by the seizure and sale of the debtor's goods by public officials. (D. 42, 1, 6, 2 ; D. 42, 1, 31.) Once introduced, this became the regular way of levying execution for debt when the debtor was not suspected of insolvency. (C. 7, 53, 9.)

Anything belonging to the debtor could be taken in execution, except slaves, oxen, or implements of agriculture. (C. 8, 17, 7.) Animals and moveables were, however, to be taken and exhausted before recourse was had to the land of the debtor. (D. 42, 1, 15, 8.) Money due to a debtor could also be seized in execution (C. 7, 53, 5), if it were undisputed, but not otherwise. (D. 42, 1, 15, 9.) The creditors may either sell the debt or sue the debtor, as they deem expedient. (D. 42, 1, 15, 10.) So money deposited with bankers, and standing to the credit of the debtor, could be seized in payment of his debt. (D. 42, 1, 16, 11.)

The sale of goods was conducted by the officers of court (*officiales, apparitores*). (C. 8, 23, 2.) If the judgment debtor

causes the sale to be defeated, the creditor may have the goods adjudged to him as his property, unless the goods were of greater value than the debt. (C. 8, 23, 3 ; D. 42, 1, 15, 3.)

D. Extrajudicial Remedies.

The *legis actio per pignoris capionem* (by taking a pledge) applies to some matters by custom, to others by statute. (G. 4, 26.)

By custom it was brought in for military matters. Soldiers were allowed for their pay to take a pledge from the man that ought to give it them, if he did not give it them : the money given them on account of pay was called *aes militare.* They were allowed to take a pledge too for the money with which they had to buy their horses : that money was called *aes equestre.* And again, for the money with which they had to get barley for their horses ; that money was called *aes hordearium.* (G. 4, 27.)

By statute, again, it was brought in for some cases, as by the statute of the XII Tables against the man that bought a sacrifice and did not give the price, and also against him that did not give the price for the beast of burden that another had let out to him expressly in order to spend on a feast—that is, a sacrifice to Jupiter Dapalis. By the Censorial law, again, *pignoris capio* was allowed the farmers of the State taxes of the Roman people against those that owed them taxes under any statute. (G. 4, 28.)

The *leges censoriae* were the terms of the contracts entered into between the censors and those who undertook to collect the taxes.

In all those cases, when the pledge was taken, a set form of words was used, and, therefore, most were of opinion that this action too was *legis actio.* But some were of opinion that it was not. In the first place, they said that the taking of the pledge was carried out, not in court (*extra jus*), that is, not before the Prætor, and often even in the absence of the opposite party ; whereas no other actions could be used, except before the Prætor, in the presence of the opposite party. Then, further, a pledge could be taken even on a day that was *nefastus*—a day, that is, on which one could not lawfully bring a *legis actio.* (G. 4, 29.)

Sir Henry S. Maine has some very interesting and important observations (Early History of Institutions, p. 257) on the place occupied by *pignoris capio* as an ancient form of distress, initiating civil proceedings. The analogous practices among ancient nations that he points out, seem to throw light upon a subject that is left by Gaius very obscure.

PART IV.—APPEALS.

First Period—During the Republic.

The Roman magistrates during the Republic did not form a hierarchy. They were independent of each other, each being theoretically a delegate of the sovereign power of the people. But the notion of an appeal implies a subordination of courts, and a challenge of the judgment of a lower in a higher court. So long, therefore, as there was no subordination of magistrates

there could be no appeal. Nevertheless, during the Republic two institutions existed that in some, although insufficient, measure, supplied a substitute for a regular system of appeal.

I. PROVOCATIO. — When a person was condemned by a criminal court, he could appeal (*provocare*) to the Roman people. According to Cicero, this right of appeal existed under the kings; but a text of Pomponius states that the right of appeal was introduced on the expulsion of the kings, as a limitation of the powers of the consuls, who could not touch the *caput* of a Roman citizen without the sanction of the people. (D. 1, 2, 2, 16.) In later times, criminal justice was administered by commissions (*quaestiones perpetuae*) composed of private citizens selected by the Prætors, and the appeal to the people fell into disuse. The trial itself was held by the delegates of the people, and there was no longer the same necessity for an appeal as when that formed the only restriction on the arbitrary power of the magistrate.

II. APPELLATIO.—From the peculiar constitution of the Roman magistracy another consequence followed. Each magistrate, as a distinct depository of the sovereign power, had the right to forbid any execution or judicial act of any other magistrate. It was a maxim of the Roman law with reference to partnerships, that in a dispute between two partners, that one who said "No" was to have his way. In like manner, a magistrate could be stopped in any official act by the veto of any other magistrate of equal or higher standing. (D. 5, 1, 58.) Such a veto was called *intercessio*, and the formal demand for it by a private individual, *appellatio*. The tribunes especially had this right of veto over even Consuls and Prætors. They exercised the power either individually or collectively after hearing the grounds of the application.

The effect of the veto was purely negative: it stopped for the time the act forbidden, but it substituted nothing in its place, and thus could not operate as an amending power. In many cases, however, this remedy was sufficient.

Second Period—DURING THE EMPIRE.

During the first days of the Empire the old system continued. The Emperor, in virtue of being made tribune for life, could veto the acts of any magistrate in Rome and Italy. In the imperial provinces the Emperor governed by his lieutenants, from whose decisions an appeal lay as of course to him; and in

the provinces reserved for the Senate, the Emperor, in his capacity of Proconsnl, could veto any of the acts of a governor. At first, therefore, the interference of the Emperor in the administration of justice arose from his combining in himself a number of offices formerly held by different elected magistrates. But although the Republican forms were scrupulously followed, the establishment of the Empire meant the abolition of all the independent and rival magistracies of the Republic, and the substitution of a single sovereign. The want that must have been felt during the Republican period of a proper court of appeal, soon led the Emperors to overstep the strict limits of the magistracies they held, and to make themselves a supreme appellate tribunal from all courts throughout the Roman world.

I. From whom an appeal lies.

At first the only court from which no appeal lay was the Emperor; but after Hadrian, the Senate (D. 42, 2, 1, 2), and after Constantine, the Prætorian Prefects gave final decisions. (C. 7, 62, 19.) These courts might, however, be asked to rehear a cause. (C. 1, 19, 5.) The Emperor could also, in appointing any judge to determine a cause, provide that his decision should be final. (D. 49, 2, 1, 4.) In all other cases an appeal could be brought. (C. 7, 62, 19.)

Generally appeals from magistrates in Rome, and from the judges in certain provinces, were carried, in the first instance, to the prefect of the city (C. 7, 62, 17; C. 7, 62, 23); and from the presidents of provinces to the Prætorian prefect. (C. 7, 62, 32, pr.)

II. From what judgments an appeal lies.

1. There was no appeal when the judgment was *ipso jure* invalid. In a former chapter (p. 1011), cases have been pointed out where a judgment could be treated as null and void without the necessity of any appeal.

Generally no appeal lay from an interlocutory judgment—that is, a judgment upon some subordinate point, arising in the course of the proceedings before the judge gives his final decision on the question brought before him. (D. 49, 5, 4.) The exception was when, if the judge was wrong, the judgment would do an irremediable wrong, as by the unlawful infliction of torture. (D. 49, 5, 2.)

3. No appeal lay from the execution of a judgment, unless the official carrying it out exceeded his authority. (C. 7, 65, 5.)

4. No appeal lay from a judgment by a magistrate against

one of the officers of his court in respect of his official acts. (C. 7, 65, 3.)

5. In other cases, an appeal was disallowed when vexatious, or causing inconvenient delay—as to prevent the opening of a will, or the entry of an heir (D. 49, 5, 7, pr.), or to deprive a secured creditor of his right of sale. (D. 49, 5, 7, 2.)

There was no restriction as to the value of the subject-matter of litigation. (C. 7, 62, 20.) But it appears there was some limit as to the amount of money in dispute in cases of appeal to the Emperor. (D. 49, 1, 10, 1.)

III. Who may appeal.

Not merely the parties or their agents could appeal (D. 49, 5, 1; D. 49, 9, 1), but sureties that intervened in the suit (D. 49, 1, 5, pr.), and others interested. Thus, if one of two co-heirs is sued, and judgment given against him by collusion, the other co-heir can treat the judgment as null and void, or may appeal if he thinks fit. (D. 49, 1, 5, pr.) So legatees and slaves enfranchised by will can appeal against a judgment pronouncing the will illegal on the ground of its not having provided for certain persons (*inofficiosum*), if they allege collusion. (D. 49, 1, 5, 1.) A person against whom, as contumacious, judgment has been given, cannot appeal. (D. 49, 1, 23, 3; C. 7, 65, 1.)

IV. Notice of appeal.

The usual course was for a dissatisfied litigant to give verbal notice of appeal on hearing the judgment given (D. 49, 1, 2); but if he did not, he preserved his right of appeal by giving notice in writing within a certain time, which was finally fixed by Justinian at ten days. (Nov. 23, 1; D. 49, 1, 3, 4.)

V. Security for costs.

If the appeal was frivolous or upon insufficient grounds, the appellant was required to give securities for a penalty of one-third the amount in dispute, in the event of the appeal failing. (Paul, Sent. 5, 33, 1.) If good sureties are not forthcoming, the appellant must deposit the amount. (Paul, Sent. 5, 33, 2.)

VI. Proceedings to hearing.

Unless notice of appeal has been given on hearing judgment (D. 49, 1, 2), the first step to be taken by the appellant was to present to the judge from whom the appeal was made a written petition of appeal (*Libellus Appellatorius*). It contained the names of the appellants, the respondents, and the judgment appealed against (D. 49, 1, 1, 4), with a statement of the grounds of appeal. (D. 49, 1, 13, 1.) The appellant was not,

however, restricted to the reasons so stated, and could at the subsequent stages adduce other reasons. (D. 49, 1, 3, 3.)

The judge, after receiving the petition of appeal, sent it to the Court of Appeal. (D. 49, 6, 1, pr.; D. 50, 16, 106.) His letter (*litterae dimissoriae, apostoli*) simply stated the fact that the appellant appealed from his judgment in a particular matter. (D. 49, 6, 1, 1.) When the appeal was to the Emperor, the letter was called *relatio.* (C. Th. 11, 30, 1.) A judge that improperly refused to admit an appeal was liable to fine (C. 7, 62, 22; C. 7, 62, 31), and the appellant could appeal from such refusal directly to the court above, if the court below pertinaciously refused. (D. 49, 5, 5, pr.) When a judge refused to admit an appeal, he ought to state the grounds of his refusal, and give a copy of them in writing to the suitor. (D. 49, 5, 6; D. 49, 1, 25.)

Within a period, at first of twenty (C. Th. 11, 30, 8), and afterwards of thirty days, all the documents must be sent to the Court of Appeal. (C. 7, 62, 24.) If the record was mutilated, and any pleadings or evidence suppressed, the judge of the court below was made infamous. (C. 7, 62, 15.) A certain time was allowed to prosecute the appeal, finally fixed by Justinian at six months in appeals from distant provinces, and three months from the nearest provinces, and five days. (C. 7, 63, 5, pr.) If the appellant did not appear by the last day of grace, his appeal was lost. (Nov. 119, 4.)

The Court of Appeal could not remit causes to the lower court (C. 7, 62, 6, pr.), but could take new evidence if necessary (C. 7, 62, 6, 1), and admit new arguments, even when these might have properly been urged in the lower court. (C. 7, 63, 4.)

Until the appeal is decided, the rights of the parties must not be changed. (D. 49, 7, 1; C. 7, 62, 3.) A person sentenced to relegation cannot be banished until his appeal is disposed of. (D. 49, 7, 1, 2.)

VII. Costs.

At first no penalty was attached to failure of appeal, but in the case first of appeals to the Emperor, and afterwards to the Senate, the unsuccessful appellant was subject to penalties. In the timeof Paul, an unsuccessful appellant was liable to fourfold the costs of his adversary. (Paul, Sent. 5, 37, 1.) By a constitution of Diocletian and Maximian, the amount of the penalty was left to the discretion of the Court of Appeal. (C. 7, 62, 6, 4.)

EVIDENCE.

In the division called Substantive Law, an account has been given of Rights and Duties, and of the modes in which they are created, transferred, or extinguished. For most of the transactions of life this department of law suffices. But occasionally a difficulty arises; it is not agreed whether certain facts exist, or whether, if they do exist, they give rise to rights or duties. For the determination of such questions the Law of Procedure makes provision. The steps to be taken to obtain the decision of a dispute have now been enumerated; there remains only the subject of evidence.

At the outset, a distinction may be made between questions of law and questions of fact. When two litigants agree as to the existence of an alleged fact, but dispute whether it is investitive or divestitive of an alleged right or duty, the question submitted to the judge is one of law alone, and there is no occasion for evidence. When the parties disagree as to the existence of an alleged fact, but agree that if it existed it would be investitive or divestitive, as the case may be, the question is one of fact alone. Both things may be in dispute, and then the question is one both of law and of fact. This distinction was emphasised in Rome up to the time of Diocletian by a difference of tribunal. If no question of fact were at issue between litigants, the controversy was determined by the magistrate alone, without sending the parties to a *judex*.

In order to put an end to a controversy, a judge had to decide as to the existence of an investitive, divestitive, or transvestitive fact. This is very clearly brought out in the *formulae* in actions *in personam*: "If it appears that A. ought to give 10 *aurei* to B. in consequence of a sale, mandate, etc., etc." The *intentio* specifically affirms the duty, and the *demonstratio* points out the investitive fact. Again, suppose the question is whether Titius is under the *potestas* of his father. Titius alleges that he was emancipated. Here the question is as to the existence of a divestitive fact; if the judge is satisfied as to that, the consequence follows that Titius is not under his father's *potestas*. The object, then, of evidence, is to lead the judge to believe in the existence or non-existence of an alleged investitive, divestitive, or transvestitive fact.

A judge is supposed to have no personal knowledge of the facts in dispute in any case brought before him. He can arrive at a conclusion, therefore, solely upon evidence. The word "evidence" is used with great latitude, but it is perhaps convenient to restrict its use, and to distinguish it from "testimony." "Testimony" is the statements of witnesses; evidence is any fact tending to satisfy a judge of the existence of an investitive fact. In one sense, doubtless, testimony is itself only an evidentiary fact. That A. *says* he witnessed a certain event, is merely a fact from which the judge may infer that the event actually happened. The fact that A. makes the statement is made known to the judge through his senses; but that the statement is true, is pure inference, which, according to circumstances, may be of any degree of probability, from zero up to complete assurance. But the credibility of witnesses is so special and distinct a kind of inference, that there is good reason for distinguishing between the testimony of witnesses and the facts to which they testify. The distinction may be expressed in another way. A fact is said to be *proved* when a judge is satisfied of its existence. No better definition of *proof* can be given. Attempts have been made to set up an external or objective standard of proof, to supply, as it were, a foot-rule for the measurement of evidence, but such attempts are necessarily futile. Whatever conviction rests upon human testimony can never attain more than a certain high degree of probability, and it is absolutely impossible to measure that probability by any hard and fast rules. Taking "proof," then, in the sense here given, we may distinguish between the facts to be proved and the instruments or media of proof. The instrument of proof is human testimony. Witnesses are, so to speak, the eyes through which the judge sees what does not take place in his presence.

This leads to another distinction. The facts proved by witnesses may be either the alleged investitive or divestitive facts, or others from which these facts may be inferred. In the former case, the testimony is Direct; in the latter, Circumstantial. In one sense, indeed, nearly all evidence may without impropriety be called circumstantial; for in nearly every investitive fact an element of "intention" comes in, and that is a mental fact that cannot be proved directly, but only by inference. A. is seen to raise a gun, to aim at B., and to pull the trigger. B. is killed. This would satisfy a judge that A. *killed* B., but not

necessarily that A. *intended to kill* B., for it might be that A. did not know that the gun was loaded. Strictly speaking, as an intention can be inferred only from outward and visible facts, the evidence might be called circumstantial. But practically what is meant by direct evidence is such testimony that, if it were absolutely to be trusted, would put the judge in the same position as if he himself were actually present at the transaction in question. Evidence is circumstantial when the testimony does not go so far, but only to facts from which by a process of inference the judge may pass to the conclusion that the transaction actually took place. Much has been said as to the comparative worth of direct and circumstantial evidence. The advantage of direct evidence is that it contains only one source of error—the fallibility of testimony; while circumstantial evidence, in addition to that, has fallibility of inference. Occasionally, it is true, the circumstantial evidence may be given under circumstances that practically eliminate the fallibility of the witnesses, but there still remains the fallibility of inference. There is, however, little to be gained by a comparison in the abstract, since both forms admit of every degree of probability, from the lowest to the highest.

The question may now be considered, what is the purpose of the law of evidence, and what is meant by a rule of evidence? It is important to point out what a rule of evidence does *not* mean. A rule of evidence is *not* a measure supplied to a judge to enable him to determine whether a fact is proved or not. A rule of evidence is a rule simply for *excluding* evidence. This will appear from obvious considerations. Evidence is of infinite degrees, and even the slightest fact or testimony may have some value. But if a judge were allowed to take into account everything that could by possibility affect his judgment, litigation might be protracted almost without end. Evidence might easily be led to a length too great for the importance of the matter at stake or for the time at the disposal of the judge. A balance must be struck between the considerations of the worth of the evidence and of its cost. Evidence may be so slight as not to be worth the trouble or expense of bringing it forward. An instance is, the rule that requires evidence to be produced at once, or within a specified time. After that time has elapsed new evidence may be discovered, such that, if produced in time, it would have seriously affected the opinion of the judge. But a controversy cannot be kept open for ever, and it is better, on

the whole, that a judge should occasionally be led wrong by an insufficiency of evidence, than that controversies should never be ended.

The first head of exclusion may be called "Irrelevant Facts." There is a distinction between logical and legal relevance. A fact is logically relevant if, in accordance with the rules of logic, it ought to influence the belief of a judge. When a witch was thrown into a pond of water, the fact that she sank had no causal connection with the fact that a particular man's cow had died. Such a fact is therefore logically irrelevant, but in some systems of law such facts have been admitted. Trial by ordeal affords an instance of facts logically quite irrelevant, but not legally irrelevant. A rational system of jurisprudence will exclude facts that are logically irrelevant, but it will not, therefore, admit every fact that is logically relevant. There may be, and are, in the circumstances under which justice is administered, good reasons why some logically relevant facts should be excluded from the cognisance of a judge. Their evidentiary value may not be worth the trouble and cost of establishing them. The reasoning applicable to the decision of such a point is well illustrated by the controversy, whether previous good or bad character should be admitted in the case of a person accused of a crime. Logically, character is often a specially relevant circumstance. A person goes into a shop and offers in payment of goods a bad sovereign. If this person has borne an unblemished character, and has never been known to attempt to pass false money, the inference is almost irresistible that in this case he was not aware the sovereign was bad. Suppose, however, that he is a thrice-convicted utterer of bad coin, the inference is very strong, although not absolutely conclusive, the other way. In all cases where the act done is ambiguous, and, standing alone, raises no very strong presumption either of guilt or innocence, the character of the accused may be of the last importance. In other cases, again, the inference to be derived from previous character may be very slight. To show that a man twenty years ago committed an assault, would have a scarcely appreciable relevance on a charge of forgery. The English and French systems of criminal jurisprudence deal with the relevance of character in an entirely opposite spirit. By the French law, the antecedents of an accused person may be raked up against him; while the English law refuses, as a general

rule, to admit even a previous conviction for crime, unless to rebut evidence of good character. The Indian Penal Code steers a middle course. It allows a conviction for crime to be proved, and even evidence of bad character, if led in answer to evidence of good character; but in no case does it go further than to admit evidence of general reputation or disposition; it excludes evidence of particular acts by which reputation or disposition may be shown.

The second head of exclusion relates to "Testimony." What testimony, or, in other words, what statements of persons, are inadmissible? Under the word "Testimony" may be reckoned every statement that is not part of the *res gestae*. In many cases an investitive fact may be a statement of a person. Thus, if Titius stipulates for 10 *aurei*, and Gaius promises them, the question for the judge is whether Titius made one statement and Gaius another. A statement of a person is testimony when it tends to prove either an investitive fact or a relevant fact. In this sense it may be said that the bulk of the law of evidence is concerned with the exclusion of testimony.

In the Roman law a third head may be found in the rules as to the Sufficiency of Testimony. It will appear that a certain arbitrary objective standard of evidence was laid down.

The fourth and last head consists of the rules under which admissible testimony may be produced and recorded.

It would be interesting, doubtless, if it were possible, to trace the history of the Law of Evidence in Rome. Gaius, our best source of information in Roman legal antiquities, is silent on the subject. It seems, however, expedient to give a brief sketch of the Law of Evidence as it stood in the time of Justinian.

A. Relevancy of Facts.

It would probably be difficult to say how far the Roman law went in the exclusion of facts logically relevant; but instances may be cited of the exclusion of facts on the ground of logical irrelevance.

To prove that Titius is freeborn, it is relevant to prove that he was born after his mother was manumitted. It is not relevant to prove that no one has questioned that the brothers of Titius are freeborn. (C. 4, 19, 17.) Titius may be free, and his brothers slaves. (C. 7, 16, 17.)

To prove that Titius is freeborn, it is irrelevant to show that his daughter is free, for she would be free if her mother were free, although her father were a slave. (C. 4, 19, 10.)

To prove that Glyco is a slave, it is not enough to show that his mother and brothers were slaves, for he might have got his freedom. (C. 4, 19, 22.)

B. Exclusion of Testimony.

Testimony is either oral or written. Two kinds of exclusion, therefore, have to be considered—the exclusion of oral testimony, not by writing, and the exclusion of oral testimony by writing.

(A.) Written Testimony.

It is obvious that by far the most trustworthy testimony of a fact is that recorded at the time, if made under the eyes of the person interested in exposing a falsehood. The written record of a contract signed by the two parties is by far the best evidence of the agreement made between them. So much impressed with this view has been the English Legislature that it refuses sanction to many agreements, unless they are written, and signed by the person to be bound. Generally speaking, however, in the Roman law, writing was not essential. (C. 4, 21, 15.) Thus it was not essential to any contract in the time of Justinian that the terms of agreement should be in writing (C. 4, 22, 1), except in the case of sale, where the parties agreed that the contract should not be binding until reduced to writing (p. 504). If, however, a written record of a transaction were made, the original writing formed the best and only admissible evidence. From this arises the first rule:—

I. A copy is not admitted while the original exists and is producible.

Even the State suing on a contract cannot prove it by a copy (*index, exemplum*), but must produce the original document. (D. 22, 4, 2.)

II. Where a statement has been written, oral evidence of it is not admitted.[1]

Public monuments and records are preferred to witnesses, according to a *Senatus Consultum.* (D. 22, 3, 10.)

But if a document is lost, oral evidence of the facts is admissible. (C. 4, 21, 1; C. 4, 21, 6.)

To prove that the poet Archias was a citizen of a municipality, Cicero offered to produce as witnesses the persons that inscribed his name on the register. This was objected to, but Cicero argued for the admissibility on the ground that the register itself was burned. (Cic. pro Archia poeta, 4, 8.)

Soldiers on leaving at the end of their term obtained a written discharge. If this

[1] *Contra scriptum testimonium non scriptum testimonium non fertur.* (C. 4, 20, 1.)

was lost, a soldier was not precluded from adducing other evidence that he was properly discharged, and entitled to the privileges of a *veteranus*. (C. 4, 21, 7.)

III. Written testimony of persons is occasionally admissible, although those persons could not be allowed as witnesses. It will presently appear that parties to a cause could not be witnesses, but the ground of exclusion did not affect statements made by them prior to the litigation. But statements made by a man in his own favour were not binding upon others.

Entries made by a creditor in his books (*instrumenta domestica, privata testatio*), unless otherwise supported, do not bind the debtor. (C. 4, 19, 5; C. 4, 19, 7.)

The books of a deceased person, or an inventory of debts in his will, are not sufficient to charge a person with a debt to the inheritance. (C. 4, 19, 6.)

Justinian enacted that an inventory of his goods in the will of the deceased should be conclusive on the heir (Nov. 48, 1, pr.); but of course not on the creditors of the estate. (Nov. 48, 1, 1.)

(B.) Exclusion of Oral Testimony.

I. It is a sound rule to exclude the statements of persons not present as witnesses. The reason is that testimony given in courts of justice is covered by weighty sanctions; to bear false witness is a crime. Moreover, testimony given in court is taken with peculiar care, both parties having an opportunity to ask questions in order to clear up doubts, or to shake the credibility of the witness. It is with good reason, therefore, that hearsay is generally excluded in courts of justice. It would appear that rumour and hearsay were, as a general rule, excluded in the Roman law, but with what limitations it does not seem easy to say. From a somewhat obscure passage (D. 22, 3, 28), it would seem that hearsay was admitted in regard to an ancient fact, where eye-witnesses could not be produced.

II. Testimony is admitted only of facts within the knowledge of the witness, not of his opinions. How far this rule was stringently observed in the Roman law it would perhaps not be easy to say, but in one case opinion was necessarily admitted; in the case, as will appear presently, of comparison of handwriting.

III. Exclusion of witnesses.

The only reason for excluding a witness, as distinguished from the exclusion of irrelevant facts, is that the witness is not trustworthy. But the incredibility of a witness is a question of degree, and although it ought properly to affect the weight to be given to his testimony, is no reason why that should not be admitted. The moment we distinctly realise that the object of judicial investigations is the discovery of truth, it becomes

clear that the wholesale exclusion of classes of witnesses, upon the ground of antecedent incredibility, admits of no justification. But from the manner in which civil judicature grew up, it may be inferred that the discovery of truth was by no means an exclusive idea with those who controlled the forms of procedure; but that the ancient point of view rather was that the object of a trial was to put an end to a mere private dispute. An enumeration of the classes of persons excluded from giving testimony, discloses the motives that influenced the makers of Roman law.

A. Persons absolutely incapable of giving testimony.

1. Persons destitute of understanding.

In civil causes, witnesses must be above the age of puberty. (D. 22, 5, 3, 5.)

In criminal cases, witnesses must be twenty years of age. (D. 22, 5, 20.)

2. Persons convicted of crime, unless pardoned (D. 22, 5, 20), or letting themselves out to fight with wild beasts, or prostitutes, or persons convicted of receiving bribes to give or not to give testimony (D. 22, 5, 3, 5); women convicted of adultery (D. 22, 5, 18), and officials taking bribes or extorting money, cannot be witnesses. (D. 22, 5, 15, pr.)

3. Pagans, Manichaeans, and other heretics (*Borboritæ*, *Samaritæ*, *Montanistæ*, *Tascodrogi*, *Ophitæ*) were excluded by Justinian's legislation. (C. 1, 5, 21.) It would appear that, from an opposite feeling, it was considered degrading to the exalted order of bishops to appear in the witness-box (C. 1, 3, 7); but as this privilege might occasionally be inconvenient for themselves, Justinian kindly invented a plan by which their dignity might be spared without the danger of compromising their interests. A bishop could not be summoned as a witness, but an officer of court was to be sent to take down his testimony, and report it to the judge. (Nov. 123, 7.)

B. Persons excluded in certain cases only.

1. Slaves were not admitted to give evidence, unless when the testimony available was insufficient. (D. 22, 5, 7.) A slave could not be examined for or against his master, but he might in respect of facts affecting himself. (D. 22, 3, 7; C. 4, 20, 8.)

2. The plaintiff and defendant in a suit could not be witnesses.[1] (C. 4, 20, 10.)

3. Persons closely related to the plaintiff or defendant were also excluded. (D. 22, 5, 6.) Thus parents and children were inadmissible for or against each other (C. 4, 20, 6; D. 22, 5, 24); and so also patrons and freedmen. (C. 4, 20, 12.)

4. Persons engaged as accuser and accused in a criminal proceeding could not give evidence against each other in a civil suit until the end of the criminal trial. (Nov. 90, 7.)

5. An advocate could not give evidence in a cause in which he had been engaged. (D. 22, 5, 25.)

6. Jews and Heretics, except those above mentioned, were admissible as witnesses; but only in causes where neither plaintiff nor defendant was orthodox. (C. 1, 5, 21.)

C. Sufficiency of Testimony.

Generally speaking, the Roman law required two witnesses,

[1] *Nullus idoneus testis in re sua intelligitur.* (D. 22, 5, 10.)

at least, to prove any fact. (D. 22, 5, 12.) But prior to Constantine it would appear that the rule was not peremptory. That Emperor, however, enacted that in no case should the testimony of one witness, however eminent he might be, suffice to prove a fact. (C. 4, 20, 9, 1.) In certain cases a larger number even was necessary. Thus, in a question whether a person were freeborn, five witnesses must be produced, unless there was documentary evidence, in which case three sufficed. (C. 4, 20, 15, 1.)

Apart from this artificial rule, which, considering the number of persons excluded from the witness-box, must have caused many failures of justice, the views taken by the Romans as to the weight and sufficiency of evidence were sensible. A rescript of Hadrian points out that no rigorous rules could be laid down, but that the judge ought to listen to every admissible kind of evidence, and form the best conclusion he could. (D. 22, 5, 3, 2.) Callistratus recommends judges to examine the weight of testimony in each particular case; to look to the status of the witness, whether he is a person of rank or not; whether he is a man of blameless life or of bad character; whether he is well-off or needy, and likely to sell his testimony; whether he is friendly or hostile. (D. 22, 5, 3, pr.)

D. Production of Testimony.

I. Upon what persons lies the burden of producing testimony?

This question is to a great extent one of detail, and special rules affecting the burden of proof have been mentioned already in several instances. There are, however, one or two leading general rules that may here be conveniently stated.

1. The burden of proof rests on him that affirms, not on him that denies. (D. 22, 3, 2.)

The *actor* must prove the facts alleged in the *demonstratio;* the *reus* must prove the facts alleged in the *exceptio.* (D. 22, 3, 21; C. 2, 1, 4; D. 22, 3, 19, pr.)

If the question is that A. belongs to a particular *gens*, A. must prove the fact. (D. 22, 3, 1.)

Does A. owe money to B.? B. must prove that the money is due. If that is proved, but A. affirms that he has paid the debt, A. must prove the payment. (C. 4, 19, 1.)

2. In a suit, the burden of proof lies generally on the person that would fail if no evidence were produced on either side.

Generally the plaintiff must lead evidence. (D. 22, 3, 21; C. 4, 19, 8.) But if he establishes such facts as would, in the absence of special circumstances, entitle him to

succeed, it is for the defendant to satisfy the judge that these circumstances exist. (D. 22, 3, 19, pr.)

A. is in possession of a farm, and B. sues for it, claiming it as his own. B. must prove his title. (C. 4, 19, 2.)

A. sues B. on a contract of sale. B. admits the sale, but affirms that the contract was made through fraud. B. must prove the fraud. (D. 22, 3, 6.)

Titius promises by stipulation to appear in court. He fails to appear, but excuses himself from the penalty for non-appearance on the ground that he was prevented by illness. He must prove that he was ill. (D. 23, 2, 19, 1.)

A. sues B. on a stipulation. B. admits the stipulation, but says A. released him by verbal agreement (*pactum*). B. must prove the agreement. (D. 22, 3, 19, pr.)

A testator bequeathed to Gaius a slave belonging, not to himself, but to Titius. Gaius claims the slave from the heir. He must prove that the testator knew that the slave was not his property. (D. 22, 3, 21.)

A testator leaves to Titius a legacy of 100 *aurei*. The heir pleads that after deducting his Falcidian fourth he cannot pay more than seventy-five *aurei*. He must prove the allegation. (D. 22, 3, 17.)

Intimately connected with the question of Burden of Proof is the topic of Legal Presumptions. Jurists are accustomed to specify three kinds of presumptions, of which only one has any right to a place in the law of evidence. The law may adopt one of three attitudes with reference to any alleged fact. (1) It may be entirely neutral, inclining neither to believe nor to disbelieve the assertion, and leaving to the party interested in creating a belief of the fact to produce evidence. (2) The judge may be directed, in the absence of evidence to the contrary, to prefer either to believe or to disbelieve the alleged fact. (3) The judge may be required to believe or disbelieve the alleged fact, and to admit no evidence that would tend to produce a contrary conviction. Thus, when, in the absence of other evidence, a defendant is put on his oath, his answers are held absolutely to bind the interrogator. If the attitude of the law is one of neutrality, any allegation tending to convince the judge that a particular state of facts existed is a *praesumptio facti*. This has, therefore, really no place in the law of evidence. Again, in the third case, where the law peremptorily requires certain facts to be taken as true, these facts belong really to the substantive law. They are of the nature of investitive and divestitive facts. Such facts are said to be *praesumptiones juris et de jure*. There remains then only the second class (*praesumptiones juris*) to be considered in the law of evidence. Such a presumption is ordinarily said to shift the burden of proof; but it would be, perhaps, more accurate to say that it determines the burden of proof, for to say that a man has such a presumption in his favour, is only another way

of stating that the burden of proof rests on the opposite party.

In most cases legal presumptions (*praesumptiones juris*) are drawn from the ordinary course of events. It is presumed that every formal transaction—as, for example, emancipation (D. 22, 3, 5, 1)—is correctly performed. Generally that is so; and besides, it is expedient to throw the burden of proof on the person that questions a legal transaction. In other case presumptions are admitted, because they lead to certain results desired by the legislator. The Roman law appears anciently to have presumed that every person was a minor (D. 22, 3, 13) until the contrary was proved; the English law presumes that every person is of age until the contrary is proved; while the later Roman law adopted an attitude of neutrality.

II. Production of Documents.

1. Generally speaking, a suitor could not call upon his adversary to produce any documents. The Roman law, in this respect, adhered to the theory that litigation is a form of private quarrel, and that each party ought to make out his case without help from the other. (C. 4, 20, 7.) Especially in criminal cases, we are told that neither law nor equity permitted an accuser to inspect documents in the hands of the defendant. (C. 2, 1, 2.) But a defendant sued for money could demand an inspection of the creditor's books (C. 2, 1, 5), although the creditor could not demand the production of the debtor's books. (C. 2, 1, 8.) Again, money-dealers (*argentarii*) were compelled to produce their books. (D. 2, 13, 4, pr.; D. 2, 13, 9, 3.)

2. As a general rule, persons that could not refuse to appear as witnesses in a cause, could not refuse to produce documents. But they were not obliged to produce any documents if it would do them harm. (C. 4, 21, 22.)

3. The authenticity of documents was proved, in the first instance, by the attesting witnesses. If the witnesses were dead, comparison of handwriting was allowed. But no document, Justinian enacted, was to be used for the purpose of comparison, unless it were proved to be in the handwriting of the person in question by three attesting witnesses, or were made with the formalities of a public document. Apparently the determination was left to experts, who were required to take an oath that they would give an impartial opinion. (C. 4,

21, 20.) Also documents produced by a party himself could be used to compare handwriting. (Nov. 49, 2, 1.)

III. The Production of Witnesses.

1. Certain persons, although competent witnesses, could not be compelled to appear.

A magistrate could not be summoned, but if present in court he could not refuse to give his testimony. (D. 22, 5, 21, 1.)

Old persons, the sick, soldiers, persons absent on the service of the State, could not, as a general rule, be compelled to appear as witnesses. (D. 22, 5, 8.)

Persons related by affinity, and cousins, and even the children of cousins, could not be compelled to bear testimony against each other. (D. 22, 5, 4.)

2. Summonses to witnesses were issued by the judge. If the witnesses lived in the place, they must appear to be examined; but if they were at a distance, provision was made for taking their testimony by the procurators of the parties before a judge in the place. (C. 4, 20, 16, pr.) The travelling expenses of the witnesses must be paid by the party calling them. (C. 4, 20, 11.) They could not be detained more than fifteen days. (C. 4, 20, 19.)

3. The sanctions of testimony. Up to the time of Constantine, it would not appear to have been essential that a witness should be sworn (C. 4, 20, 9, pr.), although doubtless as a matter of practice little or no credit was attached to a witness that was not prepared to take an oath.

In certain cases torture was used. Defendants in criminal cases, if there was considerable but not sufficient evidence against them, could be put to the torture to induce them to confess. (D. 48, 18, 1, 1.) But in civil causes no torture was allowed, except of slaves, and then only when the truth could not otherwise be ascertained. (D. 48, 18, 9; C. 9, 41, 9.) A belief in the efficacy of torture was widely entertained in antiquity. (D. 48, 18, 8.) In cases where a slave could not be a witness he could not be tortured. (D. 48, 18, 1, 10; C. 9, 4, 1, 7.)

4. In the examination of witnesses, leading questions seem to have been avoided. Thus it is said, when a slave was tortured, that he should not be asked whether "Lucius Titius killed a man," but generally, "who killed the man?" The former, it was remarked, was a suggestion rather than an interrogation. (D. 48, 18, 1, 21.)

APPENDIX.

No. I.

CRIMINAL LAW.

PUBLIC proceedings (*publica judicia*) are not taken by actions (*actiones*), nor are they in any point like any of the other proceedings of which we have spoken, but are begun and carried out in a manner widely different. (J. 4, 18, pr.)

They are called public, because anyone of the people is for the most part allowed to follow them up. (J. 4, 18, 1.)

Some public proceedings are capital, some are not. We call those capital that visit the offender with the last punishment of the law, or that forbid him fire and water, or that deport him (*deportatio*), or send him to the mines. All others that in any way inflict infamy and money loss are indeed public, but are not capital. (J. 4, 18, 2.)

The public proceedings are as follows (J. 4, 18, 3) :—

The *lex Julia Majestatis* (statute on treason) exerts its vigour against those that have raised up anything against the Emperor or the Commonwealth. By its penalty the guilty man endures loss of life and his memory is condemned even after death. (J. 4, 18, 3.)

This statute was passed under Julius Cæsar (p. 57).

The *lex Julia de Adulteriis* (to restrain adultery), again, punishes with the sword not only those that rashly pollute another's marriage, but those too that dare to employ their abominable lust on males. By the same statute, also, the foul crime of debauchery is punished, as when a man without force debauches a virgin or a widow that is living an honourable life. The penalty this same statute inflicts on offenders is, if they are of honourable standing, the confiscation of half their goods ; if they are of low degree, bodily chastisement and banishment (*relegatio*). (J. 4, 18, 4.)

This statute belongs to the reign of Augustus (B.C. 18).

The *lex Cornelia de Sicariis* (on assassins), again, pursues with the sword of vengeance men-killers, or those that go about with a weapon in order to kill a man. Weapon (*telum*), as our Gaius has left in writing in his interpretation of the statute of the XII Tables, is the common name for what is sent from a bow ; but it means also anything that is sent by anyone's hand. It follows, therefore, that this name includes a stone as well, and wood, and iron. It is so called because it is sent to a distance, and is formed from the Greek word τηλοῦ (afar off). This meaning we can find in the Greek name too ; for what we call *telum* they call βέλος, from βάλλεσθαι (to be thrown).

Xenophon calls our attention to this, for he has written thus :—"And the weapons (βέλη) were carried together, spears, arrows, slings, and very many stones as well." Assassins (*sicarii*) are so called from *sica*, which means an iron knife. By the same statute also poisoners are capitally condemned, who, by the hateful arts of poisons and magic spells they whisper, have killed men, or who have publicly sold evil drugs. (J. 4, 18, 5.)

The *leges Corneliæ* were passed by Sulla about B.C. 81.

Another statute, next, the *lex Pompeia de Parricidiis* (B.C. 55) (on the murder of blood relations), pursues a crime the most unfeeling with an unprecedented penalty. It provides that if a man hastens on the fate of an ascendant or a son, or in any way attempts anything included under the designation *parricidium*, whether he dares it secretly or openly, he shall be punished with the penalty of *parricidium*; further, that if anyone wilfully brings about such a crime, or is an accomplice, then, even although he is an outsider, the result shall be the same. The penalty is as follows :—He is not to be subjected to the sword, nor to flames, nor to any other regular punishment, but he is to be sewn up in a sack with a dog, and a cock, and a viper, and an ape, and, shut up in this cramped place of death, is (according to the kind of district) to be thrown into either the sea, if near, or a river, that all use of the elements he may begin even in life to lack, and that the sky may be taken from him while he still lives, and the earth when he is dead. But if a man kills other persons joined to him by the ties of kinship or affinity, he will endure the penalty of the statute on assassins (*lex Cornelia de sicariis*). (J. 4, 18, 6.)

The *lex Cornelia de Falsis* (on forgery), again, also called *testamentaria* (on wills), imposes a penalty on the man that writes, seals, publicly reads, or foists in a will or other document that is forged ; or that makes, cuts, or moulds a spurious seal wilfully and maliciously. The penalty under that statute is,—for slaves, the last punishment of the law, as upheld in the statute on poisoners and assassins ; for freemen, deportation. (J. 4, 18, 7.)

Again, the *lex Julia de vi Publica seu Privata* (on violence either public or private) rises up against those that commit violence, either armed or without arms. If it is armed violence that is charged, then deportation is imposed under the statute on public violence ; if without arms, confiscation of the third part of the offender's goods. But if the violence has been used to ravish a virgin or widow, or woman devoted to religion, whether she has taken the veil or not, then both the perpetrators and those that have aided the foul crime are punished capitally. So a constitution of ours determines, from which it is possible to learn all this more plainly. (J. 4, 18, 8.)

The *lex Julia Peculatus* (against embezzlement) punishes those that steal money or property belonging to the State, or consecrated or devoted. If it is judges that have actually, while holding office, made away with State moneys, they are visited with capital punishment ; and not they alone, but those also that have lent them aid in this, or that have knowingly received from them the property made away with. But all others that fall under this statue are subjected to the penalty of deportation. (J. 4, 18, 9.)

This and the former *lex Julia* were passed under Caesar or Augustus, it is uncertain which.

There is, too, among public proceedings, a *lex Fabia de Plagiariis* (on kidnappers), that under the sacred constitutions imposes a penalty, sometimes capital, sometimes lighter. (J. 4, 18, 10.)

The *lex Fabia* is an old statute (date unknown) mentioned by Cicero.

There are, besides, among public proceedings, the *lex Julia Ambitus* (on bribery), the *lex Julia Repetundarum* (against extortion by provincial governors), the *lex Julia de Annona* (on raising the price of food), and the *lex Julia de Residuis* (on incomplete accounts). These speak of certain special offences, and do not impose loss of life, but subject those that neglect their precepts to other punishments. (J. 4, 18, 11.)

This we have set forth about public proceedings, that you may be able to touch them with the tip of the finger, and as it were to point them out. But beside this, you may attain to a more studious knowledge of them, if God graciously favours you, from the larger books of the Digest or Pandects. (J. 4, 18, 12.)

There is a stage in human progress when the conceptions represented by the words SIN, CRIME, and CIVIL WRONG are not distinguished. The law, in so far as what may properly be termed *law*, has disengaged itself from *custom*, views conduct simply in a general way as reprehensible, and visits it with penalties that from the standpoint of a rational jurisprudence may be considered capricious, although not inexplicable. Doubtless in a rough way the offences visited with penalties in early codes were in the main the acts that were found most prejudicial to society, and doubtless also the penalties awarded were intended to prevent, and partially had the effect of preventing, harmful conduct. But of all the problems that the human race has had to confront, the greatest perhaps is to know what conduct is really injurious to mankind, and what is the best way to secure good conduct. Scarcely less important is it to know the degree in which conduct is injurious. On all these points, early societies had everything to learn; and, as was unavoidable, the lesson was acquired slowly and imperfectly. It would be rash to assume that even now the classification of wrongs and offences is satisfactory or final; and it is universally admitted that the art of *punishment*, or rather of *prevention*, is still far from perfect.

The first great step in the progress of law is when the distinction between acts that are harmful to human society, and acts that may not be so, but are hateful to supernatural beings, is thoroughly grasped. The distinction between *sin* and *crime*, between an offence against some god, and an offence against the State, lies at the root of all legal development. It is impossible to make any advance towards a rational classification of offences, until the elementary conception of an offence—as an act injurious to man living in society—is thoroughly apprehended and firmly applied. The distinction is illustrated in a very striking manner by the way in which perjury was dealt with in the Roman law. Perjury is the *sin* of invoking a divine being to attest a falsehood. False testimony is the *crime* of perverting the administration of justice. The Roman law appears from the earliest times to have contained provisions for punishing false testimony; but it was not considered necessary to punish perjury by human laws. It was the business of the gods, said Tacitus, to punish those that despise them; and the same sentiment appears in a constitution of the Emperor Alexander. (C. 4, 1, 2.)

The distinction between *crime* and *civil wrong* naturally emerges at a later period. The difference between an offence against the State and an offence merely against the individual that suffers, although very clear and important, is not apprehended at an early stage in the history of law. Even after it is recognised, a long period generally elapses before a proper distribution of offences is made. Thus theft in the early Roman law was treated purely as a civil wrong; and even to the latest period, petty

thefts were not brought under the lash of the criminal law. The true distinction between crime and civil wrong to be found in the remedy that is applicable. The aim of the Civil Law is to give redress to a sufferer, in the form either of restitution or of compensation. The aim of the Criminal Law is punishment. The *penal actions* of the Roman law occupy a middle position; the penalty of fourfold damages inflicted on a thief caught in the act went far beyond the requirements of compensation, but yet fell short of the severity of the Criminal Law. Theft, however, is more than a private wrong; it destroys the general feeling of security that is a necessary basis of the accumulation of wealth. When theft comes to be regarded in this light, it passes over from the category of private wrongs, and takes a place amongst offences against the State.

In classifying the Criminal Law, the first broad division to be adopted is that between Substantive Law and Adjective Law; between the law of offences, and the law of criminal procedure. Criminal Procedure has been already considered: see pp. 55-60.

The substantive Criminal Law is simple; it consists of an enumeration of offences and punishments; in other words, of the acts forbidden, and of the penalties of disobedience. It is convenient to start with a general review of the kind and degree of punishments.

Offences are divided into two leading groups. One group consists of the offences that are conterminous with the Civil Law, where the same acts are at once a civil wrong and a crime. Here the offence is an injury to some specific individual, as well as harmful to society; it is a violation of some particular person's right, as well as a crime against the State. The second group consists of offences against the State solely, which are punished—that is to say, not because any specific individual is hurt, but because they are considered injurious to the State. The same distinction may be expressed with more precision in the language sanctioned by Austin. He distinguishes absolute from relative duties. Relative duties correspond to rights belonging to specific individuals; absolute duties do not correspond to any such rights. In the Civil Law every duty is created in favour of some specified person or persons, who thus have a right to claim the acts or forbearance constituting the duty. Offences may therefore be subdivided thus:—(1) Violations of absolute duties, or offences solely against the State; and (2) Violations of relative duties, offences that are also violations of rights of specified individuals.

Punishments.

The punishments of the Roman law need be considered only as they existed during the Empire. They were divided into two classes, according as they did or did not affect the *caput* of the accused. The term *caput* is to be understood in the large sense already explained (p. 215), as including not merely life but freedom and citizenship. A punishment that involved the forfeiture of the rights of citizenship was considered capital. (D. 48, 19, 2.)

I. Capital Punishments.

1. The punishment of death was generally termed the extreme penalty of the law (*summum supplicium*). Various ways of executing criminals existed at different times. Under the Republic we have the punishment of burying alive, in the case of vestal virgins that violated their vow of chastity; and the XII Tables direct that false witnesses should be hurled from the Tarpeian Rock. In the time of Paul the chief modes were crucifixion (of slaves), burning and decapitation. (Paul, Sent. 5, 17, 3.) Constantine abolished crucifixion out of regard to the memory of the Founder of the new religion that he adopted. A revolting sentence was to condemn the criminal to fight with wild beasts. This was either in the form *ad bestias* or *ad gladium*, in which the victim was to be thrown to the wild beasts at once or within a year; or *in ludum*, when the condemned had a chance of life, and after five years might even

regain freedom. (Mos. et Rom. Leg. Collat. 11, 7.) These repulsive forms of punishment also were abolished by Constantine. (C. 11, 43, 1.)

The XII Tables provided that only the *Comitia Centuriata* should pass a sentence affecting the *caput* of a citizen. At an early period the *Comitia Tributa* came to overshadow it; and the Assembly, which towards the end of the Republic was the only criminal tribunal, was thus unable to award punishments of sufficient severity.

2. Deprivation of freedom was up to the time of Justinian (Nov. 22, 8) the result of condemnation to the mines. (D. 48, 19, 12.) This was either *in metallum* or *in opus metalli*. In both cases the punishment was for life, but there was a difference in severity, especially in the weight of the chains with which the prisoners were loaded. (D. 48, 19, 28, 6; D. 48, 19, 8, 6.)

3. Forfeiture of citizenship was a consequence of banishment during the Republic (*aqua et igni interdictio*). During the Empire the same effect followed on deportation (*deportatio in insulam*) and condemnation on public works (*in opus perpetuum*). (C. 9, 47, 1.)

These sentences were for life, and involved forfeiture of the property of the persons convicted. (D. 48, 19, 18, 1; D. 48, 22, 15.)

II. Non-Capital Punishments.

1. *Relegatio* was either for a time, or for life, or to an island. It differed from deportation in being generally to a more pleasant island. *Deportatio* also carried confiscation of property, unless the contrary was stated in the sentence; *relegatio* did not involve the loss of property unless stated in the sentence. (Heren. Modest. Frag. 2.) Another term sometimes used is *exilium;* it was either *relegatio* or *lata fuga*, that is restriction to a particular place; or it was a prohibition from entering a particular place. (D. 48, 19, 5.)

2. Corporal punishment—as by flogging or beating with sticks. (D. 48, 19, 7.)

3. Imprisonment was sanctioned only for a time, not for life. (D. 48, 19, 8, 9.)

4. Fines.

5. Degradation of rank—as the removal of a person from the Senate (D. 1, 9, 3), or from the *curia* of a municipality. (D. 48, 22, 7, 20.)

6. Suspension from practice, as of an advocate. (D. 48, 19, 9, pr.)

Violations of Absolute Duties.

I. Offences against External Security.

The following offences may be included under this head:—

1. A Roman citizen bearing arms against his country, or deserting to the enemy; or

2. Causing a Roman army to be caught in ambush or surrendered to the enemy; or

3. Preventing the success of the Roman arms; or

4. Exciting a friendly State to make war on Rome; or

5. Aiding an enemy by giving him arms, weapons, horses, provisions, or money, or causing such things to be given to be used against the Roman people; or

6. Entering into communication with the enemy, or giving him advice to be used against Rome.

In ancient times such an offence was called *perduellio;* under the Emperors, however, more generally *crimen laesae majestatis*. The *lex Julia Majestatis* defined those offences and affixed the penalty of banishment (*aqua et igni interdictio*). In the time of Paul the punishment was death. (Paul, Sent. 5, 29, 1.) In later times beheading was the rule, unless the offences were less serious; thus, harbouring a fugitive enemy was punished only with deportation. (D. 48, 19, 40.)

The crime of treason (*majestas*) had certain peculiarities:—

(1.) There was no action or penalty for malicious prosecution.

(2.) Persons prohibited in other cases from being accusers could prosecute for treason. (D. 48, 4, 7, pr.)

(3.) The defendant, of whatever rank, could, if necessary, be put to the torture. (C. 9, 8, 4.)

(4.) Slaves could be examined against their masters. (C. 9, 8, 7, 1.)

(5.) The prosecution went on after the death of the accused, in order that the Exchequer might obtain his property if he were found guilty. (C. 9, 8, 8.)

II. Subversion of the Government or Usurpation of its Prerogatives.

1. Under the Empire, the worst offence of this kind was a plot or attack on the life of the Emperor. To question the choice of a successor made by an Emperor was next to sacrilege, and punished by an odious form of death. (C. 9, 29, 3; D. 48, 13, 6, pr.) But mere verbal insults were not considered treason (D. 48, 4, 7, 3; Paul, Sent. 5, 29, 1); for, said the Emperors Theodosius, Arcadius, and Honorius, in language that is a standing rebuke to pusillanimous tyrants, if the words are uttered in a spirit of frivolity, the attack merits contempt; if from madness, they excite pity; if from malice, they are to be forgiven. (C. 9, 7, 1.)

2. An attack on the life of a member of the *Consistorium*. (C. 9, 8, 5.)

3. Causing anyone to take an oath for the subversion of the Government. (D. 48, 4, 4, pr.)

4. Levying war or raising an army without the authority of the Emperor. (D. 48, 4, 3, 1.)

5. Conspiracy to kill hostages without the authority of the Emperor. (D. 48, 4, 1, 1.)

All these offences are treason (*majestas*), and punishable in the way mentioned above (I.)

III. Offences against Public Tranquillity.

1. A seditious gathering or conspiracy. (Paul, Sent. 5, 22.)

2. When an armed assembly takes possession of any public place.

These offences also were treason.

IV. Offences against the Public Force.

1. Desertion by a soldier. (D. 48, 4, 2.)

2. Soliciting or exciting soldiers to make a tumult or sedition. (D. 48, 4, 1, 1.)

These offences also were treason.

V. Offences against the Administration of Justice.

1. Conspiracy to kill a magistrate is treason. (D. 48, 4, 1, 1.)

2. Setting free a person that has pleaded guilty to a criminal accusation is also treason. (D. 48, 4, 4, pr.)

3. Forcibly to prevent trials being held, or to make a magistrate act contrary to his judgment, was prohibited by the *lex Julia de vi*. (D. 48, 6, 10.)

4. To take money either to accuse or not to accuse a person of a criminal offence. (D. 47, 13, 2.)

5. To procure the conviction of a person of an offence punishable with death (Paul, Sent. 5, 23, 1) by false testimony, was forbidden by the *lex Cornelia de Sicariis*. The punishment was, death for common people; deportation, for persons of rank. (D. 48, 8, 16.)

6. A witness wrongfully giving or withholding testimony was punishable with deportation. (D. 48, 10, 1, 2; D. 48, 10, 1, 13.) Perjury was not a crime, but a person swearing *per genium Principis* falsely was considered to offer an indignity to the Emperor, and was to be beaten with rods. (D. 12, 2, 13, 4.)

7. Corrupting a judge, or causing him to be corrupted, was punishable under the *lex Cornelia de falsis*. (D. 48, 10, 21.)

8. Maliciously to accuse another of a crime. This was the offence of *Calumnia*. (D. 48, 16, 1, 5.) By the *lex Remmia* the punishment was branding with the letter K.

(D. 48, 16, 1, 2.) This was abolished by Constantine (C. 9, 47, 17), and the later punishment was either relegation or degradation of rank. (D. 47, 10, 43.)

9. To conceal a crime, or by collusion with the accused procure his acquittal, constituted the offence of *Praevaricatio*. (D. 48, 16, 1, 6.) The punishment was at one time the same as the accused would have got (D. 47, 15, 6), but in later times it was left to the discretion of the judge. (D. 47, 15, 2.)

10. Improperly to abandon a prosecution was *Tergiversatio* (D. 48, 16, 1, 1), under the *Senatus Consultum Turpillianum* (reign of Nero). (D. 48, 16, 1, 7.) That fixed a penalty of five *librae* of gold, but in later times the offence was punishable at the discretion of the judge. (C. 9, 45, 2.)

VI. Offences against the Exchequer.

1. Exacting taxes without authority was made punishable by the *lex Julia de vi*. (D. 48, 6, 12.)

2. The *lex Julia Peculatus* made it an offence to add anything to any gold, silver, or bronze belonging to the State. (D. 48, 13, 9, 2.) The punishment was, for common people, the mines; for persons of rank, exile. (D. 48, 13, 5, 2; D. 48, 19, 38.)

3. A person that counterfeits, breaks, melts, scrapes, or falsifies coins, gold or silver, or refuses to take properly-stamped coins (unless when they are adulterated), is, if of rank, to be deported; if not, to be sent to the mines or crucified. (Paul, Sent. 5, 25, 1.) Constantine made the punishment burning to death. (C. 9, 24, 2.)

4. Any person converting to his own use money belonging to the State or entrusted to him for the use of another, was fined under the *lex Julia de residuis*. (D. 48, 13, 2; D. 48, 13, 4, 5.)

VII. Offences by Servants of the State.

1. The refusal of a governor of a province to give up his place to his successor was held to be treason by the *lex Julia*. (D. 48, 4, 2.)

2. A person having lawful authority causing a Roman citizen to be killed, beaten, or put to torture, pending an appeal that has been made, was punished with death if of humble station; if a person of rank, with deportation. (Paul, Sent. 5, 26, 1.)

3. A magistrate or president of a criminal court receiving money to cause a person to be accused of a capital crime (D. 48, 8, 1, 1), was punished with death; or, if he were a person of rank, with deportation. (D. 48, 8, 3, 5.)

4. Any public servant taking any money or any article of value to act in violation of his public duty was punished under the *lex Julia repetundarum* with deportation or exile. (D. 48, 11, 7; D. 48, 11, 6, 2; D. 48, 11, 7, 3.)

5. A *judex* that wilfully gave judgment against an enactment brought under his notice was punishable with deportation. (Paul, Sent. 5, 25, 4.)

6. An advocate betraying his client was punishable with the penalty that the client was exposed to. (D. 47, 15, 1, 1; D. 47, 15, 6.)

VIII. Offences in respect of Weights, Measures, and Markets.

1. Those who sold (bread) by false weights were subject to relegation according to a decision of Hadrian. (D. 47, 11, 6, 2; D. 48, 10, 32, 1.)

2. Any person doing anything or entering into any contract to raise artificially the price of provisions was punished under the *lex Julia de Annona* (D. 48, 2, 2, pr.) with a fine of 20 *aurei*. (D. 48, 12, 2, 2.) Those who kept merchandise out of the market to enhance the price (*Dardanarii*) were prohibited from trading, or were relegated. (D. 47, 11, 6, pr.)

IX. Offences against Decency or Morals.

1. *Stuprum* is the offence of having connection with a free and respectable woman except in marriage or concubinage. (D. 48, 5, 34, pr.) The punishment by the *lex Julia de adulteriis* is not known: in the time of Justinian it was corporal punishment

and relegation for the common people, and forfeiture of half their property for persons of rank. (J. 4, 18, 4.) If the girl was under puberty, the punishment in the first case was the mines, and, in the second, relegation. (D. 48, 19, 38, 3.)

2. Sodomy was punished under the *lex Julia* with forfeiture of goods (Paul, Sent. 2, 26, 13); under the Christian Emperors, with death by burning. (C. Th. 9, 7, 6; C. 9, 9, 31.)

3. Incest was punished with deportation. (Paul, Sent. 2, 26, 15.)

X. Offences in respect of Religion and Witchcraft.

1. Prophets were to be beaten and expelled from the city; if they came back, they were to be imprisoned or deported. (Paul, Sent. 5, 21, 1.)

2. Persons consulting with reference to the life of the Emperor were punished with death. (Paul, Sent. 5, 21, 3.)

3. Those who offered sacrifices to injure their neighbours (*malefici*), even if no evil result followed (D. 48, 8, 14), were punished under the *lex Cornelia de Sicariis*. (D. 48, 8, 13.)

4. Those who took part in the exercise of magical and diabolical arts were to be crucified; the magicians themselves, to be burnt alive. (Paul, Sent. 5, 23, 17.)

5. Even to keep books on the subject was a crime; the books were to be burned and the owners severely punished. (Paul, Sent. 5, 23, 19.)

6. Paul says that persons introducing new kinds of worship, unknown to custom or reason, disturbing weaker minds, were to be punished, if persons of rank, with deportation; if not of rank, with death. (Sent. 5, 21, 2.)

Violations of Relative Duties.

In classifying offences, the same order may be observed as has been followed in the Civil Law. But a preliminary question must be noticed. When a crime was at once an offence against the State and also a violation of the right of a specific individual, is the right of the injured individual to compensation to be postponed to the claim of the State for punishment? The general rule in the Roman law was, that when a civil and criminal remedy concurred in respect of the same offence, either or both might be used. Thus when a person sued a thief and recovered a penalty, he could, if the case admitted it, afterwards prosecute the thief criminally. Again, if a suitor recovered damages from a false witness, he was not precluded from subsequently prosecuting him for false testimony. (C. 9, 31, 1.) But it was held that the punishment of the criminal ought to take precedence of the civil remedy (C. 3, 8, 4); and when a civil trial disclosed a crime, the civil proceedings were delayed until the criminal prosecution had first taken place. (D. 47, 10, 7, 1.)

This suggests the question, whether if the crime was capital, and the punishment included confiscation of the goods, there could be any fund out of which a suitor in civil proceedings could satisfy his claim? Apparently in this case the sufferer would be deprived of his remedy.

(A.) Rights *in rem* to one's Person.

I. Immunity from Bodily Harm.

1. Parricide is defined by the *lex Pompeia de Parricidiis* to be the crime of wilfully causing the death of an ascendant, a brother, sister, aunt, uncle, or cousin; a husband, wife, or relation by affinity, or patron: also when a mother killed a child, or grandfather a grandchild. (D. 48, 9, 1.) Constantine added the killing of a son by a father. (C. 9, 17, 1.) The punishment mentioned by Justinian (J. 4, 18, 6) was anciently reserved for the murder of ascendants, the murder of other relatives being punished simply with death. (D. 48, 9, 9, 1.)

2. Murder.

(1.) Killing any person, even a slave (D. 48, 8, 15); or

(2.) Preparing, selling, or giving poison to kill any person (D. 48, 8, 3, pr); or

(3.) Going armed with weapons to kill or steal; or

(4.) Conspiring to murder (C. 9, 16, 7), were punished under the *lex Cornelia de Sicariis* with deportation and forfeiture of the offender's property; but during the Empire this leniency was restricted to persons of rank, the common people being punished with death. (D. 48, 8, 3, 5; D. 48, 8, 16.)

Offering a child in sacrifice was made a capital offence by Valentinian, Valens, and Gratian. (C. 9, 16, 8.)

The crime of homicide was complete when an intention to kill was manifested by overt acts, although the person whose life was attacked escaped.[1] (Paul, Sent. 5, 23, 3.) This intention was inferred from the use of a deadly weapon. Thus, wounding and killing a man with a sword brought the offender within the statute, but not striking a man with an iron key, even if the blow happened to be fatal. (D. 48, 8, 1, 3.)

The *lex Cornelia* did not provide for killing by *negligence* (D. 48, 8, 7); but during the Empire this was punished (*extra ordinem*) with relegation (D. 48, 8, 4, 1), or even by sentence to the mines. (Paul. Sent. 5, 23, 12.)

Homicide was justified by the *lex Julia de Adulteriis* in certain cases. The second chapter of that statute relieved from the punishment of the *lex Cornelia* a father killing an adulterer caught with his daughter in his own house or in his son-in-law's house (Paul, Sent. 2, 26, 1), provided he also killed his daughter. (Mos. et Rom. Leg. Collat. 4, 9, 1.) A husband under the same circumstances could kill an adulterer if he were an infamous person, or a slave or freedman of his family (Paul, Sent. 2, 26, 5); but the provocation did not excuse the killing of his wife, although it was a ground for a lighter sentence. (Mos. et Rom. Leg. Collat. 4, 10, 1.) If he killed an adulterer, he must openly proclaim the fact, and divorce his wife within three days. (Paul, Sent. 2, 26, 6.)

3. Wounds and assaults.

An assembly of men to beat or strike another, if the injury were grave, was punished by the *lex Julia de vi*. (D. 48, 6, 10, 1; D. 48, 7, 2.)

4. Giving one a drink to cause abortion or excite love, although followed by no evil result, was punishable with condemnation to the mines in the case of common people, and by relegation and fine in the case of persons of rank. (Paul, Sent. 5, 23, 14.)

5. Castrating any person, whether slave or free, even with their consent, was punishable under the *lex Cornelia de Sicariis*. (D. 48, 8, 3, 4.)

6. Generally, a person guilty of *atrox injuria*, and too poor to pay damages in a civil court, was punishable with beating (D. 47, 10, 35); or if a person of rank, with temporary exile, or suspension from professional practice. (D. 47, 10, 45.)

II. Offences against Personal Liberty.

1. To shut up or imprison a man wilfully, was punished with banishment by the *lex Julia de vi*. (D. 48, 6, 5.)

2. He that knowingly and wilfully concealed, imprisoned, bought, or was concerned in concealing, imprisoning, or buying any freeman or freedman against his will, was punished under the *lex Fabia de Plagiariis* with a fine. (D. 48, 15, 6, 2.) But under the Empire severer punishments, even to condemnation to the mines, were inflicted (D. 48, 15, 7); and kidnapping a freeborn person was finally made a capital crime. (C. 9, 20, 7.)

III. Offences against Reputation.

The XII Tables contained provisions against libellers, and throughout the whole

[1] "*In lege Cornelia dolus pro facto accipitur.*" (D. 48, 8, 7.)

history of Roman law an attack upon honour or reputation was deemed a serious crime. The authors of libels, or the person that disseminated them, were punishable with relegation, or even deportation. (C. 9, 36, 1; Paul, Sent. 5, 4, 15.)

A person taking shelter under the statue of an Emperor, to make it appear that he was oppressed by another, was punished with imprisonment. (D. 47, 10, 38.)

IV. Offences against Chastity.

1. A person that by stratagem removed a boy from the protection of his attendants, or attempted the chastity of a woman or girl, or committed an indecent assault, was punished, if the boy or girl were seduced, capitally; if not, then with deportation. (D. 48, 11, 1, 2; Paul, Sent. 5, 4, 21.)

2. Rape was punished with death. (D. 48, 6, 3, 4; C. 9, 13, 1.)

(B.) Rights *in rem* to other Human beings.

I. Offences against Owners of Slaves.

1. To persuade a slave to flee from his master, or to conceal, imprison, or buy him, knowing him to be another's, was an offence punished by fine under the *lex Fabia de plagiariis*. (D. 48, 15, 6, 2.)

2. To cause another man's slave to be tortured (D. 48, 7, 4, 1), was punishable with fine and deprivation of rank under the *lex Julia de vi privata*. (D. 48, 7, 1.)

(C.) Rights *in rem* to Things.

I. Offences against Ownership.

(*α*.) Moveables.

1. Theft. In the Roman law, even under Justinian, every case of theft was not punishable criminally. (D. 47, 2, 92.) Criminal proceedings could be taken only in serious or aggravated cases of theft.

(1.) *Abigei* are those that make a business of cattle-stealing. The crime existed when a person stole an ox or horse from the pastures or a stable (D. 47, 14, 3, 1), or ten sheep, or four or five swine. (D. 47, 14, 1, 1; D. 47, 14, 3.) The punishment might be even death, but persons of rank suffered only relegation. (D. 47, 14, 1, pr.; D. 47, 14, 1, 3.) When the thieves were dealt with as criminals, so also were the receivers. (D. 47, 16, 1.) The receivers of *abigei* could be banished from Italy for ten years. (D. 47, 14, 3, 3.)

(2.) Persons stealing by night, or from baths, could be sent to public works for a time, or for life. (D. 47, 17, 1.)

(3.) Housebreakers (*effractores*) by night were beaten and sent to the mines; if by day, then to the public works for a time, or for life. (D. 47, 18, 2.)

(4.) *Directarii*, or persons that sneak into houses to steal, might be sent to the public works, or flogged, or relegated for a time. (D. 47, 11, 7.)

(5.) Stealing from a house on fire was punishable under the *lex Julia de vi publica* with banishment (D. 48, 6, 5), and stealing from a vessel wrecked was severely punishable. (D. 48, 7, 1, 2.)

2. Robbery.

(1.) Highway robbers were punishable with relegation, or the mines; or, if frequently convicted, with death. (D. 48, 19, 28, 10.)

(2.) If a number of persons assembled with weapons to attack a house for the purpose of robbery, the penalty was death. (D. 48, 6, 11.)

(3.) To attempt to obtain money by threatening an accusation of crime, was visited with punishment, as by the *lex Cornelia de falsis*. (D. 47, 13, 2.)

β. Immoveables.

1. Forcible Ejectment.

(1.) The ejectment of a man from his land with weapons was punished with banishment under the *lex Julia de vi publica* (D. 48, 6, 3, 6); if by an assembly

without weapons, the punishment was fine under the *lex Julia de vi privata*. (D. 48, 7, 5 ; C. 9, 12, 6.)

(2.) He whose slaves have taken arms with his knowledge and approval to acquire or recover possession of an immoveable, was punishable under the *lex Cornelia de Sicariis*. (D. 48, 8, 3, 4.)

2. The offence of raising fire was punished in serious cases with death (D. 48, 8, 10) ; otherwise less severely. (D. 48, 19, 28, 12.)

II. Offences in respect of Things not subject to Ownership.

1. *Peculatus*.—No one, unless permitted by law, could carry or cause to be carried away or converted to his own use anything sacred, public, or devoted. (D. 48, 13, 1.) This prohibition was extended to the moveables belonging to cities by a rescript of Hadrian. (D. 48, 13, 4, 7.) The *lex Julia Peculatus* provided a penalty of fourfold (Paul, Sent. 5, 27, 1); but at a later period the punishment was the mines for common people (D. 48, 19, 38), or exile for persons of rank. (D. 48, 13, 5, 2.) See also J. 4, 18, 9.

2. *Sacrilegium* is strictly the theft of a sacred or public moveable. (D. 48, 13, 4, 2.) The punishment was the mines, or deportation for persons of rank ; or if force were employed, death. (D. 48, 13, 6, pr.)

3. *Crimen sepulcri violati* was an offence constructively established by the *lex Julia de vi publica*. It was any act that prevented the proper sepulture of the dead (D. 47, 12, 8) ; as, *e.g.*, obliterating inscriptions, overthrowing a statue or column, carrying away a portion of the tomb (C. 9, 19, 1), or despoiling the dead bodies. If the offence was committed by force, the punishment was death ; if without, condemnation to the mines. (D. 47, 12, 3, 7.) Death was also the punishment for removing the bodies and bones of the dead, except in the case of persons of rank, who were subjected to no severer punishment than deportation. (D. 47, 12, 11.)

(D.) Rights *in personam*. Contract.

I. Fraudulent Contracts.

A person making a contract with reference to a thing over which he had no power to contract, was guilty of the crime of *Stellionatus* (C. 9, 34, 2) ; as, for example, by contracting a second mortgage, concealing a prior mortgage (C. 9, 34, 1), or selling the same thing twice over (D. 48, 10, 21), or paying a debt with property pledged to another. (D. 47, 20, 3, 1.) The penalty was for common people *in opus metalli* ; for persons of rank, relegation or degradation. (D. 47, 20, 3, 2.)

II. Compelling a person to enter into a contract by force, was punished under the *lex Julia de vi*, which also rescinded the obligation. (D. 48, 6, 5, pr.)

III. Forging a chirograph or altering accounts was punishable with relegation. (D. 47, 10, 13, 1.)

(E.) Rights *in personam*. Status.

I. Patron and Freedman.

A freedman falsely representing himself as freeborn was punishable under the *lex Visellia*. (C. 9, 21, 1.)

II. Parent and Child.

To palm off on a person a supposititious child was a crime ; only the person aggrieved could prosecute. (D. 48, 10, 30, 1.)

III. Husband and Wife.

1. *Adulterium*, in later times, rested upon the *lex Julia*, which abrogated all prior enactments. (Mos. et Rom. Leg. Collat. 4, 2.) The infidelity of the husband was not a crime, but only the infidelity of the wife (C. 9, 9, 1), on account of the danger of introducing strange children to the husband. (D. 48, 5, 6, 1.) It was not

essential that the marriage should be valid according to the requirements of the civil law (D. 48, 5, 13, 1), for even a girl betrothed, and a concubine in certain cases, was in the same position as a wife. (D. 48, 5, 13, 5 ; D. 48, 5, 13, pr.) The woman, however, must be in a respectable position. If she were engaged in a shop (Paul, Sent. 2, 26, 11), or an actress, neither she nor her paramour could be prosecuted. (D. 48, 5, 10, 2.) By the *lex Julia* the punishment was fine and relegation in the case both of the man and the woman. (Paul, Sent. 2, 26, 14.) Constantine celebrated his new zeal for the sacramental idea of marriage by establishing the punishment of death. (C. 9, 9, 30, 1.) It may be presumed that this extravagance defeated its object, and accordingly we find that Justinian enacted that the woman should be whipped and sent to a monastery for two years, after which she was to be returned to her husband. If he refused to take her, she was to be sent back to the monastery for life. (Nov. 134, 10.)

The husband could prosecute for adultery, but only if he divorced the woman immediately on discovering her offence. (C. 9, 9, 26 ; D. 48, 5, 2, 6.) After sixty days, however, and up to four months, a brother or uncle of the woman was allowed to prosecute. (D. 48, 5, 14, 2 ; D. 48, 5, 4, 1 ; C. 9, 9, 30.)

2. By a rescript of Severus and Antoninus it was determined that a married woman procuring abortion should be punishable with exile for defrauding her husband of children. (D. 47, 11, 4 ; D. 48, 8, 8.)

3. It was an offence to attempt to seduce a married woman, or to persuade her to divorce her husband. (D. 47, 11, 1, pr.) Hadrian sentenced to relegation for three years a man who took another man's wife to his house, and thence sent a bill of divorce to her husband. (D. 24, 2, 8.)

(F.) Offences in relation to Inheritance.

I. *Crimen expilatae hereditatis.*

Before an heir entered on an inheritance, or obtained possession of moveables belonging to it, he had not such a title as would support an action for theft. (D. 47, 19, 2, 1.) Hence it was made an offence to carry off any goods belonging to the inheritance, the punishment being in the discretion of the judge. (D. 47, 19, 1.)

II. Offences as to Wills.

1. He that carries away, conceals, takes by force, rubs out, or re-seals a will or *codicilli* (Paul, Sent. 4, 7, 5) ; or,

2. He that knowingly writes, seals, or causes to be written or sealed, a forged will or *codicilli ;* or,

3. He that opens the will of a man during his life, was punishable under the *lex Cornelia de falsis.* (D. 48, 19, 38, 7.)

4. The punishment of that statute was extended by an edict of Claudian to those that in writing a will wrote a legacy with their own hands for themselves or for any one in their *potestas* (D. 48, 10, 22, 1 ; D. 48, 10, 15), unless the testator was proved to have given his sanction. (D. 48, 8, 1, 8 ; D. 40, 8, 8, 13, 3.)

No. 2.—PASSAGES OMITTED.

AGAIN, in the *formula* set forth for a farmer of the taxes, the fiction is this, that whatever is the sum of money at which, if in old times a pledge had been taken, he from whom it was taken would be bound to redeem it, that is the sum in which the defendant is to be condemned. But no *formula* is moulded on the fiction of a *condictio;* for whether it is money or some determinate object due to us that we claim, in the statement of claim we allege that it ought to be given us; and we join to this no fiction of a *condictio.* We understand, therefore, at the same time, that the *formulae* by which we state our claim that money or some thing ought to be given us take effect by their own force and power. Of the same nature are the actions of free loan, *fiduciae, negotiorum gestorum*, and countless others. (G. 4, 32-33.)

Penal actions, too, in great numbers, the Prætor has brought in by virtue of his jurisdiction. Such actions may be brought, for instance, against the man that has spoiled any entry in the Prætor's *album;* against the man that has summoned to court a patron or an ascendant, although he had not obtained leave to do so; against the man, again, that has rescued by force another when summoned to court, or that has wilfully induced a third person so to rescue him; and there are countless others. (J. 4, 6, 12.)

The next division is that some actions are designed to recover a thing, some to recover a penalty, while some are mixed. (J. 4, 6, 16.)

Actions arising from misdeeds (*ex maleficiis*) are designed, in some cases, to recover a penalty only, in other cases to recover both a penalty and the thing, and are therefore mixed. The penalty only is what one recovers in an action for theft; for whether the action is against a thief taken in the act for fourfold the amount, or against a thief not taken in the act for twofold, it is for a penalty only that the action is brought. The thing itself a man pursues by the fitting action, claiming it (that is) as his; and this whether it is a thief that is in possession of it or any one else, no matter who; nay, more than that, against the thief also a *condictio* for the thing lies. (J. 4, 6, 18.)

We bring an action sometimes to obtain a thing only, sometimes a penalty only, sometimes for both thing and penalty. We recover the thing only, for instance, in actions arising from contract. We obtain a penalty only in, for instance, the action for theft or for *injuriae;* and, as some think, in that for robbery, for we can avail ourselves of both a *vindicatio* to recover the actual thing, and of a *condictio.* But we recover both things and penalty in those cases, for instance, in which we bring an action for twice the amount against a man that denies our claim; this happens in an action for the amount of a judgment, or of a debt paid for another, or of wrongful damage under the *lex Aquilia,* and also in the action on account of legacies left to a determinate amount *per damnationem.* (G. 4, 6-9.)

The action for robbery is mixed; because in the claim for fourfold is included the claim for the thing, while the penalty is threefold. The action under the *lex Aquilia* for damage is mixed, not only if the action is for twofold against a man that denies the claim, but sometimes also if one brings an action for the amount simply; if, for instance, one kills a slave that is lame or blind, who within that year was sound and of great value, then the

amount one is condemned in is the highest value of the slave within that year, according to the arrangement already laid down. There is a mixed action against those, again, that have put off giving things left to our very holy churches or other venerable places, as legacies or trusts, until they are actually summoned before a judge. Then, indeed, they are compelled to give both the actual thing or money left, and as much more by way of penalty; and therefore the condemnation is to be twofold the amount. (J. 4, 6, 19.)

All actions *in rem* are designed to recover some thing. Of the actions *in personam* (against a person) again, those that arise from contract seem all for the most part designed to recover a thing; as, for instance, those in which the plaintiff claims money on loan or brought into a stipulation; or again, for free loan, deposit, mandate, partnership, purchase, sale, letting on hire, taking on hire. Evidently, however, if an action of deposit is to be brought on account of what has been deposited by reason of a sudden outbreak of fire, of the fall of a house, or of shipwreck, the Prætor gives an action for twice the amount, if only the action is against the man with whom the thing was deposited, or against his heir as the result of his own fraud; and in that case the action is mixed. (J. 4, 6, 17.)

All actions, moreover, are framed either for the amount simply, or for twofold, or for threefold, or for fourfold; but no action goes further. An action may be for the amount simply, as are those that arise from a stipulation, from giving on loan, from purchase and sale, from letting on hire, from taking on hire, from mandate, and, in fine, in many other cases. We may bring an action for twofold against a thief not taken in the act; for instance, for wrongful damage under the *lex Aquilia*; for deposit in certain cases; or, again, for corrupting a slave. This action is open to us against the man that has encouraged or advised another's slave to run away or become obstinately defiant to his master, or to begin to live luxuriously, or, in short, in any way to become worse. In it account is taken also of the things the slave carried off when he ran away. We may bring such an action, again, for a legacy left to venerable places, according to what we have said above. (J. 4, 6 21-23.)

An action may be brought for fourfold, as against a thief taken in the act; or again, for what has been done under the influence of fear (*actio quod metus causa*), or for the money that has been given for this end, that he to whom it is given should give or should not give trouble to some one by trumping up a charge against him. An *actio condictitia* also, by virtue of a statute, arises under a constitution of ours. It imposes a fourfold penalty on the officials that carry out actions if they, contrary to the rule of our constitution, have exacted anything from the defendants. (J. 4, 6, 25.)

But the action against a thief taken in the act, and that for corrupting a slave, differ from all the others we have spoken of, at the same time, in this point, that these actions are in any case for double the amount. Those, on the other hand—the action for wrongful damage, that is, under the *lex Aquilia*, and sometimes that for a deposit—are doubled if the claim is denied; but if it is owned, the action given is for the amount simply. The actions available for things left to venerable places are doubled, not only if the claim is denied, but if payment of what is left has been put off until by order of our magistrates the defendant was summoned. If, moreover, the defendant owns the

claim, and pays before he is summoned by order of our magistrates, the action is given for the amount simply. Again, the action for what has been done under the influence of fear differs from all the others we have spoken of at the same time in this point, that in its very nature it tacitly involves that if at the judge's order the defendant gives up the actual thing to the plaintiff he must be acquitted. In all the other cases this is not so; but in any event each defendant is condemned in fourfold the amount, as is the case also in an action against a thief taken in the act. (J. 4, 6, 26-27.)

INDEX.

INDEX.

Abetting theft, 240-41.
Abigei, 1070.
Abortion, 1069, 1072.
Absence, 186, 271, 649, 681, 720.
Absens (=in different province), 290.
Absolutoria judicia, 1009.
Abstinendi jus, 876-81.
Acceptilatio, 639-41 ; 559, 560, 568, 642, 644, 913, 914.
Accessio, 274-282 ; land our to moveables, 280 ; land to land, 275 ; to legacies, 901 ; moveables to land, 276 ; moveables to moveables, 279 ; possessionis, 266 ; temporis, 371.
Accomplices, 240-41.
Accounts—fraudulent alteration of, 1071 ; household, 466 seq.; incomplete, 1063.
Accrescendi jus (accrual), 757-9, 776-7, 789-90, 915.
Accrual—between co-heirs, 757-9, 789-90; between co-legatees, 915 ; of persons passed over in the will, 776-7.
Accursius, 100.
Acquisition—per universitatem, 126, 127, 739 seq.; singularum rerum, 127, 739 (see Fideicommissa, Legacy) ; modes of, 113 (Bracton), 259 seq.; of possession, 343-9 (see Possession) ; through extranea persona (outsider), 324 ; through persons in potestas, 294, 610 seq. (contract) ; through slaves, 157, 323-4, 610 seq. (contract).
Acquittance in fraud of creditors, 1040-42.
Acta, 178.
Actio—definition and classes, 124-5, 131 ; place in the Institutional classification, 124, 128 ; opposed (with petitio and interdictum) to cognitiones extraordinariæ, 1013 ; opposed to petitio, 1001, 1013 ; proceedings taken in execution of judgment, 1029. Actions in Bracton, 115 ; præstare vel mandare, 627-8. Actionis cessio, 626-8, 648 ; editio, 983 ; impetratio, 1013 ; postulatio, 983.
Actio ad exhibendum, 334-5, 884, 987 ; ad supplendam legitimam, 786 ; æstimatoria seu quanti minoris, 505 ; aquæ pluviæ arcendæ, 20, 333, utilis, 409 ; Aquiliæ (legis), 332, 335, 409, 514, 524, 551, 565, in factum, 224-5, utilis, 244,
Actio (*continued*).
240 ; arbitraria, 585, 987 ; arborum furtim cæsæ, 332, 514 ; bonæ fidei, 48 note, 537, 994, 1009, 1016, 1017 ; bonorum vi raptorum, 241-2, 183-4, 330, 409, 1073 ; calumniæ, 185, 1020-21, 999, 1074 ; civilis, 264 ; commodati, 238, 478-9, 1018 (no set-off in), 1073-4, utilis, 479, 700 ; communi dividundo, 337, 339-40, 524 ; condictitia (see Condictio); conducti, 514 ; confessoria, 425, 387, 388, 409 ; contraria, 479 (commodati), 48 (depositi), 490 (mandati) ; curationis causa utilis, 735 ; damni injuriæ, 243-5, 183, 1073-4 ; de æstimato, 542 ; de calumnia, 185 ; de dolo, 235, 533, 552, 597, 648 ; de dote, 911 ; de eo quod certo loco, 585 ; de eo quod metus causa, 1074-5 ; de in rem verso, 616, 617, 620 ; de partu agnoscendo, 222 ; de pauperie, 249, 331 ; de peculio, 614-15, 620 ; de pecunia constituta, 566-7, 576, 928 ; de rationibus distrahendis, 724 ; de rupitiis sarciendis, 20 ; de sepulcro violato, 147, 317 ; de servo corrupto, 183, 234, 409, 1074 ; de termino moto, 332 ; de tigno injuncto, 276 ; dejecti aut effusi, 153 ; depensi, 570, 576, 985-6 (recognisances), 1003 (confessio), 1019 (costs), 1073 ; depositi, 239, 481-2, 700, 1074, utilis, 482 ; directa. 478 (commodati), 482 (depositi), 489 (mandati) ; emphyteuticaria, 429 ; empti, 504 ; ex contractu, 131, etc. ; ex empto vendito, 1074 ; ex locato conducto, 1074 ; ex maleficio, 131, 241, 1073 ; ex mutuo, 474 ; ex sponsu, 525, 695 ; ex stipulatu, 463, 464, 505, 564, 724 ; exercitoria, 617-18, 620, 621, 623 ; familiæ erciscundæ, 19, 114, 259-60, 757, 883, 891-92 ; fiduciæ, 436, 1073 ; finium regundorum, 337 ; furti, 183, 237-41, 325-8, 330. 409, 514, 524, 646, 1073-5, concepti, 21, 328, non exhibiti, 329, oblati, 21, 328, prohibiti, 328-9, honoraria, 42 ; hypothecaria (or quasi-Serviana), 308 (dos), 433, 447-8, 646, 897, 952, 987 ; in factum, accommodata legi Aquiliæ (or ad exemplum legis Aquiliæ), 244-5, Pauliana, 1012, præ-

Actio (*continued*).
scriptis verbis, 453, 505-6, 533, 542-5; in personam, 131 seq.; in rem, 131 seq.; injuriarum, 154-6, 149, 154, 166, 183, 185, 1020, 1021, 1073—persons under power, 194-6—persons *in mancipio*, 228, 230—res communis, 310, 312 — usufructuary, 409; institoria, 618-20, 621, 623, actions on analogy of, 621; interrogatoria, 1004-5; judicati, 1031-33, 1073 — recognisances, 985-6 —confessio, 1003—costs, 1019; legatorum per damnationem relictorum, 1003 (confessio); legis (see Legis actio); legis Aquiliæ, 332, 335, 409, 514, 524, 551, 565, in factum, 244-5, utilis, 244, 240; legitima, 42, 264; locati, 514, 238; mandati, 489, 490, 556, 557, 565, 576, 1074; metus, 552; mixta, 1073-4, 340 (in rem and in personam); mutui, or ex mutuo, 474; negativa, or negatoria, 425, 387, 409; negotiorum gestorum, 661-6, 735, 1073; noxalis, 184, 166, 167, 197, 331, 248-9 (pauperies), utilis, 248; oneris ferendi, 426; Pauliana, 1042, in factum, 1042; per judicis postulationem, 978, 975, 37, 48-49; per manus injectionem, 1030-31; per pignoris capionem, 1044, 970, 974-5; pigneratitia, 448, 382, 439; poenalis, 1064, 1073; popularis, 332, 1016; positi aut suspensi, 150, 153; præjudicialis, 989, 129, 1005; præscriptis verbis (see Actio in factum above); prætoria, 42, 264; prima (in criminal trial), 59; pro socio, 524, 519, 521, 522, 556, 629, 1074; Publiciana, 263-5, 387, 420, 425, 429, 987, rescissoria, 272; qua quæritur an actor juraverit, 615; quasi-Serviana (or hypothecaria), 308, 433, 447-8, 646, 897, 952, 987; quod jussu, 614, 615-17; quod metus causa, 1074-5; receptitia, 566-7; redhibitoria, 505; rei persequendæ causa, 1073-4; rei uxoriæ, 307; Rutiliana, 1037; sacramenti, 364-7, 372; secunda (in criminal trial), 59; sepulcri violati, or de sepulcro violato, 147, 317; servi corrupti, or de servo corrupto, 183, 234, 409, 1074; Serviana, 41, 433, 447-8, 987, 1000; stricti juris, 48 note, 537, 994, 1009, 1016, 1017; superficiaria, 430; tributoria, 604, 614-15, 620; tutelæ, 697, 723-6, 731—utilis, 724-5; utilis, 40, 1038, 244; venditi, 505; vi bonorum raptorum, 241-2, 183, 184, 330, 409, 1073.
Actor, 454; tutoris, 733.
Actus, 415, 419.
Addictio—bonorum libertatis causa, 742-744; in diem, 590.
Addictus, 1034.
Ademptio legatorum, 949.
Aditio hereditatis, 875-81. Heres necessarius, 875, suus et necessarius, 876, extraneus, 876-7. Jus deliberandi, 877. Formal acceptance (*cretio*), 877-9; informal acceptance—by sui et necessarii (*immixtio*), by extranei (*pro herede gerendo*), 879-81.
Aditio hereditatis (*continued*).
Adjournments—in judicio, 1008; in jure, 985.
Adjudicatio, 988, 989.
Adjudicatus, 194.
Admissions, 1003.
Adoption, 203-21: of persons alieni juris, 209; by mere declaration, 210; effect of, 203; forms—later (adoptio), 204, oldest (arrogatio), 204-7; informal confirmation of), 211; before Justinian, 207-8; Justinian's alterations, 207-10; by mancipation, 209-10; before a magistrate, 210; naturam imitatur (copies nature), 211; primary objects of, 204; potestas acquired through, 203; release from, 212-21; cannot be repeated, 211; restraints on, 211; by testament, 211; of women, 206.
Adopted child: disherison of, 778-9; succession of child given in adoption, to natural father intestate, 851-3; succession of natural father to intestate child given in adoption, 853.
Adpromissio, 565.
Adrogatio. See Arrogation.
Adscriptitii, 162-3.
Adsertor libertatis, 24, 174, 184-5.
Adsessores, 73.
Adsiduus, 968-969.
Adsignatio libertorum, 870-71.
Adstipulatio, 563-5; of slave, 605; relations of adstipulator and stipulator, 564, 641.
Adulterium, 687, 1061, 1067, 1069, 1071.
Adversaria, 466.
Adverse possession, 362, seq.
Advocates, 1028-29, 1022.
Ædiles, 15, 43, 44, 70; cereales, 43; curule, 43; plebeian, 43. Edict as to animals, 249; sale, 499-501.
Æquitas, 119; naturalis, 43, 60, 216.
Æs, 229; equestre, hordearium, militare, 1044.
Æs et libram, per: conveyance (mancipatio), 229, etc.; contract, 459, 528, 529, 531, 538-9-40, release, 459, 547, 641; testamentum, 538, 767-9.
Æstimatio litis, 336.
Affines—who are forbidden to intermarry, 686; intestate succession of, 863-4.
Affinitas, 686.
Affirmatores, 716.
Agency—In contract: perfect type, 609; none in early Roman law of contracts —why? 609-10; how far substitute provided by old law within the family,

Agency (*continued*).
610-17, beyond the family (exercitor, institor), 617-22 ; extensions on analogy of institor, 621 ; actiones exercitoria and institoria fall short of true agency, 621 ; did the Romans ever approach nearer to true agency ?—discussion of Savigny's views, 621-3. Cases analogous to, 623-6.
In conveyance, 322-5 ; in possession, 352-7, 378 ; in property, its fate contrasted with that of agency in contract, 623 ; principal's responsibility for wrongs done by his agent, 154.
In procedure : three periods, 1025 ; procurators and advocates, 1022-28 ; appointment of procurators and cognitors, 1022-3 ; when must give security, 1023-4 ; under Extraordinary Procedure, 1024-9.
Ager—arcifinius, 276 ; assignatus, 276 ; compascuus, 417 ; limitatus, 276 ; privatus, publicus, 367 seq. ; Romanus, 250 (interference with landmarks) ; vectigalis, 426.
Agere—of jurisconsult, 55.
Agnati—defined, 835-6, 684, 830 ; forbidden to intermarry, 684-6 ; as tutores, 711 (impuberum), 729 (mulierum) ; as curators, 732 seq. ; intestate succession, 835-7, 848, 857-60, 861, 863.
Agni, 905.
Agnitio, 648 ; (bonorum possessor) 843-4, 887.
Agreements, 457.
Agricultor, relief from error of law, 660.
Agrimensores, 1013.
Album—judicum, 46. 57 ; Prætor's, 35, spoiling entry on (albi corruptio), 1073.
Aleator, 691.
Alienation of property, voluntary, 258 seq. : of bequest (created presumption of revocation) 950 ; in fraud of creditors, 1040-42 ; by emphyteuta, 427 ; of pledge, 437 ; compared with voluntary promise, 318-19 ; restrictions on, 318-22, 945-6 (legacy); by usuary, 410 ; by usufructuary, 401-2.
Alieni juris, 193-4, 117, 128.
Aliens. See Peregrini.
Aliment, legacy of, 909, 943.
Alluvio, 275, 399.
Altius tollendi jus, 418 ; altius non tollendi jus, 418.
Alveus derelictus, 275-6.
Ambiguity in testator's intentions, 957-64 : arising from language or grammatical construction, 958-60 ; from testator's saying too much, 960-61 ; from irreconcilable dispositions, 961-4.
Ambitus, laws regarding, 57 note 2.
Ampliatio—in criminal proceedings, 59 ; litis, 1007.
Anastasian rescript, 213.
Ancestral worship, 745-6.
Ancilla, 168.
Aneclogistus, 704.
Animals—undisclosed faults (on sale) of, 498-500 ; injury to, 242-7, 330-31 ; legacy of, 905 ; mischief done by, 248-9, 331 ; occupatio of, 256, 345-6 ; as res mancipi, or nec mancipi, 260-61 ; theft of (abigei), 1070 ; usufruct of, 401 ; usus of, 410 ; young of, 300, 335.
Animus—domini (in possession), 375-88 ; fraudandi, 179 ; revertendi (of animals), 346 ; tenendi, 378, 341, 348-9.
Anniculi probatio, 198, 673.
Annona, 1067.
Annuity, 753, 912-13.
Anquisitio, 56.
Antichresis, 439.
Antiqui, the, 93-94.
Apochæ, 428, 636.
Apostoli, 1048.
Apparitores, 1043.
Appeal, 1044-8 ; history of, 13, 22, 23, 26, 71-72. Under Empire, 1045-8 ; who may appeal, 1047 ; costs of, 1048, 1047 (security for) ; frivolous, 1047 ; lies from what judges, 1046, from what judgments, 1046-7 ; judge's letter of, 1048 ; notice of, 1047 ; written petition of, 1047 ; proceedings on (to hearing), 1047-8 ; vexatious, 1047. Under Republic, 1044-5 (substitutes for regular appeal).
Appearance—avoidance of, 969-70, 972 ; bail for, 968-9 ; prevention of, 969-70.
Appellatio, 1045.
Appointment, power of, 823, 941.
Apportionment, 399, 816, 941.
Aqua—æstiva, 424 ; pecoris ad aquam appulsus, 416, 425 (interdicts) ; cottidiana, 424 ; aquæ ductus, 415, 419, 424 (interdicts) ; aquæ educendæ jus, 416 ; water-rate (pro aquæ forma), 910 (legacy) ; aquæ haustus, 415, 425 (interdicts) ; pluvia, 254.
Aqua et igni interdictio, 218, 187, 1061, 1065 ; when dissolved marriage, 694 ; effect on testamenti factio, 795.
Aquiliana stipulatio, 639-40, 642.
Arbiter, 18, 22, 23, 44, 48-49 ; procedure before, 1007.
Arbitraria formula, 998-9.
Arbitration, reference to — compulsory 973, voluntary, 967.
Arbitrators, the, 44-51.
Arbitratu (or arbitrio) viri boni, 402, 406, 503.
Arbitrium, 48 note.
Arbores furtim cæsæ, 251-2, 332, 514.
Arcarium nomen, 467.
Archiatri, 601 (promise of remuneration).
Area, 444 (hypothec).
Arenæ fodiendæ jus, 417.

Argentarii—actio receptitia, 567 ; codex, 468 ; special mortgage, 445 ; partnership, 517 ; set-off, 994-5 ; joint stipulation, 560 ; surety, 569.
Aristotle, on slavery, 161-2.
Armamenta, 336 (of ship).
Arrest, 1030-31, 1034 ; of bankrupt's property, 1037.
Arrhæ, 504 ; sponsalitiæ, 696.
Arrogation, 204-7, 209 ; 7, 10, 126 ; inquiries preliminary to—in case of boys under puberty, 207, of women, 206 ; by legislative act (ancient form), 205 ; by imperial rescript, 206 ; restraints on, 206, 211 ; form of universal succession, 740-2, 754 ; of pupillus (ends tutela), 723.
Arrogated child—disherison of, 778-779.
Arson, 57.
As, 229.
Assassins, 1061, 1062, 1066, 1068, 1069, 1071.
Assault, 1069 (punishment).
Assessors, 73.
Atrox injuria, 155, 1069.
Auctoratus, 194.
Auctores juris, 55, 76.
Auctoritas—patrum, 13 ; populi (in arrogation), 205-6 ; of tutor impuberum, 699-702 ; of tutor mulierum, 728.
Audientia episcopalis, 74.
Auditores, 79.
Auditoria, 52.
Auditorium sacrum, 67, 71.
Augurs, 10.
Augustus—changes in the law under, 66-67 ; gives jus publice respondendi, 53, 76 ; supremacy of, 65-66.
Auspicia, 7, 8, 25.
Authenticæ, 92.
Aversionem, per, 512.
Aves, 905 (legacy of).
Azo, 100, 109.

Bail, 968 (vindex), 969 (cautio judicio sisti), 972 (vadimonia), 1030 (manus injectio).
Ballot, in criminal trials, 59.
Banker. See Argentarii.
Bankruptcy, 1036-42, 126, 133 note ; involuntary, 1036-9 ; on application of bankrupt, 1039-40 ; fraud of bankrupt, 1040-42.
Barter, 491, 541-2.
Basilica, 95-96, 97 ; abridgments of, 96 ; scholia on, 95-96 ; Basilicorum Synopsis, 93, 97 ; Minor, 96.
Bastards, 683.
Beneficium—abstinendi, 876, 877, 879-81 ; cedendarum actionum, 554, 578 ; divisionis, 554, 578 ; legis Corneliæ, 572 ; ordinis seu excussionis, 447, 554, 568 ; principale, 674 ; quinquennalium, 1040.
Bequest. See Legacy.
Betrothal, 695-6, 525, 535.
Bishops, 74, 221, 293, 717, 1056.
Blackstone's classification, 135-7.
Blind, cure of, 732 ; wills of, 772.
Bluhme's discovery, 91.
Body, harm to the, 146-7.
Bologna school, the, 99-101.
Bona—in Bonorum possessio (q. v.), 841, 745 ; materna, 293-4, 444, 853 ; vacantia, 865-6 ; vi rapta, 166 (see also Actio vi bonorum raptorum). In bonis, 843, 1038.
Bonorum—addictio libertatis causa, 742-4 ; cessio, 1039-40 ; collatio, 849-50, 858, 783 ; distractio, 1038-9 ; emptor, 994-5, 1038, 1042 ; possessio (see Bonorum possessio); possessor, 1038, 1039 (see also Bonorum possessio); sectio, 1036; separatio, 748-9 ; venditio, 1037, 126.
Bona fide contract, 537 ; *bona fide* possessor, 237, 247-8, 268-9, 277, 279, 336, 341-2, 398, acquisition by, 885-6 ; slave possessed *bona fide*, 323, 354 ; in usucapio, 268-70.
Bonæ fidei actions, 48 note, 537, 994, 1009, 1016-17.
Bonds, 429.
Bonitarian ownership, 263-5, 371 seq., 612.
Bonorum possessio, 840-63, 40, 127 ; agnitio, 843-4, 887 ; definition, 840 ; special sense of *bona* and of *possessio* in this connection, 841 ; interdict *quorum bonorum*, 842-5 ; origin of, 846-8 ; cum re, sine re, 845-6 ; remedies, 886-7 ; tempus utile, continuum, 884. See Inheritance.
Succession to Freeborn.—Defects in law of XII. Tables—Prætorian modifications, 848 seq. ; agnates, 857-60 ; collateral cognates, 860-62 ; fathers and children, 849-53 ; grandfathers and grandchildren, 854-5 ; husband and wife, 863 ; mothers and children, 855-7 ; unde cognati, 848 seq., 861 seq.; unde legitimi, 848 seq., 860 seq., 869 ; unde liberi, 848 seq., 860 seq. ; unde vir et uxor, 863, 848, 861. Justinian's reform, 863-5. Contra tabulas, 860 ; secundum tabulas, 860.
Succession to Freedmen, 866-74. To freedmen (Roman citizens), 866-71 ; tum quem ex familia, 861, 869, 870 ; unde cognati manumissoris, 861, 863 ; unde decem personæ, 851, 860-61 ; unde liberi patronis patronæque et parentes eorum, 861, 869, 870 ; to Latini Juniani, 871-4 ; to dedititii, 874.
Borboritæ, 1056.
Borrower. See Loan.
Boundaries, 20 (XII. Tables).

Brachylogus, 100.
Bracton—obligations of, to Roman Law (chiefly through Azo), 109-116 ; summary of chief points of Roman Law in, 113-16.
Breach of promise of marriage, 525.
Breviarium Alarici(anum), 89.
Breviculus, 1009.
Brevi manu delivery, 349.
Bribery, 57, 1063.
Burden of proof, 1057-8 ; causa liberalis, 185 ; actio confessoria de usufructu, 409 ; condictio indebiti, 661 ; utilis actio tutelæ directa, 725.
Burdens—on things bequeathed, 901 ; on land, 402-3, 428, 901.
Burial-ground, 316-17.
Burning alive, 1064, 1067, 1068.
Burying alive, 1064.
Byzantine Law, 93, 97.

Caduca, 758, 866, 915.
Calcis coquendæ jus, 417.
Calendar, the, 10, 24, 52.
Calumnia, 1020-21, 827, 986, 999, 1019, 1066, 1074.
Canon, 426, 428.
Capita, division of intestate inheritance in, 835, 857, 864, 865.
Capital cases, 21, 23, etc. (see Caput); crime, 671 ; punishments, 1064-5.
Capitis deminutio, 214-20 ; meaning of, 219-20 ; maxima, 215, media or minor, 218, minima, 219. Effect in joint obligation, 559 ; on partnership, 523 ; in conditional stipulation, 592 ; on cognation and agnation, 685, 836, 843, 857-8, 861 ; on tutela, 723 ; on arrogatio and coemptio in manum, 741-2 ; on testation, 805, 809 ; on membership of gens, 838 ; in intestate succession to freedmen, 868.
Capito, 77.
Captatoria institutio, 947.
Captive, 215-17 ; returned, 215-17 ; (in war) made slave, 160-61, 169 ; testamenti factio, 795.
Caput, 219, 23, 26, 30, 50 note, 160, 215, 1045, 1065. Slaves have no, 160, 214.
Carbonianum edictum, 886.
Carmen, 148.
Cassians, the, 77.
Castellum, 425.
Castration, 1069.
Catonia regula, 948.
Cattle-stealing, 1070.
Causa—cause, case, grounds : cognita—adrogationis, 207 ; under Edictum Carbonianum, 886 ; on application for bonorum possessio, 886 ; injuria to son, 196 note ; as to superficies, 430.
Cause, consideration, ground, motive: cessante causa non cessavit lex, 375 ; causa data causa non secuta, 656 ; falsa—in legacy, 925, in usucapio, 270 ; justa — adquisitionis, 336, 290, manumissionis, 180-81, possessionis, 290, 272 ; traditionis, 282, 287 ; injusta, 598 ; lucrativa, 270, 914, 944 ; of legacy, 896, 925 ; noxalis, 196, 229-30 ; pietatis, 658 ; turpis, 598. Valuable consideration, 597 (sine causa), 944.
Cause, suit : causæ conjectio, 1007 ; liberalis, 184-5.
Offspring, produce, things appertaining to, 335, 901-2 (casual gains).
Cautio — of arrogator, 207 ; in bonorum addictio libertatis causa, 742-3 ; damni infecti, 465, 495 ; de dolo, 465 ; judicatum solvi, 1026, 983, 1024 ; judicio sisti, 969 ; juratoria, 1024 ; in loan, 469-71 ; Muciana, 939 ; de persequendo servo, 465 ; as evidence of stipulation, 463 ; in usufruct, 397, 406 ; in usus, 411. See Satisdatio.
Cavere—of jurisconsult, 55.
Censors, the, 12, 28, 29, 70, 71.
Censuale officium, 773.
Census—evasion of, punished with slavery, 169 ; manumission by enrolment of slave's name on, 174-5, 192. Census magister, 773.
Centenarii (liberti), 869.
Centumviri, 49-51, 39, 259, 885, 975, 976, 979, 982, 1007.
Cessio—bonorum, 1039-40 ; in jure (next article) ; nominum vel actionum, 626-8, 648.
Cessio in jure, 262, 260, 261, 263, 246, 20, 55, 209 ; who cannot acquire by, 262 ; in fiduciæ contractus, 434-5, 433 ; of inheritance, 881-2 ; in legacy per damnationem, and sinendi modo, 890 ; creates, servitudes, 419, 420, terminates servitudes, 422 ; tutela of women transferred by, 730 ; creates usufruct, 404, terminates usufruct, 407.
Character, evidence of, 1052-3.
Chastity—attempts on, 149-50 ; offences against, 1070 ; of vestal virgins, 1064.
Child—rights and duties of, 194-7 (under potestas), 676-8 (not under potestas) ; exposure of, 190, 220 ; palming off a suppositious, 1071 ; prostitution of, 220 ; sacrifice of, 1069 ; sale of, 191-2 ; succession to, 853 ; will of father, 774.
Chirographa, 468-9, 470 ; forgery of, 1071 ; legacy of, 913.
Christianity, influence of, 68, 69 ; slave accepting, set free, 183.
Church—action by (prescription of), 648-9 ; admission into, frees slaves, 183 ; as heir, 800 ; endeavour of, to suppress interest, 652 ; legacies, trusts, left to, 659 ; legislation in favour of,

Church (*continued*).
659, 689-90, 1074 (ter) ; manumission in, 177 ; property (sale of), 316.
Circumstantial evidence, 1050-57.
Citatio in criminal proceedings, 58.
Citations, law of, 69, 79.
Civitas, 30, 186 ; forfeiture of, 1065 ; grant of privileges of freeborn, 671 ; conversion of Latinitas into, 673-4 ; loss of, effect on testamenti factio, 795 ; sine suffragio, 31.
Civitatum defensores, 74.
Clam, 252-3.
Clans (*gentes*), the, 6.
Classification of Roman Law, 122-142 ; of ancient codes generally, 122 ; of the Perpetual Edict, 123 ; of the Roman Codes, 123 ; of the Digest, 123, 139 ; Pothier's re-arrangement, 123 ; of the Institutes (Gaius and Justinian), 124-132 ; classification of the present work, 132-142 ; importance of a sound and uniform system of exposition, 139-140 ; order of exposition (with illustrative example), 140.
Clausula—codicillaris, 829-30, 765 ; prorogationis, 930 ; stipulationis judicatum solvi clausulæ tres, 1062.
Clergy—property of, 293 ; excused from being tutores, 720 ; attempts to obtain jurisdiction over publication of wills, 773.
Clients and patron, 4.
Cloacæ mittendæ jus, 419 ; interdicts de cloacis, 425.
Cloacarium, 901.
Codes—ancient, 122 ; of Byzantine emperors, 94-96 ; Gregorian, 85-86 ; Roman, promulgated by German kings, 88-89—Lex Romana Burgundionum, 89, Visigothorum (or Breviarium Alarici), 89, Edictum Theodorici, 89 ; Hermogenian, 85-86, 123 ; Indian (definition of contract), 457 ; Indian Penal, 1053 ; Justinian's—New (repetitæ prælectionis), 92, 123, Old (Vetus), 90 ; Theodosian, 86-87, 123—projected new, 87.
Codex—accepti et expensi, 466-9. Code (see Codes).
Codicillaris clausula, 829-30, 765.
Codicilli, 825-30 : form of, 826 ; introduction of, 765, 809-11 ; manumission by, 175-7 ; offences as to, 1072 ; trusts left by, 895 ; comparison with will (testamentum), 825-8 ; confirmation by will, 828 ; wills construed as, 829-30 ; as dependent on wills, 828.
Cœlebs, 798, 824. See Lex Papia.
Coemptio, 224-5, 222, 223, 226, 19 ; fiduciaria, 731, 795 ; compared with mancipatio, 229 ; matrimonii causa, 731 ; as mode of universal succession, 740-42.
Coemptionator, 228, 229, 731, 741.
Cognati—defined, 830 ; forbidden to intermarry, 683-4 ; as tutores, 711 ; collateral (intestate succession), 860-65.
Cognatio legitima, 836.
Cognitio (Prætoris), 988 ; extraordinaria, 42, 1013.
Cognitor, appointment of (compared with procurator), 1022-3 ; exceptio as to, 991 ; security, 1023-4.
Co-heirs, 553.
Coinage, offences as to, 1067, 183 (coiners of bad money).
Coke, Lord, his use of Bracton, 111 ; on insults to the dead, 147.
Collateral relations—defined, 830 ; forbidden to intermarry, 683-6 ; intestate succession of collateral cognates, 860-65.
Collatio—bonorum, 849-50, 858, 783 ; Mosaicarum et Romanarum Legum, 88.
Co-legatees, 915.
Collegium, 314.
Coloniæ—civium Romanorum, 32 ; Latinæ, 32, 218 ; maritimæ, 32.
Colonus—tenant-farmer, 398, 447, 507 seq. ; adscriptitii or censiti, 162-3 ; inquilini, liberi, tributarii, 162-3.
Comitia—Calata, wills made in, 766 ; Centuriata, 7, 8-11, 34, 60, 66, 1065 ; Curiata, 7, 66 ; Tributa, 14, 25-27, 56, 60, 66, 1065.
Comitium, 51.
Commercium, 5, 30, 198, 599.
Commixtio, 281.
Commodatum, 475-9, 527 seq. ; damnum injuria under contract of, 248 ; theft under contract of, 238 ; compared with usus, 475-6.
Compensatio, 993-5, 1017-18.
Compensation—in accessio, 277-81 ; for unexhausted improvements, 301 (dos), 337, 440 (pignus) ; in simple injury, 154 ; in aggravated (atrox) injury, 155. See Responsibility.
Comperendinatio, in criminal proceedings, 59.
Comperendinus dies, 1007.
Compromise (transactio), 549.
Conceptio (formularum), 986 seq.
Conciliabula, 32.
Concilium plebis, 26, note 1 ; concilia semestria, 71.
Concubinatus, 678, 694 ; gifts to concubines, 321-2 ; concubines as heirs, 802 ; legitimation of children of (by subsequent marriage), 201-2.
Condemnatio, of formula, 988, 989, 996 (variance).
Condictio—origin and definition, 37 seq., 132, 463-4, 975, 979, 980, 981, 982 ; certi—on adstipulatio, 564 ; on expensilatio, 469, 471 ; on mutuum, 472, 474 ; on sale, 505 ; on stipulation, 464, 526, 537 ; incerti—in delicts, 1073 ;

Condictio (*continued*).
on stipulation, 464; in tutela, 724; furtiva, 237, 325, 329, 552; indebiti, 658-61, 588; ex lege, 973.
Conditio. In contract: may be attached to all contracts (except expensilatio), 589; conditional obligations, how valued (lex Falcidia), 752-3; definition, 586; dies cedit, venit, 587; differs from incertus dies, 587; chief practical effect, 587; fulfilment, 589; illegal, impossible, 591-2; novation, 630; præpostera, 592; resolutive, suspensive, 589-91.
In inheritance, 788.
In legacy: casualis, 938; definition, 932; distinguished from dies, 932-3; from modus, 934; extrinsecus, 934-5; non faciendi, 939; failure, fulfilment, 925-9; illegal, impossible, 941; jusjurandi, 947; manumission, 176; in restraint of marriage, 947-8; mixta, 938; against morality, 948; Muciana cautio, 939; potestiva, 937; restrictions on, 937-41; si volet, 940.
In usufruct, 406.
Condominium, 337-40, 519, 553, 612-13. See Joint-ownership.
Conductio. See Hire.
Confarreatio, 225, 223, 226, 5, 19.
Confessio in jure, 1003.
Confiscation of goods, 1065, 1068, 1069.
Confusio — Merger: ends emphyteusis, 428; mortgage, 447; prædial servitudes, 422; in dissolution of obligations, 649, 748, 755; in joint obligation, 559.
Mixture of materials, chiefly liquids, 281.
Conjectio causæ, 1007.
Conjunctim (bequests), 915.
Consanguinei, 782, 836, 848, 858, 860-62.
Consent — in betrothal, 695-6; in contract, 580; of curator, 733; in marriage, 680-81; of tutor, 702, 717.
Consertio manuum. See Manuum consertio.
Consideration — illegal, 598; immoral, 468; valuable — contracts for, 458, 490-524, 534-6, want of, 597.
Consilium—Advice (distinguished from mandatum), 483.
Board, Council: Council of the King, 8; jury in criminal trials, 44; board of manumission, 180; necessariorum, 6, 224, 735; of præfectus urbi, 72; of Præses, 44; of Quæstor, 56.
Consobrini, 831, 836.
Consolidatio — terminated emphyteusis, 428; usufruct, 407.
Consortium servile, 862.
Conspiracy, 1066.
Constitution, the Servian, 9.
Constitutiones, of the Emperors, 76, 119-120; generales, 120; personales, 120.
Constitutum—Pactum de constituto, 566-76, 549; possessorium, 352.
Construction of terms in wills and legacies, 953-64.
Consuetudo — diutina, diuturna, inveterata, 119; revertendi (of animals), 346.
Consuls, the, 11, 27, 70.
Consultatio Veteris Cujusdam Jureconsulti, 88, 86.
Contempt of court, 337, 1008.
Contestatio litis, 560, 562, 631, 633, 650, 984-5, 992, 1005, 1007, 1009, 1014-16, 1028. See Litis Contestatio.
Continuatio—dominii (intestate succession of sui heredes), 876; temporis (in usucapio), 266-7.
Contract, 451 seq. Accessory, 563-79; agency in, 609-23; cases analogous to agency, 623-6; arrangement — by Gaius, 126-7, by Justinian, 458, in present work, 458, 524-40; bilateral, 535-6; in Bracton, 115; causa (see Causa, Consideration) — sine causa, 597-8, injusta, turpis causa, 598; conditio, 586-92; confusio, 649; consensu, 458, 642 (dissolution); consent, 580-84; consideration—illegal (injusta, turpis causa), 598, contracts for valuable, 458, 490-524, 534-6, extension of contracts for valuable (pacta), 545-60, want of valuable (sine causa), 597-8; damages, measure of, 650-52; definition, 456-7, 451, comparison with pactum, 546; dissolution of, 626-50; dolus, 595-8, 1071 (punishment); equitable, 458, 471-90, 527-34; extension of equitable, 540-45, 532-3; error (essential, non-essential), 580-84; executed, executory, 535-6; bona fides, 537; force (see vis, below); formal, 458, 459-71, 525-7; fraudulent (see dolus, above); of freemen in mancipio, 602-4; of furiosi, 606; genus and species in, 580; heir, descent of obligations to the, 650; history and classification, 524-40; illegal promises, 600-1; impossible promises, 598-600; of impuberes, 607; innominate real, 540-45, 532-3; interest, 652-3; intimidation (metus), 593-5; invalidating facts, 593-601-609; joint-obligation, 551 seq.; laches, 653-4; literis, 458, 641 (dissolution); litis contestatio, 650; of persons under manus, 604-6; metus, 593-5; of minors, 608; modality, 534-92; mora, 653-4; novatio, 626-32; place, 584-5; of persons under potestas, 604-6; prescription, 645-9; promises, illegal and impossible, 598-601; quality, 580;

Contract (*continued*).
quasi-contract, 655 seq.; re, 458, 471, 641 (dissolution), — innominate real, 540-45, 532-3; releases—formal, 638-642, non-formal, 642-5; remedies, 650-54; rights and duties, interpretation of, 579-80; rules applicable to contracts generally, 579 seq.; of slaves, 602-4; solutio, 632-8; of spendthrifts, 609; time, 585-6; unilateral, 535-6; usufruct, to establish (in Provinces), 405; verbis, 458, 466, 639-41 (release); vis, 593-5, 1071; who cannot contract, 602-9; of women in tutela, 606. See also under the separate contracts.
Contractatio, 233-4; fraudulosa, 235.
Contributory negligence, 246-7, 146, 154. See Responsibility.
Contubernium, 678, 666.
Contumacia, 337, 1008.
Contutores, 554, 706-8.
Conubium, 5, 22, 25, 30, 187, 197-9, 682.
Conventio—agreement, 457; in manum, 126-7.
Conventus juridici, 44, 180.
Conveyance, 258-90.
Convicium, 147, 164.
Convicts, 170, 162.
Copy, when not admissible in evidence, 1054.
Corporations—constitution, and property of (res universitatis), 314-15; as heirs, 799, 866; incertæ personæ, 799.
Corporeal things, 287.
Corpus—Authenticarum, 92; damage done corpore corpori, and nec corpore nec corpori, 243-4; of dos, 297-300; opposed to fructus (q.v.); Juris Civilis, 24, 93; Theodosianum, 89.
Correality, 551-62; contribution, 555-7; creation, 557-9; definition, 555; dissolution, 559-61; rights and duties of correi, 555-7; correality and solidarity, 561-2. Correi — promittendi or debendi, 554; stipulandi or credendi, 554.
Correctores, 67.
Costs, 1019-21; of appeal, 1048; security for, 1047.
Co-sureties, 577-9.
Co-tutors, 554, 706-8.
Coulanges, M. de, on the *gens*, 839.
Courts—civil, 51, 52; criminal, 55-60.
Creditor—defined, 179, 454; right to action for damnum injuria, 248, for theft, 237; of deceased person—duties of heir to — before Justinian, 747-9, after inventory made, 755-6, order of priority, 755-6, duties of joint-heirs to, 759-60, duties of *fideicommissarius* to, 817-22; fraud of, acquittances and alienations in, 1040-42, manumissions in, 178-9; joint, 551 seq.; peculiaris, 910; subsidiary, 563 seq.; substitution of new, 626-8; theft from, 236.
Creditum, 472.
Cretæ eximendæ jus, 417.
Cretio, 877-9, 788-9, 798-9; abolition of, 879; continua, 878; definition, 877; perfect and imperfect, 878-9; vulgaris, 877.
Crime, contrasted with Sin and Civil Wrong, 1063.
Crimen—adulterii, 687, 690-93, 1071-2; expilatæ hereditatis, 1072; laesæ majestatis, 1065; de pecuniis residuis, 57; sepulcri violati, 1071; suspecti tutoris, 713, 721-2, 726-7.
Crimina extraordinaria, 74-75.
Criminal—courts (of Republic), 55-60; law, 1061 seq., (under Empire) 74-75, 1061.
Criminals—may be divorced, 691-3; forbidden to marry, 687, 683.
Crucifixion of slaves, 1064, 1067, 1068.
Culpa—in commodatum, 477; in deposit, 480; in hire, 508-13; of (person charged with) legacy, 903; in mandate, 487; in negotiorum gestio, 663; of heir, as to trusts, 816; of tutor, 704, 707, 722, 724; in sale, 494-5, 502.
Cum liber erit, 717.
Cum re (bonorum possessio), 845-6.
Cura, curatio, 732-5, 126, 128, 130; definition and chief cases of, 732; opposed to tutela, 698.
Curatores — annonæ, 43; bonorum distrahendorum, 1038-9; ludorum solemnium, 43; of minors, and others—appointment, 733, dativi, 734, duties, 733, legitimi, 734, responsibility of heirs of, 735, security given by, 734; urbis, 43.
Curia—oblatio curiæ, 202; privileges and burdens of the, 202; removal from, 1065.
Curiæ, the, 7.
Curiata—comitia, 7, 66; lex de imperio, 8, 76, 211, Vespasiani, 82.
Custodes (watchers), 222.
Custodia, 342; nuda, 465.
Custom—as "customary law," 431 note; long-continued mores, mores diuturni, 60, 119, 741 (jus quod consensu receptum est), 791, 1006.

Damage—secret, definition of, 252-3. See also damnum injuria.
Damages, measure of, 650-52:—in property (damnum injuria), 330-31; in condictio indebiti, 661; in injuria, 154-5; de sepulcro violato, 317; de servo corrupto, 183-4; in stipulation, 464; in theft, 327.
Damnas, 889.
Damnationem, legacy per, 889-93, 894-7.
Damnosa hereditas, 748.
Damnum infectum, 39, 495, 975; stipulation, 465.

Damnum injuria, 166, 184, 242-8, 252-3, 330-31 ; elements of, 243 ; compared with damnum, 245, with injuria, 245 ; what damage supports an action, 245 ; measure of damages, 330-31 ; noxal action for, 184 ; permissible, 247 ; what persons, besides owners, may sue for, 247-8.
Dardanarii, 1067.
Dare, 453.
Datio—dotis, 304, 466 ; usufructus, 404.
Deaf and dumb—cura of, 732 seq.; could not enter into stipulation, 461 ; testamenti factio, 794, 796, 803 ; could not be tutores, 717.
Debitor, debtor, 454, 453 ; joint-debtors, 551 seq.; judgment debtor made slave, 169 ; legacy of release to, 913-14 ; substitution of new, 631-2.
Debts, 466-71 ; discharge of, 632 seq.; hereditary, liability for, in coemptio in manum, 741-2, contracted by person adopted, or woman married, 741-2, liability of heir for debts of deceased, 747 ; judgment (see Judgment debt) ; novation, 626-32 ; as set-off, 1018. See Nomina.
Decapitation, 1064, 1065.
Deceased wife's sister, 686.
Decemviri—judices, 15, 26, 49-50 ; legibus scribendis, 15 ; litibus judicandis, 49, note 3.
Decency, offences against, 1067-8.
Decisiones Quinquaginta, 90.
Decretum—of Emperor, 76 ; of prætor, 41, 998, 1000.
Decuriones, 202 ; legacy of a Latin *per vindicationem* to a colony, 889 ; property of intestate, 866.
Deditio noxalis, 166-7, 197, 1034.
Dedititii, 128, 199, 675-6 ; intestate succession to, 874 ; testamenti factio, 795, 798 ; trusts, 824.
Dedititii peregrini, 675.
Deductio—de peculio, 604 ; in case of sacramentum, 978 ; set-off, 993-5 ; usufructus, 404 ; uxoris in domum mariti, 682.
Deducto usufructu, 404.
Defence — equitable, 989-93, 1015-17 ; improper (penalties for), 1019-20.
Defendere, meaning of (in clause of judicatum solvi stipulatio), 1025-6.
Defensor, 1026.
Defensores civitatum, 74, 714.
Degradation (of rank), 1065, 1067, 1070, 1071.
Degrees of propinquity, 830-32.
Dejecta, 153-4, 155, 552.
Delatio—criminis, or nominis, 58 ; hereditatis, 876.
Delegatio, 626, 630, 631-2.
Delictum, 135, 128-7, 131, 137 ; privatum, 74-75 ; of slave, 168.
Delivery. See Traditio.
Dementia, 606.
Demonstratio—of formula, 987, 989, 993, 996 (variance), 1057 (proof of facts) of object of legacy, 924, falsa, 923.
Denunciatio—to free woman cohabiting with slave, 170 ; litis, 972.
Deportatio, 218, 192, 1061, 1062, 1065-71.
Depositio et obsignatio (formal tender), 637.
Depositum, 479-82, 527, seq. ; miserabile, 1074 ; no set-off in action on, 1017 ; theft under contract of, 239.
Derelictio, 257-8.
Desertion to the enemy, 1065, 1066.
Detentio, 342.
Determinatio, in legacy, 924.
Detestatio sacrorum, 766.
Deversorium, 444 (hypothec).
Dictatorship, the, 25.
Dictio dotis, 466, 304.
Dies, 587, etc. :—in diem addictio, 590 ; dies cedit, dies venit—in contract, 587, in legacy, 930-32, 896 ; certus, incertus, 587, 933 ; comitiales, 52 ; comperendinus, 1007 ; endotercisi (or intercisi), 52 ; fasti, nefasti, 10, 24, 52, 1044 ; juridici, or judiciarii, 52.
Diffarreatio, 227.
Digest, the, 90-91, 123, 139 ; Digestum Novum, 101 ; Vetus, 101. References to, *passim*.
Dignitas, loss of, involves no capitis minutio, 215.
Diligentia. See references under Culpa.
Dipondius, 229.
Directarii, 149, 1070.
Diriment impediments to marriage, 683.
Disease, contagious, wills of persons suffering from, 772-3.
Disherison, 774-9, 783-4 ; explanation of rule, 774-5 ; grounds for, 783-4 ; modes —nominatim, 774, inter cæteros, 774 ; no disherison by codicilli, 827 ; who, if not made heirs, must be expressly disinherited, 775-9.
Disjunctim (bequests), 915.
Dispensator, 165, 229.
Disseisin, 250-51.
Distractio—bonorum, 1039 ; pignorum, 437.
Divinatio, in criminal proceedings, 58.
Divorce—Divortium, 689-94 ; form, 690 freedom of, 601, 679, 690-91 ; grounds, 691-3 ; by mutual consent (bona gratia), 689-90, by one party alone, 690-93, by paterfamilias of wife, 689 ; legislation regarding, 691-3 ; provision for children, 693-4 ; restraints on, 690-94. See also Repudium.
Documents—admission and exclusion of, in evidence, 1054-5 ; production of, 1059 ; proof of authenticity of, 1059.
Dolus, 593-8, 171, 236, 239, 241, 249-50,

Dolus (*continued*).
1040-42, 1071. See references under Contract, Culpa.
Dominium, 231 seq., 223, 309. See Ownership.
Dominus—emphyteuseos, 426-8 ; invitus (furtum), 234-5 ; proprietatis nudæ, 384 note, 386, 397 ; rei gestæ, 664 seq. See Ownership.
Domus—instructa, 907 ; cum instrumento, 907 ; domus quæque mea ibi erunt quum moriar, 908.
Dona deorum, 752.
Donatio—mortis causa, 915-17, 115, 321, 751, 898, 916-17 (compared with legacy) ; ante vel propter nuptias, 308-9, 442, 682, 692-3 (how affected by divorce), 782 (legitim) ; inter vivos, 318. How far adopted in English law, 113, 115. Donationis pactum, 550.
Dos (dowry), 295-308, 679 ; adventitia, 297, 305-6 ; datio (giving of), 304 ; definition, 295 ; gift of (with marriage to a freeman), involving liberty, 177 ; dictio (promise of), 304, 466 ; exactio, 683 ; father having means must give to daughter, 677-8 ; husband's rights to *corpus* of, 297-300, to income and produce of, 300, expenditure upon property included in, 301-2 ; husband's power of alienation, 299-300, his duties as to, 302-4 ; hypothec over, 444 ; legacy of, 911-12 ; legitim, 782 ; pactum de constituenda dote, 550 ; prædium dotale, 299 ; priority, 442 ; profectitia, receptitia, 297, 305-6 ; recovery and restoration, 304-8, 691, 574 (sureties for) ; remedies, 307-8 ; retentio, 307 ; tacit resettlement of, 304 ; Rufus's work on, 295 ; promised by woman, 573 ; woman must have tutor in settling, 728. In Bracton and Fleta, 115.
Dotale prædium, 299.
Ducenarii, 45.
Duplicatio, 992.
Dupondii, 80.
Duties and Rights : the basis of the classification in this work, 132 ; divisions of, 133 ; negative, 133, 134 ; positive, 133.
Duumviri, 25, 56.

Ebriosus, 691.
Ecloga Legum, 94 ; ad Prochiron mutata, 96.
Edict—of ædiles, 34-35, 249, 331, 535 ; Carbonianum, 886 ; of Emperor, 76 ; magistratuum, 12, 34, 60, 75, 76, 119, 120 ; peremptorium, 1008 ; perpetuum, 34, 35, 67, 75-6, 83, 123 : Prætor's, 34 seq., and *passim* (see below) ; provinciale, 35 ; in rem, 134 note ; Theodorici, 89 ; tralatitium, 35 ; urbanum, 35.
Edict of Prætor, 34 seq. : actio noxalis, 184 ; actio Publiciana, 263-4 ; adjoining proprietors, 253 ; adjournments, 285-6 ; agency, 623, 614-15, 617 ; Bonorum possessio (q.v.) ; commodatum, 475-6 ; convicium, 147 ; corrupting slaves, 164 ; damnum injuria, 243 seq., 330 ; de glande legenda, 254, 333 ; de suspensis, 153-4 ; deposit, 479 ; equitable contracts, 527 seq. ; filiusfamilias (injuria to), 195-6 ; formulæ, 980 seq. ; heir, 875-7, 886 ; heir and legatee, 917, 952 ; injuria, 146-156, 164-6 (slaves), 195-6 (children) ; interdicts, 997 seq. ; intestate succession, 840-63, 866-9 (freedmen) ; lex Aquilia (extension of), 146, 244 ; libel, 148 ; manumission (private), 172-3 ; negotiorum gestio, 661 ; pacta, 546-9 ; pater fiduciarius (fraud by), 213 ; pauperies, 248 ; pecunia constituta, 566-8 ; penalty for injuria, 154-5 ; possession (q.v.) ; prescription, 289 ; slander, 148 ; slaves — corrupting, 164, injuria to, 164-6, runaway, 163, theft by, 240 ; summons, 969-71 ; usucapio, long possession equivalent, 289, rescission of, 271 ; vi bona rapta, 241, 332 ; wills, 768-9.
Edictales, 80.
Editio actionis, 983.
Education, legal, 55, 79-80.
Effractores, 1070.
Effusa, 153-4, 155, 552.
Ejectment, forcible, from lands, 250, 1070-71.
Electio—in legacy, 928 ; in alternative stipulation, 579-80.
Emancipatio, 212-14 : ancient form (based on triple sale), 212-13 ; under the Anastasian rescript, 213 ; Justinian's alterations, 214 ; voluntary on both sides, 212.
Emancipated brothers or sisters—intestate succession, 858.
Emancipated child—child and parent, 676-8, 130 : disherison of, 778 ; intestate succession of, 849-54 (fathers), 855-7 (mothers).
Embezzlement, of public property, 45, 57, 1071, 1062, 1067.
Emperor, the, 71, 76 ; his council, 71.
Emphyteusis, 426-9, 383 ; alienation, 427, 429 ; creation, 428 ; definition, origin, and nature, 426 ; forfeiture, 428 ; rights of *emphyteuta*, 427 ; use and enjoyment (*utendi fruendi*), compared with right of *fructuarius*, 427 ; is he in law owner? 426 ; compared with ownership, 383 ; remedies, 429 ; termination, 428.

Employer and workman, 512-13.
Emptio bonorum, 994-5, 1038, 1042.
Emptio-venditio. See Sale.
Emptor familiæ, 767-8, 769, 803-4.
Enchiridium, 100.
Epanagoge Legis, 95; Aucta, 96.
Epigrammata, 148.
Episcopalis audientia, 74.
Epistulæ, imperial, 76.
Epitome Legum, 96; ad Prochiron mutata, 96.
Equitable contracts, 458, 471-90, 527-34 (history).
Equites, the, 9, 44.
Eremodicio, in, 1008.
Ereptitium legatum, 915.
Ergastula, abolished, 158.
Erro, 501.
Error—falsæ causæ, 270; in statement of claim, 1018; in contract—in corpore (essential), 581-2, in substantia or materia (non-essential), 582-4; of fact, of law, in quasi-contract, 660, affecting bona fides in usucapio, 268; in legacy, 923-6 (in corpore); marriage under (as to status of one of the parties), 199-200; recovery of money paid in, 657-661, 894, 923.
Escheat, laws of, 789. See Caduca.
Eunuchs—cannot adopt, 211.
Eviction—in hire, 508; in sale, 493, 495-498, 502, 817.
Evidence, 1049-60; admission and exclusion of, 1051-3, 1054-6; circumstantial, direct, 1050-51; defined, 1050; object of, 1049-51; rule of (what is, and is not, a), 1051; sufficiency of, 1056-7; who cannot give, 1055-6. See Testimony, Witnesses.
Exceptio, 40, 133 note, 989-92, 1015-17; nature, objects, and form of, 990; not used in Legis actio, 1015; in extraordinary procedure, 1016-17; when failure to use is fatal, 991; defendant must prove the facts alleged in, 1057.
Exceptio cognitoria, 991; cohærens personæ, 133; cohærens rei, 133; dilatoria, 991, 1017, 1027 (procurator); doli, 470, 594, 598, 630, 633, 642, 700, 846, 847, 891, 916, 925, 990; in factum composita, 594; jusjurandi, 1016; litis dividuæ, 991, 996; metus causa, 594; nisi bonis cesserit, 576; non numeratæ pecuniæ, 470-71; pacti conventi, 576, 589, 630, 642, 913, 914, 990, 991; peremptoria, 990-91, 1017; perpetua, 660, 1017; procuratoriæ, 1027; rei alienæ a fisco emptæ, 272; rei in judicium deductæ, 1015; rei judicatæ, 1015, 1016; rei residuæ, 991; temporalis, 1017.
Exceptores, 293.
Exchange (permutatio), 541, 491.
Excusationes—curatorum, 734; tutorum, 718-21 725-6.
Execution of Judgments, 1029-44; against the person, 18 (XII. Tables), 1034-36, 1033; against property, 1042-44, 1033; by sale of debtor's universal succession, (bankruptcy), 1036-42.
Exemplum (copy), 1054.
Exemptions from serving as curator, 734; as tutor, 718-21, 725-6.
Exercitor, 617-18.
Exercitus, 10.
Exheredatio (disherison), 774-9, 783-4.
Exilium, 1065, 1067, 1069, 1071, 1072.
Existimatio, loss of, 1038-40, 1043.
Expenditure—beneficial, necessary, ornamental. See Impensæ.
Expensilatio, 466-71, 525-7, 537; no condition attachable, 589; novatio, 629; release, 641.
Experientia Romani, 96.
Expilata hereditas, 1072.
Expressa nocent, non expressa non nocent, 941.
Expromissio, 468-9, 631-2, 565, 626, 630.
Extortion by provincial governors, 57, 1063.
Extrajudicial Remedies for debt, 1044.
Extranea persona (outsider), 324.
Extraneus heres, 834, 871-2, 876-81.
Extraordinariæ cognitiones, 1013; extraordinaria crimina, 74-75; judicia, 1012, 1029, 1039.

Facere, 453; non facere, 453.
Fact, questions of, 1049; relevant and irrelevant, 1052, 1053.
Falcidia—lex (see Lex Falcidia); quarta, 750-2, 760, 819, 820, 882-3.
Falsum, 57, 1062.
Familia—the family, 5; early limits and conditions of, 203-4; early quasi-partnership of father and children in the property of, 774-5; under XII. Tables, 259. Familiæ emptor, 767-8, 769, 803-4. Familiæ erciscundæ judicium (or actio). See Judicium.
Farm. See Fundus.
Farm stock, rights of usufructuary in, 399.
Farmer, 398, 447, 507 seq.
Fees (advocates'), 513, 1013, 1028.
Fenus. See Interest. Fenus nauticum, 474.
Feriæ—imperiales, repentinæ, solemnes, 52.
Fetials, 10.
Fiction, 40, 263, 342, 741-2, 843, 1037.
Fideicommissum—introduction of, 809-11, 824; definition, 812; in classification of Gaius, 126; as affecting position of heres, 812-22; fideicommissarius, 813; duties of heres to fideicommissarius, 813-16; duties of fideicommissarius to heres, 816-17; duties of fideicommissarius to creditors and legatees—legis-

Fideicommissum (*continued*).
lative changes, 817-22 ; as enlarging the power of substitution, 822-4 ; power of appointment, 823 ; a trust upon a trust, 823 ; as removing testamentary incapacity, 824-5 ; of freedom, 175-7, 186 (remedies) ; instruments creating (will, letter or spoken words, or nod, codicils), 825-30 ; mora, 894 ; form, 894-5 ; modality, 895 ; restrictions as to object of bequest, 895, as to persons capable of being legatees, 895-6, as to causa, 896 ; release, 896 ; remedies, 896. See Codicilli, Legacy.
Fidejussio, fidejussor—definition, 565-6 ; distinction from pactum de constituto, 567-8 ; extinction, 575 ; form, 570 ; præscriptio in action against fidejussor, 993 ; restrictions, 571 seq. In case of co-sureties, 577-9 ; in case of tutores, 716.
Fidepromissio—definition, 565 ; extinction, 575 ; form, 570 ; restrictions, 571 seq. In case of co-sureties, 577.
Fiducia, fiduciæ contractus, 431-7, 528 seq., 850-51 (emancipation).
Fiduciarius (-aria)—coemptio, 731, 795 ; pater, 213, 712 ; tutela, tutor, 712-13 (impuberum), 730-31 (mulierum).
Filiafamilias, 194 ; disherison of, 776-7, 779 ; dowry of, 850 (hotchpot). See Child, Filiusfamilias.
Filiusfamilias, 194, 189-93 ; agent — in contract, 610 seq., in conveyance, 323, in possession, 354, 356-7 ; restrictions on his power to borrow, 473-4 ; incapacity to contract, 605-6 ; anciently suable for delicts, 197 ; disherison of, 775-7, 779 ; injuria to, 194-5 ; labour of, 189 ; loans to, 473-4 ; peculium, 292-5, 605-6 ; peculium castrense, 605-606, 797, 803 ; property of, 189 ; surrendered in mancipio, 196-7 ; testamenti factio, 794 seq. ; could not be tutor, 717. See Potestas.
Finance Ministers, provincial, 73.
Fines, 1065, 1069, 1071-2.
Fire-raising, wilful, 1071.
Fiscus—caduca, 758 ; claimed inheritance in absence of heirs ab intestato, 806 ; claimed trusts left to aliens, 824 ; forfeiture of inheritance to, 882-3 ; hypothec of, 443 ; prescription of actions competent to, 649 ; priority of, 442 ; property of, not susceptible of usucapio, 272 ; successor of man whose memory is condemned, 835.
Fishing—in harbours, rivers, sea, 310.
Flamen—Dialis, 220, 223, 225, 227 ; Martialis, 225 ; Quirinalis, 225.
Fleta, Roman law in, 111.
Florentinæ Pandectæ, 101.
Flumen, 313 ; distinguished from rivus (stream), 313 ; perenne, torrens, 313.
Fluminis recipiendi vel non recipiendi jus, 417.
Food, raising price of, 1063, 1067.
Fora, 32.
Force. See Vis.
Foreclosure of mortgage, 437-8.
Forfeiture—of emphyteusis, 428 ; of inheritance to Fiscus, 882-3 ; of freedman's independence for ingratitude, 170, of son's, 212 ; of patria potestas, 220 ; of master's property in a slave, 183.
Forgery, 57, 1062 ; of chirograph, 1071.
Formal contracts, 458, 459-71, 525-7 (history).
Formalism of Roman law, 23-24, 38, 325.
Formulæ—system of, 980-1011, 38, 68, 974 : transition from Legis actiones to, 980-83 ; transition from, to Judicia Extraordinaria, 1012-13 ; in an actio, 983-97 ; proceedings to obtain, 983 ; parts of, 987-9 ; technicalities abolished, 69, 1013.
Formula arbitraria, 998-9 ; in factum concepta, 40, 986-7, 981 ; in jus concepta, 40, 986, 987-9 ; petitoria, 368, 983 ; præjudicialis, 987.
Formulæ juris abolished, 69, 1013.
Forum, 51.
Fossa, 313.
Foster-child, 181.
Fraud—in alienation, 1040-42 ; upon creditors, in manumission, 178-9 ; sale of freeman, 171 ; removing landmarks, 239 ; theft, 233 seq. See Dolus.
Fraudationis causa latitare, 970.
Freedman, 33, 128, 130, 138, 140, 170, 171 ; ingratitude of, to patron, how punished, 170 ; falsely representing himself as freeborn, 1071. See Libertini.
Freedom. See Libertas.
Freeman, 127, 128, 171 ; as agent, in contract, 617-21 ; illegal detention of, 186 ; fraudulent sale of, 171 ; knowingly treated as slave, 147, 149, 153.
Fructuaria stipulatio, 1002.
Fructuarium judicium, 1002.
Fructuarius, 398 (see Usufructus); might bring causa liberalis, 184.
Fructus, 335, 399-401 ; 439, 444 (mortgage) ; 901-3 (legacy) ; civiles, 335 ; consumpti, percepti, 336 ; falling on another's land, 254 ; licitatio, 1002-3 ; perceptio, 398 ; separatio, 398.
Fuga lata, 1065.
Fugitivus, 500, 599.
Fundus—dotalis, 299 ; emphyteuticarius, 426 ; instructus, 907-8 ; cum instrumento, 906-7 ; legacy of, 906-7 ; with everything on the premises, 908.
Furandi affectus, 236.
Furiosi—cura of, 732-5 ; incapacity in-

Furiosi (*continued*).
herent, 130; incapable of committing injuria, 153, of contracting, 606, of being tutores, 717; marriage of children of, 681, testamenti factio, 794, 797, 803.
Furniture, 907-9, 953.
Furor, 606.
Furtiva—condictio, 237, 325, 329, 552; res, 325.
Furtum—abetting, 240; actions for, 325-30; noxal action for, 184; who (not being owner) could bring action for, 237-9; who could not bring action for, 239; aggravated, 327; might be compromised (under XII. Tables), 18; conceptum, 21, 328, 1019; definition and derivation, 233; definition adopted by Bracton, 116; elements of, 233-7; of immoveables (could there be?), 233; compared with injuria, 235; manifestum, 326, 1019-20 (costs), 169, 1073-75 (action, penalty); of moveables, 233; nec manifestum, 326, 1019-20 (costs), 21, 1073 (penalty); nocturnal, 21; oblatum, 21, 328, 1020; penalty for, 21, 169, 326-7, 1073; of possession, 236-7—from creditor, 236, by owner from *bona fide* possessor, 237, case of *mala fide* possessor, 237, under contract of deposit, 236, under contract of loan, 236; criminal punishment of, 1070; of use (usus), 235-6.

Gaius—77, 84-85; classification of Institutes of, 124-132, 139; defects of, as a text-book, 139.
Gens, 6, 838-9.
Gentiles, 6, 19, 838-9; intestate succession of, 837-40, 848.
Genus and species, 580.
Gift—to concubines or natural children, 321-2; between husband and wife, 319; confirmation of invalid, 320-21. See Donatio.
Glans, 254, 333, 335, 398.
Gloss, the Great, 100.
Glossators, the, 99-100.
Governors, provincial, 44, 67, 72, 687, 695, 882, 887, 896, 1063, 1067. See Præses provinciæ.
Græco-Roman Law, 93.
Grandfathers and grandchildren—intestate succession of, 854-5.
Güterbock, Prof. Dr., on Bracton's obligations to the Roman law, 108-116.

Habere licere, 495.
Habitatio, 411.
Handwriting, in evidence, 1055, 1059.
Harbours, rights in, 310.
Hasta, symbol of Quiritary ownership, 49, 259.
Hearsay, generally excluded, 1055.
Heir (*heres*), 744 seq.; definition, 744-5,
Heir (*continued*).
813; extraneus, 834, 871-2, 876,-7,-8, 879-81; fideicommissarius, 813 seq.; Hindoo, 745-6; indignus, 882-3; joint, 757-63; necessarius, 875, 179; sine re, 776, 845-6; 775,-6,-8,-9, 799, 805, 808, 833-5 (succession of), 839, 882; suus et necessarius, 876, 879-81; possessors *pro herede*, 885.
Appointment (*institutio*), 786-8; captatoriæ institutiones or scripturæ, 947; pro herede gerendo, 877, 879-881; substitution, 788-94. *Semel heres semper heres*, 882. Duties—prior to Justinian, 747-54, to creditors, 747-9, to legatees, 749-754;—after introduction of inventories, 754-7, to creditors, 755-6, to legatees, 756-7; converted into mere executor, 755. Incapacity of (*testamenti factio*), 798-802. Rights, 747. Descent of obligations to, 650; responsibility of heirs of curators, 735, of tutors, 724-5. See Inheritance, Bonorum Possessio, Fideicommissa.
Hereditas—in classification of Gaius, 126; damnosa, 748; fideicommissaria, 809-830; jacens, 802, 898-9; legitima, 880.
Hereditatis aditio, 875-81; delatio, 876; expilatæ crimen, 1072; petitio, 806, 884, 886, possessoria, 843; partis petitio, 886. See Inheritance, Heir.
Heretics—dotes, donationes, to children, 309, 681; slaves of (freed on acceptance of Christianity), 183; succession, 864; testimony of (excluded), 1056; wills of, 797; not witnesses to wills, 803.
Hexabiblos, of Harmenopulos, 97.
Highways, 311-13.
Hindoo law—adoption, 205 note; inheritance, 745-6; Narada, 122.
Hire (locatio conductio), 505-16: definition, 505; dissolution of contract, 513-514; no historical connexion with stipulation, 535; differs from sale, 506, from superficies, 507; payment (*merces certa*), 505, 509; remedies, 514; rights and duties, 507-13; theft under contract of, 238.
Hire of Services (*operarum*): 506-7, 511-13; distinction of services, 511; confusion of the Roman jurists, 511; workman and employer, 512-13; responsibility of workman, 512-13.
Hire of Things: 506-7, 508-11; eviction, 508, 509; faults—warranty, 509; fixtures, removal of, 509; remission of rent, 508, 509; repairs, 508, 509; responsibility for thing hired, 508, 510; subletting, 508.

Homicide, 1069.
Honorarium, 482, 490, 513, 1013, 1028.
Horrearii, 513.
Horreum, 444 (hypothec).
Hotchpot, 783, 850, 858.
House—907-8 (see Domus); forcible entry to a man's, 149; legacy of, 905-8; rights of usufructuary in, 400, of usuary, 410.
Housebreakers, 1070.
Household, the, 5. See Familia.
Humanists, the, 102.
Hurt, when an injuria, 150-2.
Husband and wife, 678-96, 130; gifts between, 319-20; intestate succession of, 863. See Marriage.
Hypotheca. See Pignus and Hypotheca.

Ignominia, 875.
Ignorance of fact and of law, 660.
Illata, 444.
Illegitimate children, 677.
Illustres viri, 156.
Imaginaria—solutio, 639, 641; venditio, 492.
Immixtio, 876-7, 879-81.
Immoral consideration, 468.
Immoveables, 249 seq.: conterminous (rights of owners of), 253-5; deprivation of owner of simple possession of, 249-51; offences against ownership of, 1070-71; rights to, 249 seq., to enjoyment and use of, 251 seq.; no robbery of, 250; no theft of, 249.
Impediments to marriage, 682-8.
Impensæ—necessariæ and utiles, 278, 301, 302, 307, 336-7, 338 (joint-owners), 440 (mortgage); voluptariæ (ornamental), 302, 478 (commodatum), 481 (depositum), 488 (mandatum), 503 (sale), 904 (legacy).
Imperium, 7, 8, 14, 41.
Impetratio actionis, 1013.
Impossibility—of conditions, in contract, 591-2, in legacy, 936-8, in bequest of liberty, 176, 937; of performance (when equivalent to actual performance), 637-8; of promises, 598-600. Impossibilium nulla obligatio est, 599.
Imprisonment, 1065, 1069; for debt, 1035-6, 1043.
Improvements, compensation for, 277-81 (accessio), 301 (dos), 337, 440 (pignus).
Impuberes, 696 seq.; inherent incapacity, 130; incapacity to contract, 607, to marry, 683; no *testamenti factio*, 797-9, 803.
In bonis habere, 263-5, 612, 674, 713.
In diem addictio, 590-91.
In judicio, proceedings, 23, 117.
In jure, proceedings, 23, 116, 973-80 (legis actio), 980-97 (formula); cessio (see Cessio in jure); confessio, 1003; interrogatio, 1003; jusjurandum, 1005.
In jus vocatio, 967-73.
Inædificatio, 276.
Incapacity, legal, 129, 130.
Incendium, standing commission on, 57.
Incerta persona—who is, 799, 922; sub certa demonstratione (id est, ex certis personis), 922; cannot be heir, 798-9; unborn child was, 799; corporation, or municipality was, 799; legacy left to, 922-3; tradition to, 284; trust left to, 825.
Incerti condictio. See Condictio.
Incertus dies, 587, 933.
Incest, 1068.
Incorporeal things, 287.
Indentures, 469.
Index, 1054.
Indian Penal Code, 1053.
Indictio, 403.
Indigni, 882-3.
Inductiones, 805.
Indutiæ quinquennales, 1040.
Infamia, 431-2 note; of bankrupt, 1038-40, 1043, 1061; of removed curator, 735; from depositum, 482; of heirs, 782; from committing or instigating injuria, 155; from mandatum, 490; of patron, 667; of partner, 1021; of removed tutor, 727.
Infantia, 701. Infantiæ proximi, 153, 607, 701.
Infanticide, 190-91.
Infortiatum, 101.
Ingenui, 667, 718.
Ingratitude, forfeiture of independence for—by child, 212, by freedman, 170, 668.
Inheritance, 739-887, 19 (XII. Tables); definition, 739, 744-5; classification, 126-7, 138, 140; chief form of universal succession, 740; influence of Roman on English law of, 114; comparison of Hindoo law of, 745-6; in jure cessio of, 881-2; division of, 761-2; heir—rights and duties of, 745-63, joint-heirs, 757-63; legacy of, 914-15; offences as to, 1072; *bona fide* possessor, 885-6, *mala fide* possessor, 885-6; remedies, 883-7; intestate succession, 830-74, prætorian innovations, 840-63; testamentary succession, 764-830; untransferable and indivestible, 881-2; vesting of (aditio hereditatis), 875-81. See Heir, Hereditas.
Injuria, 20, 145-156, 166, 240: compared with furtum, 235; Bracton follows the Institutes as to, 116; definition, 145; meanings, 150; forms, 146-50; aggravated (*atrox*), 155, 1069; circumstances rendering infliction of pain or hurt an, 150-52; to slaves, 164-6; who could not commit, 153; who could not sue for, 153; who could not suffer, 153; vicarious responsibility for, 153-4; remedies, 154-6, 1073-4; criminal prosecution for,

Injuria (*continued*).
156, 1069; condemnation carried infamy, 155; heirs of wrongdoer not liable, 155-6; prescription in action for, 156; indulgence to officials of rank sued for, 156, 1069.
Innkeeper's responsibility (furtum), 241.
Innominate real contracts, 540 seq.
Inofficiosum testamentum, 780-82, 785.
Inquilinus, 162-3, 444, 507 seq.; castrorum, 720.
Inquiry. See Inquisitio, Causa (cognita).
Inquisitio, by Prætor—before appointment of curator, 734, of tutor, 709-10, 706.
Inscriptio, in criminal proceedings, 59.
Insinuatio, 178, 309.
Institor, 618-20.
Institutes—of Gaius, 84-85, 124-32 (classification), 139 (defects, as text-book); of Justinian, 91-92, 124-32 (classification), 139 (defects, as text-book).
Institutio heredum, 786-8; captatoria, 947.
Instructus (-a)—domus, 907; fundus, 907, 908.
Instrumentum—domestica, 1055; dotalia, 937; of farm, and house, 335-6, 906-7; nuptialia, 834.
Insularius, 404, 619.
Insult—to the dead, 147; in pictures, 148; in public, 147. See Injuria.
Intellectus, 701.
Intentio—of formula, 988, 989, 996 (variance).
Intention—in delivery (traditio), 283-4; in injuria, 146, 148, 150-51; in possession, 341-57 (see Animus); in theft (furtum), 234-5.
Intercessio—of tribune, 14 note, 27, 565, 1045; by woman, 573-4, 631.
Interdictio aqua et igni, 218, 187, 694, 795, 1061, 1065.
Interdictum, 40, 41, 135, 137, 982, 1013; nature of, and comparison with actions, 998-1001; possessory, 342-74; procedure in, 997-1003.
Interdictum—de aqua cottidiana et æstiva, 424; de arboribus cædendis, 333, 409; de clandestina possessione, 351; de cloacis, 425; de fonte, 425; de glande legenda, 254, 333, 997; de inspiciendo ventre, 222; de itinere actuque privato, 387, 388 note, 403, 424, 997, utile, 388 note; de liberis exhibendis et ducendis, 221, 997 note; de libero homine exhibendo, 186, 997 note; de migrando, 514; de mortuo inferendo, 317; de precario, 381, 412; de rebus sacris, 997 note; de ripa munienda, 314; de rivis reficiendis, 424; de superficie, 430, 997 note: de vi cottidiana, 332;
Interdictum (*continued*).
de vi et vi armata, 250, 332, 409, 997 note; duplex, 359, 373; for emphyteusis, 429; exhibitorium, 359; fraudatorium, 1042; ne quid in flumine publico fiat quo aliter aqua fluat atque uti priore æstate fluxit, 314; ne quid in flumine publico ripave ejus fiat quo pejus navigetur, 314; ne quid in loco publico vel itinere fiat, 312, utile, 310; ne quid in loco sacro fiat, 318; possessorium, 1038 (G. 4, 145); possessionis adipiscendæ, 448, 842, recuperandæ, 250-51, retinendæ, 357-8; prohibitorium, 359, 998; quasi-Salvianum, 448, 997 note; quod legatorum, 385, 952; quod vi aut clam, 252, 332-3, 341, 342, 357 seq., 409, 514, 997 note; quorum bonorum, 842-5; 886-7, 997 note; for repairs, 424-5; restitutorium, 359; Salvianum, 448, 997 note, 1000, utile, 448; sectorium, 1036; secundarium, 1002-3; for servitudes, 423-5, 997 note; simplex, 359, 373; unde vi, 250-1, 342, 357 seq., 116; ut in flumine publico navigare liceat, 313; uti possidetis, 357-9, 116, 253, 333, 362, 365 seq. (history), 997 note, 1001; utrubi, 357-9, 365 seq. (history), 997 note, 1001.
Uti possidetis and *Utrubi*—conjectural date of introduction. 374 note; their purpose, later and original, 365-6; possible origin of *Uti possidetis* in the necessities of private holders of the ager publicus, 367 seq.; views of Niebuhr and Savigny, 367; possible also that interdicts were first introduced to protect the proprietary interests of peregrini, 367-9; first hypothesis accounts for *Uti possidetis*, the other accounts for both *Uti possidetis* and *Utrubi*, 370-1; ownership extended to peregrini through possession, 371; parallel in case of Inheritance, 371; corroboration of conclusions reached, from peculiarities of interdict procedure, 372 seq.; profound difference between *Uti possidetis* and *Utrubi* on the one hand, and the rest of the interdicts on the other—as *Unde vi*, 372, and *Quod vi aut clam*, 373; correspondence of this difference with a difference in Procedure, 373-4. Is the hypothesis of the origin of possessory interdicts in the necessity of establishing a wider basis of ownership, con-

Interdictum (*continued*).
sistent with the characteristic rules of the law of Possession? 375 seq.; title no defence, 375; Animus domini, 375-88 (see under Possession).
Interest, 652-3, 21; compound (*usuræ usurarum*), 653, 1032; usuræ legitimæ, 652, 724; pupillares, 723-4; fenus semiunciarium, unciarium, 652; on pecunia trajectitia, 475, 653; on purchase money unpaid, 503; on trusts, 894; when stopped by tender of principal, 637.
Interitus rei. effect of—in emphyteusis, 428; in legacy, 903, 951; in mortgage, 447; in discharge of obligation, 637-8; in servitude—personal, 408, prædial, 423.
Interpretation—of wills and legacies, 953-64.
Interrogatio in jure—in criminal proceedings, 59; interrogatories, 1003-5; actio interrogatoria, 1004-5.
Intestabilis, 21, 148, 432 note, 803.
Intestate succession, 830-74: intestatus, 833; to freeborn persons, 830-66; to freedmen, 866-74; in Gaius, 126; names and degrees of relationship, 830-32.
Under XII. Tables, 833-40—of sui heredes, 833-5, of agnati, 835-7, of gentiles, 837-40; Prætorian Edict (Bonorum Possessio, q.v.), 840-63, defects of XII. Tables, 848; Justinian's final reforms, 863-5. Exchequer as heir, 865-6.
Intimidation, 593-5.
Inundatio, 276.
Invecta, 444.
Inventory, 751, 754-7.
Invito domino, 234-5 (furtum).
Irrelevance. See Relevance.
Isaurian Law, the, 94.
Islands, formed in rivers, 275-6; in sea, 256.
Iter, 415, 419, 424. See Interdictum.
Iteratio, 674.

Jactu, lex Rhodia de, 514-16.
Jettison, 514-16.
Jews—dos and donatio to children, 309; marriage, 687; slaves of, 183; testimony, 1056.
Joint-creditors, Joint-debtors, 551 seq.
Joint-heirs, 757-63, 553: how constituted, 761-3; rights and duties as between themselves, 757-9; rights to *res hereditariæ*, 757, *jus accrescendi*, 757-9, custody of title-deeds, 759; duties to creditors, 759-60; to legatees, 760; rules determining their respective shares, 761-3, 956.
Joint legacy, 893-4, 915.
Joint legal transactions, 550-55.
Joint obligations, 551 seq.
Joint ownership, 337-40, 519, 553; how created, 339; how dissolved, 339-40; rights and duties, 338-9; remedy, 340; slave held in, 612-13.
Joint tutors, 554, 706-8.
Judex, 44-47, 18, 22, 23, 52; judicem addicere, 47; corruption of, 1066; domesticus, 190; judicem ferre, 47; judgment of, 1008-11; liability of, 1006-7; pedaneus, 73; procedure before, 1008-11—under legis actio, 1007, under formula, 1007-10; quæstionis, 58; tutelaris, 70.
Judgment, 1008-11; execution of, 1029-44; grounds of nullity, 1011, 1009; for property (enforcement of), 1033.
Judgment debts—proceedings to enforce, 1033-44, to terminate, 1029-33. Debtor, made slave (XII. Tables), 18, 169.
Judicata res, 60, 119.
Judicatum solvi stipulatio, 1026, 983, 1024.
Judices — Decemviri, 15, 26, 49-50; pedanei, 73-74.
Judicial—officers, 34-51, 70-73; proceedings (places and times of), 51-53.
Judicio, in, 22, 23, etc. (see Judicium).
Judicis postulatio, 978, 975, 37, 48-49.
Judicium (faculty of judgment), 701.
Judicium (trial, proceedings before a *judex*), 22, 23, 48 note, 52, 974, 1006-11; absolutoria, 1009; capitalia, 1061; Cascellianum, 1002; communi dividundo, 337, 339-40, 524; contrarium, 1020-21; Dei, 690; extraordinaria, 23, 68, 1012-29, 1039; familiæ erciscundæ, 19, 259-60, 757, 883, 891, 892, its influence on English law, 114; fructuarium, 1002; imperio continentia, 42, 1010; legitima, 42, 1010, 1015; ordinaria (see Formula), 1039; publica, 74-75, 1061; secutorium, 1002; sponsionum, 1003. See Actio. In judicio, 23, 117, 974, 1006-11. Judiciorum ordo (see Formula).
Juliani Novellarum Epitome, 92.
Jure, proceedings in, 23, 116, 973-80 (Legis actio), 980-97 (Formula); cessio (see Cessio in jure); confessio, 1003; interrogatio, 1003; jusjurandum, 1005.
Jureconsulti (see Jurisconsults).
Juri alieno subjectus, 193.
Juridici conventus, 44.
Juris—alieni, sui, 193-4, 117, 128; auctor, 55, 76; possessio, 392; præcepta, 116; studiosus, 55, 79; vinculum, 453.
Jurisconsults, the, 53-55, 60, 76-79.
Jurisdictio—of prætor, 41; provincial judicial district, 44.
Jurisperiti, Jurisprudentes. See Jurisconsults.
Jurisprudentia, 116; media, 859.

Jurists—Dutch, 104; French, 102-3; German, 104-6; Greek, 93, 96-97.
Jus—its meanings, 116-17; place in order of development of juridical ideas among the Romans, 125; abstinendi, 876-81; actionum, 124, 131-2; adcrescendi, 757-9, 776-7, compared with substitution, 789-90; ædificandi, 418; ædilicium, 35, 43; Ælianum, 54; agnationis, 685; altius non tollendi, altius tollendi, 418; aquæ educendæ, 416; annulorum aureorum, 670; arenæ fodiendæ, 417; calcis coquendæ, 417; civile, 24, 36-37, 117-19; civitatis, 30; cloacæ mittendæ, 419; cognationis, 685; commercii, 5, 30, 198, 599; commune, 771; conubii, 5, 22, 25, 30, 187, 197-9, 682; cretæ eximendæ, 417; deliberandi, 877; dicere, 971; edicendi, 120; Flavianum, 54; fluminis recipiendi, non recipiendi, 417; gentium, 35-36, 117-19, 161, 171, 187-8; honorarium, 24, 35-37, 118, 120; intercessionis, 14 note, 27; itineris, 415; lapidis eximendæ, 417; Latii, 31, 33, 198; liberorum, 731, 856; luminum, 418; naturale, 35-36, 117-19, 161, 171; navigandi, 415; offerendi, 442; oneris ferendi, 417; Papirianum, 1; pascendi, 416; personarum, or de personis, 124, 125-6, 129; possessionis, 392; postliminii, 33, 215-17, 714, 795, 835, activum, passivum, 216; potestatis (see Potestas); prædiorum rusticorum, 414-17 seq., urbanorum, 414, 417-19 seq.; prætorium, 35, 118; privatum, 24, 117; projiciendi, 419; protegendi, 419; provocationis, 13, 23, 26, 30; publicum, 24, 117; Quiritium, 118, 175-6, 229, 261, 262-5, 323, 379, 612, 672, 674, 699, 713, 889, 891; in re, 392; de rebus, 124, 126; publice respondendi, 76, 121; sacrum, 21, 24, 117; scriptum, non scriptum, 119; sources of, 119-121; stillicidii recipiendi, non recipiendi, 418; suffragii, 5, 30; tigni immittendi, 417; tripertitum, 117 (Private Law), 769 (testamentum).
See Jure, Juri, Juris.
Jusjurandum in jure, 1005. See Oath.
Justa causa—adquisitionis, 336, 290; manumissionis, 180-81; possessionis, 290, 272; traditionis, 282, 287.
Justæ nuptiæ, 226, 678-96.
Justinian, 69-70; his Institutes, 91, 92, classification of, 124, defects of, as textbook, 139; his Law—in Gaul, 99, in Italy, 98; his Legislation, 90-93.
Justinianani Novi, 80.
Justitia, 116.
Justus titulus, 270, 283.

Kidnapping, 147, 1063, 1069.
King, the, 8.

Labeo, 77.
Lacus, 313.
Land—burdens on, paid by emphyteuta, 428, by usufructuary, 402-3; controversies as to (trial of certain), 1013; injurious acts done to, 253; interference with owner's use of, 252; legacy of, 905-7; rights of usufructuary in, 399; tax, 403, 901.
Landlord and tenant, 278, 507 seq.
Landmarks—removing, 249-50, 332.
Land-tax, 403, 901.
Lapidis eximendæ jus, 417.
Latini coloni, 218 (caput), 32.
Latini Juniani, 128, 173, 178, 198, 672-4, 675-6; origin and name, 871; could not marry Roman citizens, 688; intestate succession to, 871-4; testamenti factio, 795-8; trusts, 824; could not be tutores, 717; abolition of, 874.
Latinitas, 31, 33, 672-6.
Latitare fraudationis causa, 970.
Latium—majus, minus, 198.
Laudemium, 429.
Law—constitutional, 117; criminal, 24, 74-75, 1061-72; ecclesiastical, 22-24, 117; private, 117; public, 21, 24, 117; questions of, 1049; real property, 20; sacred, 22, 24, 117; schools, 79-80.
Law of Citations, 69, 79.
Leading questions, 1060.
Legacy, 887-964: classification, 126-7, 138-40; at first founded on will of testator, 887-8; subsequent limitations, 888. See Legatum (next page).
Legatum (under Republic), 887-94: forms, 888-9, 897; rights of legatee under each, 889-91; restriction as to object of bequest, 891-2; release, 892-3; joint-legacy, 893-4.
Fideicommissum (under Empire), 894-6.
Fusion of Legatum and Fideicommissum (under Justinian), 897-952: definition, 897-8; specific legacy, 898 seq. Rules common to all legacies, 898-904; rights of legatee, 898-904; duties of legatee, 904. Rules applying to particular legacies, 904-15; legacy of slaves, 905; of things—unqualified ownership, 905-10, qualified ownership, 910-12, usufruct, etc., 612, 404; of rights *in personam*, 912-14; of hereditas, 914-15. Co-legatees, 915. Donatio mortis causa, 915-17.
Interpretation of legacies, 953-64: expression clear and sufficient, but involving illegality, absurdity, or injustice, 953-6; expression clear, but incomplete, 956-7; expression obscure or ambiguous, 957-64.
Making of legacies, 917-52. Simple

Legacy (*continued*).
legacy, 917-29: how made, 917-18; who could be charged with payment of, 918-20; creating words, 920-1; object of legacy and person of legatee must be certain, 921-3; error, 923-6; demonstratio, determinatio, 924; causa, 925-6; modus, 926, 934; cases where election of heir or legatee is necessary to vest the legacy (legacy — of choice, *optionis*, alternative, in general terms), 927-8; when it is uncertain whether legatee or testator died first, 928-9.
Modality of legacies, 929-41: place of performance, 929-30; time of performance, 930; postponed and conditional, 930-41; dies, 930-3, legatum purum, 932, conditio, 932-41; Muciana cautio, 939; power of appointment, 941.
Restrictions on legacy, 941-9: what may not be bequeathed, 941-2; who may not be legatees, 942-4; as to unlawful objects, purposes, or conditions, 944-9; lucrativa causa, 944; captatoriæ institutiones or scripturæ, 947; restraints on marriage, 947-8; conditions against morality, 948; Regula Catoniana, 948-9.
Remedies, 952.
Revocation of legacies, 949-52: ademptio, 949-50, translatio legatorum, 950-1, events, 951-2. Divestitive fact, 952.
Legatarius (legatee)—duties of heir to—before Justinian, 749-54, after inventory made, 756-7; lex Falcidia, 750-4; duties of joint-heirs to, 760; duties of fideicommissarius to, 817-22. Indignus, 915; partiarius, 820, 915. See Legacy.
Legati Cæsaris, or Augusti, 72.
Legatum—classification, 126-7, 138-40; compare donatio mortis causa, 916-17; ademptum, 949-50; of aliment, 909; alternative, 928; of animals, 905; of annuity, 912-13; of books, 909; of chirographa, 913; of clothes (vestis) 910; conditional, 930-41; conjunctive, disjunctive, 915; of sum due to a creditor, 914; of release of a debt to a debtor, 913-14; per damnationem, 889-93, 894-97, 1019 (costs), 1073; of dowry, 911-12; ereptitium, 915; of firewood (lignum), 910; of furniture (supellex), 908-9; left in general terms, 928; of gold and silver, 910; of inheritance, 914-15; of jewellery (ornamenta), 910; sub jurisjurandi conditione, 947; of lands or houses, 905-8; of building material (materia). 910;
Legatum (*continued*).
optionis, 927; of peculium, 910-11; pœnæ nomine, 944; per præceptionem, 889-94, 897; of provisions (penus), 909; purum, 917, 932; of securities, 913; of silver vessels (vasa), 910; sinendi modo, 889-93, 894, 897; of slaves, 905; specific, 898 seq.; translatum, 950-51; unconditional (purum), 917, 932; of usufruct, 912, 404; per vindicationem, 888-93, 897; of wheat, wine, oil, 909; of women's toilette (mundus muliebris), 910; of wood, 910.
Leges—caducariæ, 789; censoriæ, 1044; Corneliæ, 57; judiciariæ, 44; Julia et Papia, 66, 67, 68, 81, 432 note, 677, 681, 688, 691, 731; 757-8, 790 (jus accrescendi); 798 (incapacity of heirs); 807, 824-5 (cœlibes, orbi); 865 (bona vacantia); 867 (intestate succession of freedmen); 893, 898-9 (joint legacy); Juliæ, 39, 64, 81, 975, 981; Liciniæ, 25, 27, 34, 62; Publiliæ, 26, 62; regiæ, 1; republican, 61-65; tribuniciæ, 26; under empire, 81-82; Valeriæ, 13, 23, 26, 61; Valeriæ-Horatiæ, 16, 25-26, 61.
Legis actiones: 23, 36-38, 41-42, 52, 973-80; characteristics, 979-80; forms, 975; Gaius on, 974-5, 848; defects and disuse, 848, 975, 979-80, 1022 (no agents); allowed no second action on same matter, 1014-15, and no *exceptio*, 1015.
Legitima portio, 780-86, 827.
Legitimatio, 201-3; per subsequens matrimonium, 201-2, 114, 694; per oblationem curiæ, 202; per rescriptum principis, 203; by testament confirmed by Emperor, 203.
Legitimum judicium, 42, 648, 1010, 1015.
Lender. See Loan.
Leonina Societas, 516.
Lex, 60, 75, 119, 120.
Lex—Acilia (repetundæ), 45, 46, 57, 58, 59, 63; Acilia Calpurnia, 57 (note 2), 64; Æbutia, 39, 49, 62, 975, 981; Ælia Sentia, 66, 81, 178, 187, 198, 189, 200, 230, 667, 669, 672-3, 675, 699, 824, 834, 874; Æmilia, 28, 61; Anastasiana, 213, 858; Annalis, or Villia, 62; Antonia, 51 (note 2), 64; Appuleia (agraria), 63; Appuleia (majestas), 57 (note 3), 63; Apuleia (sureties), 61, 577-9; Aquilia, 20, 62, 146, 150, 152, 242-5, 247, 330-331, 335, 339, 342, 373, 564, 641, 1003, 1010, 1073-74—actio in factum, 244, utilis, 244, 247; Asinia Antistia, 81; Aternia Tarpeia, 61; Atilia, 62, 81, 714, 730; Atinia (res furtivæ), 62, 272-3;

Lex (*continued*).
Atinia (tribunes), 63 ; Aurelia, 45, 46, 59, 64.
Bæbia, 62.
Cæcilia, 64 ; Cælia, 63 ; Calpurnia (condictio), 37, 62, 464, 979-80 ; (repetundæ), 57, 58, 63 ; Canuleia, 5, 25, 61 ; Cassia (agraria), 61 ; Cassia (ballot), 59, 63 ; Cassia (senatorship), 63 ; Cicereia, 62, (Pompeia?) 577, 579 ; Cincia, 62, 319 ; Claudia, 82, 729-30 ; Clodia, 29, 64 ; Coloniæ Juliæ Genetivæ, s. Ursonensis, 64 ; commissoria, 434, 438, 590 ; Cornelia de captivis, 64, de falsis, or testamentaria, 64, 216, 795, 810-11, 1062, 1066, 1070, 1072, de injuriis, 148, 149, 155, 156, de majestate, 57 (note 3), de peculatu, 57, de sicariis et veneficis, 57, 64, 218, 1061-2, 1066, 1068-9, 1071, de sponsoribus, 64, 572, de vi, 57 (note 5), de XX Quæstoribus, 64, on prætor's edict, 35, 64, repetundarum, 57 (note 1), 64, sumptuary, 64 ; Cornelia Bæbia, 57 (note 2), 62 ; Cornelia Fulvia, 57 (note 2), 63 ; Creperia, 65, 982 ; curiata de imperio, 8, 76, 211, Vespasiani, 82.
Dei, 88 ; Didia, 63 ; Duilia, 61 ; duodecim tabularum (see Twelve Tables).
Fabia, 57 (note 2), 63 ; Fabia or Favia (de plagiariis), 147, 1063, 1069-70 ; Falcidia, 64, 750-54, 760, 815 ; Fannia (banishment), 63 ; Fannia (sumptuary), 62 ; Flaminia, 62 ; Flavia, 64 ; Fufia Caninia, 66, 81, 182, 230, 750, 922 ; Furia (de sponsu), 63, 576-8, 1031 ; Furia (testamentaria), 62, 750-51, 1031.
Gabinia, 63 ; Genucia, 62, 653 ; Gondobada, 89.
Hortensia, 25, 26, 60, 62, 120 ; Hostilia, 979.
Icilia (Aventine), 61 ; Icilia (tribunes), 61 ; imperfecta, 750.
Julia, agraria, 64, caducaria, 81, de adulteriis, 81, 178, 299, 307, 595, 1061, 1067, 1069, 1071, de ambitu, 57 (note 2), 81, 1063, de annona, 64, 1063, 1067, de bonorum cessione, 81, de civitate, 26, 32, 63, 198, de fenore, 64, de majestate, 57 (note 3), 1061, 1065-7, de maritandis ordinibus, 66, 67, 68, 81, 670, 730, de peculatu, 57 (note 4), 1062, 1067, 1071, de prædio dotali, 299, de residuis, 1063, 1067, de vi, 57 (notes 5, 7), 64, 251, 1062, 1066-7, 1069-71, de vicesima hereditatum, 81, judiciaria, 45, 64, 81, 272, 274, 1010, 1039-40, municipalis, 64, repetundarum, 57, 64, 1063, 1067, sumptuary, 64, 81. Julia et Papia Poppæa, 66, 67, 68, 81, 432 note, 677, 681, 688, 691, 731 ; (jus accrescendi) 757-8, 790 ; (incapacity of heirs) 798 ; (cœlibes, orbi) 807, 824-5 ; (bona vacantia) 865 ; (intestate succession of freedmen) 867 ; (joint legacy) 893, 898, 899. Julia et Titia, 81, 714, 730 ; Julia Papiria, 61, 65 ; Junia (de peregrinis), 63 ; Junia (repetundarum), 57, 63 ; Junia Norbana, 67, 81, 172, 173, 187, 667, 672-3, 675, 713, 824, 871, 873-4.
Latina, 188 ; Licinia (ambitus), 57 (note 2), 64 ; Licinia (plebeian consuls), 62 ; Licinia (sumptuary), 63 ; Licinia Mucia, 63 ; Livia, 45, 46, 63 ; Lutatia, 57 (note 5), 64.
Mænia, 13 (note 1), 62 ; Malacitana, 82 ; Mamilia Roscia, etc., 82 ; Manlia, 62 ; Marcia (agrarian), 63 ; Marcia (usury), 62, 1031 ; Maria, 57 (note 2), 63 ; Minicia, 65, 187.
Nervæ agraria, 82.
Ogulnia, 25, 62 ; Ottinia (or Ovinia), 1010 ; Oppia, 62 ; Orchia, 62.
Papia (banishment), 64 ; Papia, or Papia et Poppæa (see Julia et Papia Poppæa, above) ; Papiria (Acerrani), 62 ; Papiria (ballot), 63 ; Papiria (de sacramentis), 62 ; perfecta, 750, minus quam perfecta, 750 ; Petronia, 82, 158 ; Pinaria, 61, 1007 ; Plætoria, 62, 608, 734 ; Plautia, 57 (note 5), 63, 272, 274 ; Plautia Papiria, 26, 32, 45, 46, 63, 198 ; Pœtelia, 33, 57 (note 2), 62, 538, 1035 ; Pompeia ambitus, 46, 57 (note 2), 64, civitas, 33, 63, judiciaria, 45, parricide, 57 (note 6), 1062, sureties, 577, 579 [? Cicereia], tribunes, 64, vis, 46, 57 (notes, 5, 7), 64 ; Portia, 148 ; Publilia (de sponsu), 61, 570, 576, 1031—(patrum auctoritas), 7, 13 (note 1), 26, 28, 62—(tribunes), 14, 61.
Quinctia, 64.
Regia, 8, 76 ; Remmia, 64, 1066 ; Rhodia de jactu, 514-16 ; Romana Burgundionum, 89 ; Romana Visigothorum, 89 ; Rubria, 64.
Salpensa, 82 ; Scribonia, 64, 289, 419. Sempronia (agraria), 63 ; (caput), 63 ; (de fenore), 62 ; (judiciaria), 44, 56, 63 ; (provinciæ consulares), 63. Servilia, of Cæpio, 45, 63, of Glaucia, 45, 57, 59, 63 ;

Lex (*continued*).
Silia (condictio), 37, 62, 463, 979-980—(de ponderibus), 62; Sulpicia, 26, 63.
Theodosiana, 89; Thoria, 63; Trebonia, 61; Tullia, 57 (note 2), 64.
Valeria (B.C. 300), 62; Vallia, 65, 1031; Varia, 57 (note 3); Vectibulici (?), 174; Vellæa, 81, 778; vicesimaria (Julia), 81; Villia, or Annalis, 62; Visellia, 81, 674, 1071; Voconia, 62, 750-51, 811, 858.
Zenoniana, 427.
Libel, 20, 148-9, 1069-70.
Libellus—appellatorius, 1047; conventionis, 972, 1073; repudii, 690.
Liber—Authenticarum, 92; legum, 89.
Liberalis causa, 184-6.
Liberatio—legata, 913; nexi, 641; from obligation, 633.
Liberi. See Child, filiusfamilias. Adoptivi, 203, etc.; naturales—(1) born to us (not adopted), 203, (2) of concubinage, 201; sui ac legitimi, 201.
Libertas—defined, 157; bequest of—conditional and unconditional, 176-7, to incerta persona, 922-3; cap of (pileus), 177; deprivation of, 1065; directa (or justa) and fideicommissaria compared, 175-6; modes of obtaining (see Manumission); given through master's forfeiture, 183; pœnæ nomine, 945, as reward, 183; personal, 147, 1069 (offences against); prescription, usucapio, 185-6, 407, 428, malicious questioning of one's, 185; special remedies for libertas fideicommissaria, 186; suit for (liberalis causa, adsertor libertatis), 184-5.
Libertinus—Libertus. Patron and freedman, 666-76, 687, adsignatio, 870-71; libertinus defined, 667; libertus orcinus, 176, 183; duties of libertus, 667-70, services to patron, 668-70; relation how created, 670; how dissolved, 670-1; remedies, 671-2. Intermarriage, 687; intestate succession to freedmen (Roman citizens), 866-71; difficulty of arranging in tribes, 33; tutela, 711-12, 715 (must apply for tutor to children of patron), 718, 720, 721 (as tutor to patron's children), 727. See Latini Juniani, Dediticii. Centenarii, 869.
Libripens, 536, 537, 641, 767, 769, 803.
Licitatio fructus, 1002-3.
Lignum, legacy of, 910.
Limitation of time—for prosecuting suit, 1010. See Prescription.
Lis crescens, 659, 1020, 1074-5.
Lis et vindiciæ, 976-7, 982-3. See Litis.
Litem suam facere, 988, 1006.
Litigation—restraints on reckless, 1020; vexatious, 150.
Litis—æstimatio, 336; ampliatio, 1007; contestatio—in Formulary procedure, 984-5, 992, 1005, 1007, 1009, in extraordinary procedure, 1014-16, 1028, in extinction of obligations, 633, 650, in joint obligations, 560, 562, in novation, 631; denuntiatio, 972; pactum de quota, 601.
Littera—Bononiensis, or Vulgata, 101; Pisana, 101; litteræ dimissoriæ, 1048.
Liturræ, 805.
Livery-stable keeper's responsibility (furtum), 241.
Loan, 466-71, 454; commercial, or maritime, 474-5; gratuitous (commodatum), 475-9; mutuum, 472-4.
Locatio conductio. See Hire.
Locator—operarum, 511 seq.; operis, 511 seq.
Longa manu delivery, 282, 348.
Love potions, 147, 1069.
Lucid interval, 606.
Lucrativa—causa, 914, 944; possessio usucapio, 270; usureceptio, 436.
Lumen, lumina, 418.
Lunatics, 681, 732 seq.
Lustrum, 28.
Lytæ, 80.

Maeniana, 419.
Magic, 1068.
Magister—bonorum vendendorum, 1038-9; census, 773; navis, 241, 617-18.
Magistratus—from whom appeal lies, 1044-6; created by Constantine, 74; domesticus, 190; under Empire—new, 71, Republican, 70; provincial, 44, 72, 74; Republican, 11-12, 27 seq.
Maine, Sir H. S.—on condictio, 37, 62, 979-80; on Narada, 122-3; on patria potestas, 189; on pignoris capio, 1044; on sacramentum, 37, 977; on derivative theory of the stipulation, 536 seq.
Majestas, 57, note 3, 1061, 1065-7.
Mala fide possessor, 237, 247-8, 268-9, 277, 279, 336, 341-2, 398, 885-6.
Malefici, 1068.
Maleficium, 241; actio (obligatio) ex maleficio, 131, quasi ex maleficio, 241, 1073.
Mancipatio, 20, 229, 210, 212, 260-2, 263-4-5; in fiduciæ contractus, 434-5, 433; in legacy—per damnationem, or sinendi modo, 890, 892; created rural servitudes, 419; in testamentum, 767-8; in usufruct, 404; of wife, 224, 228.
Mancipium (slave), 160, 228.
Mancipium (fictitious legal status), 227-230; 20, 153, 192; 1034-6: classification, 126-7-8, 130, 135, 140; derivation, 223.
Mandata, imperial, 76.
Mandatum, 482-90: definition, 482;

Mandatum (*continued*).
formed in five ways, 483-5; no set form of words necessary, 489; history of, 533 seq.; remedies, 489-90; renunciation, revocation, 489; rights and duties, 485-9.
As contract of suretyship—distinguished from fidejussio, 566, from pactum de constituto, 567; how constituted, 570; how extinguished, 575; remedies, 576. Cosureties, 577 seq.
Manilian stipulations, 498.
Manuals, of Byzantine Emperors, 94-96.
Manumission, 171-183, 223: Board (Consilium) of, 180; definition, 171; history, 172-3; modes, 172-8, 229 (process)—formal or public (justa, legitima, publica, solemnis), 173-7, informal, 177-178, distinctions between formal and informal, 173; in fraud of creditors, 178-179, 177; legal grounds of, 180-81; by masters under 20, 180-81; of slaves under 30, 181-2; restraints on, 178-88. Inter amicos, 177, 180; censu, 174-5; per epistolam, 177; testamento, 175-7, 180, 182; per vindictam, 173-4, 180-81.
Manus, 222-7, 5, 153, 171, 678 seq.: definition, 222-3; classification, 126-7-8, 130, 135, 140; how acquired, 224-7; incapacitates from contracting, 605, 610; relation of dos to, 295-7; release, 227, 296; remedies, 227.
Manus—injectio, 17, 18, 1030-31, 974-5; militaris, 335, 1033; manuum consertio, 976.
Markets, offences as to, 1067.
Marriage, 224-6, 678-96: definition, 678, 680; as contract, 682; two principal effects—husband's powers over wife, 679, and over children, 679; freedom of divorce, 679; whose consent necessary, 680-1; delivery of wife to husband, 681-2; impediments to, 682-8; who cannot marry, 683; who can marry, but cannot intermarry, 683; modes—by coemptio in manum, 224-5, by confarreatio, 225, by usus, 225, M'Lennan on, 226; under mistake as to status of one of the parties, 199-200; dissolution of, 688-94.
Master of ship—agency, 617-18; liability (vicarious), 241.
Materfamilias, 194, 222.
Materia, legacy of, 910.
Materna bona, 293-294, 444, 853.
Matrimonium, 678-96; liberum, 601, 679; legitimatio per subsequens, 694.
Matrona, 194, 222.
Measures, offences as to, 1067.
Mediastinus, 165.
Memory, a man's, condemned, 1061.
Mensores, 1013.
Mente captus (lunatic)—cura of, 732 seq.;
Mente captus (*continued*).
incapacity to contract, 606; marriage of child of, 681.
Merces, 505, 509.
Merchandise, shipped, loans on, 474-5.
Merger—in mortgage, 447; of obligation, 629-30, 649; terminates prædial servitude, 422, usufruct, 407. See Confusio, Consolidatio.
Merx peculiaris, 604.
Metallum, in opus metalli, 170. See Mines.
Metus, 593-5.
Militia, 442, 674.
Minerals, rights of usufructuary in, 392.
Mines, the (as punishment), 170, 1061-5-7-8-9, 1070-71.
Minors—contracts of, 608; cura of, 732-5; relief from error of law, 660; could not be tutores, 717; could rescind a title acquired by usucapio, 271.
Minus petitio, 995-7, 1018.
Missio in possessionem, 133 note, 1037.
Mistake, 199-200, 268, 270, 581-4, 657-61, 894, 923-6, 1018. See Error.
Modality: in contract—conditions, 586-592, place, 584-5, time, 585-6; in legacy—conditional and postponed, 930-41, place, 929-30, time, 930; in trusts, 895.
Modestinus, 78.
Modus, in legacy, 926-7, 934.
Money paid by mistake, 657-61, 894.
Moneylenders. See Argentarii.
Montanistæ, 1056.
Mora, 494, 637, 653-4, 894, 903.
Morals, offences against, 1067.
Morbus, 500.
Mores (diuturni), 60, 119, 791, 1006; 431 note.
Mortgage, 430-48, 127: history of, 430-4; three stages—*fiducia*, 431-4, *pignus*, 432-4, *hypotheca*, 433-4—successive, but overlapping, 434. See *Fiduciæ contractus*, *Pignus and Hypotheca*.
Mosaicarum et Romanarum Legum Collatio, 88.
Mother and child—intestate succession of, 855-7.
Moveables, 232; acquisition of, 255 seq.; alienation, conveyance of, 258 seq.; dereliction of, 257; mortgage, 430 seq.; offences against ownership of, 232-49, 1070-71; possession, 341 seq.
Muciana cautio, 939.
Mulierciarius, 691.
Mundus muliebris, legacy of, 910.
Municipia, 32.
Murder, 1069, 1062.
Mutatio rei, effect of—in legacy, 951; in mortgage, 447; in personal servitude, 408; in prædial servitude, 423.
Mutuum, 472-5, 527 seq., 537.

Narada (treatise on Hindoo law), order of topics in, 122.
Naturalis (-ale)—æquitas, 43, 60, 119, 216; creditor, debitor (see Naturalis obligatio); jus, 35-36, 117-19, 161, 171; liber, 201 (of concubinage), 203 (born to us; not adopted); obligatio, 454, 353, 445, 602, 607, 658, 1018; pater, 209.
Naufragium, 328 (theft).
Navicularii, 866.
Navigandi jus (on another's lake), 415.
Necessarii, 969; consilium of, 6, 224, 735.
Necessitas, 453, 455.
Negligence—contributory, 246-7; remedies for, 146, 154. See Diligence, Culpa, Responsibility.
Negotiorum gestio, 661-6: how constituted, 663-6; duties of gestor, 662-3, responsibility for acts, 663, for omissions, 662; duties of principal, 663-4; gestor could not sue thief, 239; remedies, 666.
Nexum, 459, 53, 525-8, 530, 534, 1035.
Nexus, 260, 1035; nexi liberatio, 641.
Niebuhr, 50, 84, 106.
Nomen, Nomina (debts)—arcaria, 467; nominum cessio, 626-8; liquida, 443, 1018; transcriptitia, 468, 466-71.
Nomen (name, accusation)—nominis delatio, 58; receptio, 59 (criminal proceedings).
Nominatim, 774 (disherison).
Nominatores, 716.
Nomocanon, of John of Antioch, 92, 97.
Non liquet, 59.
Notary, 207, 442, 504, 772.
Novatio, 468-9, 560, 626-32, 1015.
Novellæ—Julian's Epitome, 92, 99; Justinian's, 92; after Justinian, 97; after Theodosius, 87, 89.
Noxa, 166-8, 193, 196-7, 248. Noxa caput sequitur, 167-8, 248, 338.
Noxæ deditio (see Noxalis).
Noxalis—actio, 184, 166-7, 197, 331, 248-249 (pauperies), utilis, 248; deditio, 166-167, disuse of, 197, compared with seizing person of judgment debtor, 1034. Noxalis actio caput sequitur, 167, 338.
Noxia, 166-7; compared with pauperies, 248.
Nudus (-a, -um)—jus Quiritium, 265, 612; pactio, pactum, 115, 548, 282; pollicitatio, 457; proprietas, 384, 386, 394, 404; traditio, 283; usus, 409.
Numa, laws of, 1.
Nuncupatio, 768-9, 846.
Nuntiatio operis novi, 134 note.
Nuntius, in contract, 622.
Nuptiæ justæ, 226, 678-96.

Oath—condition of (in legacy), 947; decisory, 1005; of defendant, 1019-20;
Oath (*continued*).
of expert (in handwriting), 1059; of traitor, 1066; of witness, 1060.
Oblatio—curiæ, 202; offer to pay, 637.
Obligatio—definition and explanation, 451-5; in Bracton, 115; civilis, 454; classification, 124-8, 131, 135; conditional, 586-92, 572; ex contractu (see Contract); damages (measure of), 650 seq.; division of Gaius, 455, of Justinian, 455; extinction or discharge of, 632 seq.; descent of, to heirs, 650; honoraria, 454; inutilis, 461-2-3, 581-585-6, 591-2-9, 600, 605-6, 624; joint, 551 seq.; ex maleficio (see Delictum); naturalis, 454-5, 353, 445, 602, 607, 658, 1018 (set-off); novatio of, 626-32; operarum, 466; prætoria, 454; quasi ex contractu (see Quasi-contract); quasi ex maleficio (see Quasi-delict); remedies, 650 seq.; in solidum, 551 seq.; sources enumerated by Modestinus, 455.
Obscene language, 150.
Obsequium—to parent, 676; to patron, 171, 667, 715.
Occupatio, 255-7, 345-6.
Offences, grouped, 1064-72.
Officiales, 1013, 1043.
Onera realia, on things bequeathed, 901.
Oneris ferendi jus, 417, 426 (actio).
Operæ—filiorumfamiliarum, 677; locatio conductio of, 511-14; officiales—libertorum libertatis causa impositæ—operarum obligatio, 668-70, 466, 639; servorum, 411.
Ophitæ, 1056.
Optionis legatum, 927.
Optivus tutor, 729.
Opusculum de Jure (Attaliates), 96.
Oraculum sacrum, 204.
Oratio, 75.
Orbi, 798, 824. See Lex Papia.
Orcinus, 176, 183.
Ordinarius, 165.
Ordo judiciorum. See Formulæ.
Orichalcum, 229.
Ornamenta, legacy of, 910.
Ortolan, 17, 50, 66, 90, 91, 95, 99; on derivative theory of stipulation, 537 seq.
Outlawry, 218, 187, 694, 795, 1061, 1065.
Overboard, goods thrown, 514-16.
Oves, 905.
Ownership, 231-340, 19: definition of dominium, 231; abandonment of derelictio), 257-8; alienation, power of, 259 (see Alienation, Conveyance); among aliens, 263-5; animals, duties of owners of (pauperies), 248-9; bonitarian (in bonis), 263-5, 612, 674, 713; classification, 126, 130, 135, 140; conveyance—ex jure civili (mancipatio, in jure cessio, usucapio, adjudicatio, legatum), 255, 258-74, ex jure gentium

Ownership (*continued*).
(accessio, traditio, præscriptio), 255, 274-90, agency in, 322-5 ; creation of (occupatio), 255-7; immoveables—rights of owners, 249-55 ; joint, 337-40, 519, 553, 612-13 ; in legacy—qualified, 910-912, unqualified, 905-10 ; limited, 394 seq. ; moveables—rights of owner, 232-249 ; offences against, 232-55, 1070-71 ; of persons, 140, 223 ; Prætorian innovations, 263, 841 note (analogy of Inheritance) ; Quiritarian, 265, 612, 674, 713 ; remedies, 335-47 ; restraints—persons that cannot be owners, 290-295, things not susceptible of ownership, 309-18 ; under XII. Tables, 19.

Pactio, nuda, 548.
Pactum, 457, 545 seq. : enforced by action, 549-50 ; adjectum, 547 ; compared with contractus, 546, relation to creation of contract, 547-9, to dissolution of contract, 546-7 ; relation to delicts, 546 ; donationis, 550 ; dotale, 601 ; de constituenda dote, 550 ; de constituto, 566-76, 549 ; in continenti, 548 ; history of, 546-9 ; ex intervallo, 548-50 ; nudum, 115 (in Bracton), 282, 548 ; in personam, 133 note, 643 ; de petendo, 547, de non petendo, 568, 575, 642-5, (Savigny on) 643-4 ; protimeseos, 503 ; de quota litis, 601 ; in rem, 133 note, 643 ; vestitum (in Bracton), 115.
Pain, infliction of—when constitutes injuria, 150-2 ; by paterfamilias, 190.
Palatini, 293.
Pandects, the (or Digest), 90, 101, 123, 139 ; the Florentine, 101.
Pannormia, 99.
Papinian, 77-78.
Papinianistæ, 80.
Parapherna, 295.
Parent and child. See Potestas Patria, Emancipatio (Emancipated Child).
Parricidium, 57, 1062.
Pars virilis, 562.
Partiarius legatarius, 820.
Partition—of inheritance, 259-60, 761-3, action for (see Judicium familiæ erciscundæ) ; form of legacy, 820.
Partnership (societas), 516-24 : definition, 516 ; how dissolved, 522-5; how formed, 522 ; kinds, 517-20 ; Leonina societas, 516 ; duties of partners *inter se*, 520-21 ; rights and duties of partners in relation to third parties, 521 ; no partner could put another in his place, 522 ; no historical connection with *nexum* or *stipulatio*, 535.
Pascendi jus, 416.
Pasture, right of, 416.
Pater—adoptivus, 209, etc. ; fiduciarius, 213, 712 ; naturalis, 209, etc.
Paterfamilias, 5, 18, 194, 259 : duties of, 196-7 ; rights of, 194-6. See Potestas.
Paternity, 221-2.
Patres, 10, 13 note 1, 26 ; patrum auctoritas, 13.
Patria potestas. See Potestas.
Patricians, the, 4, 24, 25.
Patriciatus, 220.
Patron and client, 4.
Patronus, 4, 30, 130, 138, 140. Patron and freedman, 666-76, 687 : ingratitude of freedman to patron, how punished, 170 ; intermarriage, 687 ; rights of patron, 667-70, services of freedman, 668-70—how created, 670, how extinguished, 670-1 ; power of assignment of patronage rights to one of his children, 870-71 ; remedies, 671-2 ; intestate succession of patron to freedman, 866-74, of relatives of patron, 869, 870 ; tutela, 711-12.
Paul, 78.
Pauperies, 248-9, 331.
Pecoris ad aquam appulsus, 416, 425.
Peculatus, 57, 1071, 1062, 1067.
Peculiaris—creditor, 910 ; merx, 604.
Peculium—adventitium, 293-4 ; castrense, 292-5, 605-6, 853, 855 (legacy of), 910-11 ; of free person in mancipio, 295 ; profectitium, 294 ; quasi-castrense, 293, 797, 850, 853 ; of slave, 33, 157, 290-1, (in contract) 603-4, 871, (legacy of) 905, 910-11 ; of wife, 295.
Pecunia—compared with Familia ; constituta, 566-76 ; credita, 454, 572 ; non numerata, 470-71 ; pecuniæ residuæ crimen, 57 (note 4) ; trajectitia, 474, 653.
Pecus, 905. Pecoris ad aquam appulsus, 416, 425.
Pedanei judices, 73-74.
Pegasiana quarta, 815, 820.
Pegasians, 77.
Penalty—in contract, 651-2 ; for injuria, 154-6 ; legacy left by way of, 944-5 ; for harbouring runaway slaves, 163 ; in stipulations, 651-2 ; for suit improperly brought, 1020-21, or improperly defended, 1019-20.
Pensio, 507, 427, 429.
Penus, 909.
Per aversionem, 512.
Per capita, 835, 857, 864-5.
Per stirpes, 835, 864.
Perceptio fructuum, 398, 336.
Perduellio, 57, 1065.
Peregrini, 30, 34, 38, 51, 129, 130, 169, 186-8 ; dedititii, 675 ; is Bonorum possessio to be traced to the needs of ? 846-8 ; view that Interdicts were first introduced to protect proprietary rights of, 367 ; could not marry Roman citizens, 688 ; nomina transcriptitia, 469 ; potestas, 189 ; stipulatio, 461 ;

Peregrini (*continued*).
trusts, 824 ; succession of, 846-7 ; could not be tutores, 717 ; wills, 794-5.
Peremptory — edictum, 1008 ; exceptio, 990-91, 1017.
Performance of contract, 633 seq. ; impossibility of (when equivalent to actual performance), 637-8.
Periculum rei, 285-6, 494-5, 654.
Perjury, 1063, 1066.
Permutatio, 541.
Persecutio, 490, 1013.
Persona—meanings of, 160 ; alieni, sui juris, 128, 193-4 ; jus de personis, 113, 124-6, 129 ; publica, 207 ; a slave was a, 160.
Petere minus, plus, 995-7, 1018.
Petitio—opposed to actio, and to interdictum, 1001, 1013 ; hereditatis, 834 ; hereditatis possessoria, 834. Minus petitio, plus petitio, 995-7, 1018.
Petri Exceptiones Legum Romanarum, 100.
Pictures, accession to, 279-80.
Pietas, 658, 677, 726.
Pignoris capio, 1044, 970, 974-5.
Pignorum distractio, 437.
Pignus and Hypotheca, 436 seq., 432-4, 341-342, 382 : creation of, 433-5—hypotheca, pignus, 433, tacita hypotheca, 443-5, hypothec, rural, urban, 444 ; in respect of what obligations could a hypothec be contracted ? 445 ; creditors — concurrent and subsequent, 440 seq., duties to debtors, 439-40, priority, 440-42, exceptions to rule of priority, 442-3, rights of, 436-8 ; debtors—duties of, to creditors, 439-40, remain owners, 438-9, rights of, 438-40 ; definition and distinction, 436 ; expenses on property hypothecated, 440 ; foreclosure, 437-8 ; history of, 527 seq. ; no registration of mortgages, 442 ; release or extinction of hypothec, 445-7 ; remedies, 447 ; what rights may or may not be hypothecated, 445 ; sale of pledge, 437 ; tacita hypotheca, 443.
Pileus, 177.
Pistrinum, 674.
Place—of judicial proceedings, 51, 52 ; of performance of contract, 584-5, of legacy, 929-30.
Placita principum, 119, 120.
Plagium, 1069.
Plebeians, the (Plebs), 4, 5, 11, 12, 24, 25, 28, 119 ; concilium of, 26 note 1 ; decrees of, 26, 60, 75, 119-20 ; tribunes of, 13, 25, 70.
Plebis concilium, 26 note 1.
Plebiscita, 26, 60, 75, 119-20.
Plus-petitio, 995-7, 1018.
Pœna, 22. See Penalty.
Pœnæ servus, 170, 162, 215.
Pollicitatio, 457.
Polygamy, 678.
Pontiffs, the, 10, 53.
Populiscitum, 60.
Populus Romanus, 4, 9.
Portio — hereditaria, 814 ; legitima, 780-86.
Possession, 341-93, 19 : accessio possessionis, 266.
Acquisition of, 343-9 : agency in, 352-4 ; physical fact (*corpus*) requisite in, 343-8, free dealing essential, 343, obstacles to free dealing, 343-4, occupation a matter of degree, 344-5, acquisition of things not before possessed, 345-6, transfer of possession (traditio), 346-8, delivery longa manu, 348 ; intention (*animus*) requisite in, 348-9, delivery brevi manu, 349 ; restraints on—as to persons, 349-50, as to things, 349.
Adverse, 362 seq. ; agency, 378—in acquisition of, 352-4, in loss of, 354-7 ; ambiguity of possessio, 379 ; animus — domini, 375-88, tenendi, 378, 341, 348-9.
Animus domini, 375-88 : originally necessary for interdict protection, 375-7 ; extension of interdicts to personal and prædial servitudes, 376 ; further extension (to depositees, borrowers, tenants) convenient, but not necessary, 376-7 ; errors of German writers, 377. Possession without animus domini, 379 seq. : Cases where possession (name and thing) is admitted in absence of animus domini, 380-4 — precarium, 380-2, pignus, 382, emphyteusis, superficies, sequestratio, 383 ; Cases where possession without animus domini is denied in name but admitted in fact—*Quasi-possessio*, 384 seq.—personal servitudes (ususfructus), 384-6, affirmative prædial servitudes, 386-8.
Basis, true philosophical, 378 ; nemo sibi ipse causam possessionis mutare potest, 362 ; Bonorum possessio (q.v.) ; civilis, 342 ; clandestina, 351, 371 ; corporis, 392 ; definition, 341 ; delivery brevi manu, 349, longa manu, 348 ; derivative (Savigny), 391-2 ; how far adopted in English law, 113 ; bona, mala fide, 237, 247-8, 268-9, 277, 279, 336, 341-2, 398, 885-6 ; a fact or a right ? 379 ; history of, 362-388 ; ignoranti non adquiritur, 361 ; of incerta pars, 361 ; injusta, 360, 365, 371, 375, 381.
Interdicts : animus domini, 375-88

Possession (*continued*).
(above); assisted adverse possessors, 363-4, but were introduced, not for such possessors, but for persons holding innocently against all the world, but having no title by the civil law, 364; possessio simply, or possidere, protected by, 342, possessio naturalis not protected by, 342; *Uti possidetis* and *Utrubi*, 365-74 (see under Interdictum).
Juris, 392; jus possessionis, 392; justa, 360, 365, 371, 375, 381; longi temporis (prescription), 288-290; loss of, 350-52, agency in loss of, 354-7; maxims (certain general) explained, 359-62; mere (attitude of law to), 363; missio in possessionem (bankruptcy), 1037-8; naturalis, 342, not protected by interdicts, 342; distinguished from ownership, 359, 362-3, why questions of, took precedence of questions of ownership, 364-5; pro herede, 269; pro possessore, 885; not to be confused with proprietas, 359-60; quasi-possessio, 384-8; ex jure Quiritium, 1038; remedies, 357-9; rights and remedies of possessor, 342; a right or a fact? 379; of same thing in solidum, 361-2; title no defence, 375; transfer of (traditio), 346-8; vacua, 368, 900; vitia of, vitiosa, 360, 365, 371, 375, 381, 390; what cannot be acquired, 349-50; who cannot acquire, 349.
Possessor—See Possession; bona, mala fide, 237, 247-8, 268-9, 277, 279, 336, 341-2, 398, 885-6; rights and remedies of, 342.
Possessoria hereditatis petitio, 843.
Possessorium constitutum, 352.
Postliminium, 33, 215-17, 714, 795, 835; activum, passivum, 216.
Postulatio—actionis, 983; in criminal court, 58; judicis, 978, 975, 37, 48-49.
Postumi—alieni, 798-9, 895, 923; Aquiliani, 777; disherison of, 777; extranei, 798; intestate succession of, 833-4; Vellæani, 778.
Potestas, dominica, 171, 184. See Slavery.
Potestas patria, 188-223, 5, 18, 153, 679: how acquired, 197-211, over one's own issue, 197-203, over another's issue (Arrogation, Adoption), 203-7; acquisition through, 323-4, 127, 294, 605-6, 610-11; characteristics, nature of, 189-193; classification of, 126-30, 135, 140; effects on contract, 605-6, 610-11; definition, 188; duties of paterfamilias, 196-7; determined the legal constitution of
Potestas patria (*continued*).
Roman family, 193; divorce, 689; forfeiture of, 220; inheritance, 774-9, 833-5; loans to persons under, 82, 473-4, 660; Sir H. S. Maine on, 189; marriage, 678 seq.; not (as the Roman jurists thought) peculiar to Rome, 189; property, 292-4, 323-4, 127; powers of father, 188-193; release from, 212-21; remedies, 221-2; rights of paterfamilias, 194-6; tutela, 708-10.
Pothier, 103, 104, 123.
Power of appointment, 823, 941.
Præceptionem, legacy per, 889-94, 897.
Præde litis et vindiciarum, stipulation pro, 982-3; prædes litis et vindiciarum, 976-7, 982.
Prædiatura, 270.
Prædium—414 note; dominans, 412; dotale, 299; Italica, 287 (delivery); provinciale, 261, 272; rusticum, 414, 441, 507; serviens, 412; stipendiaria, tributaria, 287 (delivery); urbana, 414, 507; vicina, 413. See Servitudes, prædial.
Præfecturæ, 32; Prætorian (Constantine), 74.
Præfectus—juri dicundo, 32; morum, 29, 71; Prætorio, 72; urbi, 69, 71, 72; vigilum, 674.
Præjudicium, 1004.
Prælegatum, 787, 813-15, 891.
Præscriptio. See Prescription.
Præscriptiones, 992.
Præses provinciæ, 44, 67, 72; extortion by, 1063; restriction on marriage of, 687, 695, 882; refusal to give place to successor, 1067; jurisdiction over trusts, 887, 896.
Præstare, 453.
Præsumptiones—facti, 1058; juris, 1058-9; juris et de jure, 1058.
Præteritio of sui heredes, etc., 776-7.
Prætexta, 150.
Prætor, 34-43, 70, and *passim*: his edict, 34-35, 123, and *passim* (see Edict of Prætor); fideicommissarius, 66, 67, 70, 811, 887, 896, 1013; influence, 40-41; innovations in law of inheritance, 841-2 note, 840-63, of ownership, 841-2 note; imperium and jurisdictio, 41-42; peregrinus, 31, 34, 38, 70, 368, 980; tutelaris, 70; urbanus, 34, 70.
Prætores (consules), 11.
Prævaricatio, 1067.
Precarium, 411-12, 341-2, 361, 380-82.
Precious stones, 256 (occupatio).
Prescription—in actions, 648-9; in Bracton, 114; creates emphyteusis, 428; of liberty, 185; of marriage (usus), 225; of mortgage, 447; as extinction of obligation, 645-9; in regard to property, 288-90, 645-6;

Prescription (*continued*).
creates servitudes, 419; in suretyship, 576; as to wills, 807, 884.
Present (=in same province), 290.
President of Province, 44, 67, 72, 687, 695, 882, 887, 896.
Presumptions—of fact and law, 1058; death of heir and legatee, 928-9.
Pretium — affectionis, 331; verum rei, 651.
Priests, colleges or guilds of, 10.
Primogeniture, 839.
Principal and agent. See Agency.
Principaliter (Gaius 4, 138), 41.
Priority among creditors, 748, 755-6.
Pro donato, dote, emptore, legato, soluto, 283.
Pro herede gerendo, 877-9.
Pro judicato, 1031.
Pro religioso, 316.
Probatio anniculi, 198, 673.
Probrosæ feminæ, 802.
Procedure, 967-1060. Extraordinary, 1012-29; transition from ordo judiciorum, 1012-13; outline of proceedings, 1013-14; litis contestatio, 1014-16; pleading and defences (exceptiones), 1016-1017; set-off, 1017-18; variance, 1018-19. Formulary (see Formulæ), 980-1011. Legis actiones (q.v.), 967-80.
Prochiron, 94; Auctum, 96.
Procinctus, 766; testamentum in procinctu factum, 766-7.
Proconsules, 30, 44, 72, 74.
Proculians, 77. See Sabinians.
Procurator, 1022-8: appointment of, 1027, 1022-3; who could not be, 1027-8; change or dismissal of, 1028; compared with cognitor, 1022-3; duties of defendant's, 1026-7, of plaintiff's, 1025; how introduced by formulary procedure, 1022; gave security, 1023-4.
Cæsaris, 73; in suam rem, 576, 628, 760, 1032.
Prodigi—incapacity to contract, 609; cura of, 732 seq.; decisory oath, 1006; testamenti factio, 797, 803.
Prohibitive impediments, 683.
Projiciendi jus, 419.
Proletarius, 968-9, 9, 17.
Prolytæ, 80.
Promise—to give, 550; illegal, 600-1; impossible, 598-600; of marriage (breach of), 525; in stipulation, 460-62; voluntary, 318-19.
Promiser. See Reus.
Promptuarium, of Harmenopulos, 97.
Proof—burden of, 1057-8, in condictio indebiti, 661; in utilis actio tutelæ directa, 725; definition, 1050. See Evidence, Testimony.
Property—classification, 135; confiscation of, 1065, 1068-9; damage to (damnum injuria), 242; execution
Property (*continued*).
against, 1042-4; family, see Familia; private (origin of), 258; real (under XII. Tables), 20; symbol of (hasta), 259. See Ownership.
Prophets, punished, 1068.
Proprætor, 30, 34.
Proprietas — contrasted with possessio, 359; nuda, 384 note, 386, 394, 404.
Prorogationis clausula, 930.
Prosecution, malicious, 1065.
Prospectus, 418.
Protectum, 419.
Protegendi jus, 419.
Protimeseos (pactum), 503.
Provinces, 30, 72, 74.
Provincial—finance minister, 73; governor, 44, 67, 72, 687, 695, 882, 887, 896; magistrates, 44, 72-74; solum, 272.
Provisions, legacy of, 909.
Provocatio, 13, 23, 26, 30, 1045.
Prudentium Responsa, 60, 76, 119-21.
Psalterium, 148.
Pubertas, 722-3; plena (full), 211; Pubertati proximus, 701.
Publica judicia, 74-75.
Publicani, 45, 1073.
Publicatio, 523, 1039.
Punishments for offences, 1064-72: bodily harm, 1068-9; capital, non-capital, 1064-5; chastity, 1070; contract, 1071; corporal, 1065, 1067; decency, 1067-8; duties, for violation of absolute, 1065-8, relative, 1068-72; exchequer, 1067; government, stability or prerogatives of, 1066; inheritance, 1072; justice, administration of, 1066-7; liberty, personal, 1069; markets, measures, 1067; morals, 1067-8; ownership, 1070-71, owners of slaves, 1070, as to things not subject to ownership, 1071; against public force, 1066, by public servants, 1067, against public tranquillity, 1066; religion, 1068; security, external, 1065; status, 1071-2; treason, 1065-6; weights, 1067; wills, 1072; witchcraft, 1068. See Offences.
Pupillares usuræ, 723-4.
Pupillus—in contract (incapacity of), 607; co-tutor's authority, 706; sometimes receives curator, 732-3; legal incapacities of, 699-701, how far removed by tutor, 701-2; decisory oath, 1006; promise without tutor's sanction, 607; property, administration by tutor, 702, by contutor, 706-8; rem salvam fore pupillo, 716. See Tutor, Contutor, Impubes.

Quæstiones, 44, 56; perpetuæ, 34, 44, 56-60, 74, 1045.
Quæstores, 12, 25; criminal judges, 56; parricidii, 12, 56; provincial, 44, 73 (imperial).

Quæstus, 517.
Quanti actoris interest, 424, 651.
Quanti ea res est, 651.
Quantum facere potest, 307, 524, 651, 668.
Quantum locupletior factus est, in, 700.
Quarta—Antonina (or Divi Pii), 207, 781; Falcidia, 750-2, 760, 819-20, 882-3; Pegasiana, 815, 820; Trebelliana, 820-21.
Quasi-contract, 138, 127, 131, 655-66, 456; -delict, 131, 150, 153; -possessio, 384 seq., 392; -relationship (in reference to prohibition of marriage), 687; -usufruct, 397-8.
Querela inofficiosi testamenti, 780-82, 786, 883-4.
Quinquaginta Decisiones, 90.
Quiritarian ownership. See Jus Quiritium.
Quota litis, pactum de, 601.

Rape, 183, 1070.
Rapina, 166. See Bona vi rapta.
Rate—sewers, 901 (legacy); water, 901 (legacy).
Ratis vel navis expugnata, 328 (theft).
Reasonable time, 585-6.
Receipts, 428.
Receptitia actio, 566-7.
Receptio nominis, 59.
Recognisances (vadimonia), 985, 972.
Rectors, 74.
Recuperatores, 38, 44, 51, 981, 985, 998, 1007, 1010.
Redemptor operis, 511.
Redhibitio, 505, 498 seq.
Reditus, 507, 427, 912.
Regal period, institutions of the, 1.
Regula Catoniana, 948.
Relatio, 1048.
Relationship — names and degrees of, 830-32; quasi-, 687.
Release—of obligation, 638-44 (formal), 642-5 (non-formal).
Relegatio, 218-19, 1065, 1061, 1067-72.
Relevance—legal and logical, 1052-3.
Religion, Roman, 10; punishments for offences against, 1068.
Relocatio, 514.
Rem salvam fore pupillo, 716.
Remancipatio, 227.
Remissio—pignoris, 446; of rent, 509; of servitude, 422.
Rent—of emphyteusis, 427-8; of farm (reditus), 509, 427, 912; ground (solarium), 403, 901 (legacy); remission of, 509; of state lands (vectigal), 901 (legacy); of superficies, 429.
Repairs—of hired thing (house, etc.), 508-9; interdict for, in case of servitudes, 424-5; of ship, 515; by usuary, 410; by usufructuary, 402.
Repetundæ, 45, 57 note 1, 1071, 1062, 1067.
Replicatio, 991-2.
Repræsentatio, 914.
Republican institutions, early, 11.
Repudium, 689.
Reputation, offences against, 148-9, 1069-1070. See Existimatio.
Res—law concerning, 113, 124, 126 (see Ownership). Æstimatæ, 298; communes, 126, 309-10; corporales, 126, 287, 913; divini juris, 315-18, 349, 126; fungibiles, 286, 930; furtiva, 325, 273; hereditariæ, 757; immobiles, 249 seq., 262, 274 (vi possessæ), 332-3 (protection of rights to); incorporales, 287, 913; judicata, 60, 119, 1015; in judicium deducta, 1015; legacy of, 913, 930; litigiosa, 1016; mancipi, nec mancipi, 260-62, 287 (delivery), 890; mobiles, 232 seq., 325; se moventes, 325, 331; nullius, 256-7; in nostro patrimonio, extra nostrum patrimonium (J. 2, 1, pr.); persons regarded as, 127; publicæ, 310-14, 349, 126; religiosæ, 315-17, 256; sacræ, 315, 256; sanctæ, 317-18, 256; singulæ, 314; singulorum, 314; universitatis, 314-15, 156; vi possessæ, 274.
Res perit domino, 285.
Rescripta, imperial, 76, 198, 203.
Respondere, of jurisconsult, 54.
Responsa prudentium, 53-55, 60, 76-79, 119-21.
Responsibility—in agency (negotiorum gestio), 662-3; for bodily harm, 146; in commodatum, 477; in deposit, 480; of heir, as to trusts, 816; in hire, 508-13; in mandate, 487; of person charged with legacy, 903; in sale, 494-5, 502; of tutor, 704, 707, 722, 724; vicarious, for wrongs, 153-4.
Restipulatio, 975, 999, 1002, 1020-21.
Restitutio—of dos, 304-8, 547; of inheritance under a fideicommissum, 812; in integrum, 41, 593, 608, 743, 991, 1028; natalium, 671; ob causam, ob conditionem, ob indebitum, ob rem, ob transactionem, 656; trusts inter vivos (quasi-contract), 656.
Reus, 454; promittendi or promittendo, 454, 460, duo, 555; stipulandi or stipulando, 454, 460, duo, 555.
Reverentia—to parent, 676; to patron, 667.
Rex, 8; sacrorum, or sacrificulus, 12, 52, 225.
Rights and duties, the basis of the classification in this work, 132; divisions of 132-3.
Rights—*in personam*, 133, classes, 137-8, exposition in detail, 451 seq.; *in rem*, 133, 137-8, classes, 134-5, exposition in detail, 145-448.

Rings, right to wear gold, 670-1.
Ripa (river-bank), 313.
Rivers, 313-14, 310 : bank defined, 313, use of bank, 310 ; right of fishing in, 310 ; navigation of, 313.
Rivus (stream), 313.
Roads—private, 311 ; public, 311-13.
Robbery, 241, 330, 1070.
Roman—commonwealth (beginnings of), 3 ; history (early), 1 ; Law—in England, 107-116, in France, 103, in Gaul, 99, in Germany, 104-6, in Holland, 104, in Italy, 98, in Scotland, 107, in Spain, 106-7—schools of, 97-80, sources of, 60, 75, 119-21 ; population, (early divisions of), 4.
Rustici, wills of, 772.
Ruta cæsa, 494, 502.

Sabinians and Proculians, 77 : on aliens and nomina transcriptitia, 469 ; animals as res mancipi, 261 ; conditions (performance of), 588 ; damages under lex Aquilia, 330-31 ; disherison of sons, 776 ; error of law, 660 ; fideicommissa, 894 ; formula arbitraria, 999 ; heredes necessarii, 875 ; in jure cessio of inheritance by heres suus et necessarius, 881-2 ; absolutoria judicia, 1009 ; legacy —with impossible conditions, 591, per præceptionem, 892, 894, per vindicationem, 889-90, place of (in will), 894 ; can slave of sole heir be legatee ? 943 ; should a son surrendered ex causa noxali be mancipated thrice, or only once ? 196-7 ; mandate (performance of), 486 ; age of puberty, 722 ; sale—ought the bona fides necessary for usucapio exist at sale or at delivery ? 268-9, barter and sale, 491, price to be fixed by third party, 491 ; slave (see below, under Stipulation),—If another's slave or son wrongs me and then comes under my potestas, does the action fall through, or is it only in abeyance ? 119 ; solutio, 633 ; specificatio, 280 ; sponsor, 629-30 ; stipulation—for self and another (in whose power we are not), 623-4, of slave hereditatis jacentis, 614, of slave held in joint ownership, by order of one master only, 612 ; usucapio, 268-9 ; usus, 410.
Sacra—family (privata), 205, 225, 746-7 ; gentilitia, 839 ; sacrorum detestatio, 766.
Sacramentum, 23, 37, 49 ; 364-8, 374 ; 975-8, 967, 981-4, 1000-1, 1007, 1014, 1019.
Sacrifice—of child, 1069 ; to injure a neighbour, 1068.
Sacrilegium, 57 note 4, 1071.
Sacrum oraculum, 204.
Sale (*emptio-venditio*), 490-505 ; colourable (imaginaria), 492 ; definition, 490 ; differs from barter, 491, from exchange, 541, from letting on hire, 506 ; duties and rights, 492-504, obligation to deliver, 492-4, delivery, 284-5, to accept delivery, 503, expenses prior to delivery, 503, prior responsibility, 494-5, by agreement, 502 ; eviction, 493, 495-8, 502 ; faults in thing sold—edict of Curule Ædile, 498-502 ; fictitious (see Mancipatio) ; contract how formed, 504 ; history of, 534-5 ; possessory interdicts, bearing of law of sale on introduction of, 368-9 ; of mortgage—by creditor, 437, by debtor, 438 ; pre-emption, 503 ; price, 491-2 ; produce and accessions, 285 ; remedies, 504-5 ; risk (periculum rei), 285-6 ; of debtor's universal succession, 1036-42 ; warranty, 501
Saltuarius, 404.
Salvius Julianus, 35, 75, 77, 83.
Samaritæ, 1056.
Sanctio, 317-18.
Sanction, the social, 431 note.
Sanguinolenti, 192.
Satisdatio—required from agents, 1023-6 ; from child (impubes), 886 ; for costs, 1047 ; from curators, 734, 1023-5 ; from defendant acting suo nomine, 1024, acting alieno nomine, 1024 ; for restitution of *dos*, 574 ; judicatum solvi, 1023-6 ; from possessor, 1023-6 ; from procurator, 1024 ; de rato, 1023, 1025 ; from tutores, 715-6, 724, 1023-5.
Savigny, 100-2, 104-8 ; on agency, 661 ; formulæ reconstructed, 1003-4 ; on relief in non-essential error, 582-4 ; on pactum de non petendo, 643-4 ; on place of performance of contract, 584 ; on possession (criticism of), 388-93 ; on stipulation, 537 seq.
Scholia—on Basilica, 96, antiqua, 96.
Schools of law, 79-80.
Scribentes, the, 102.
Scribere, of jurisconsults, 55.
Scriniarii, 293.
Scripturæ captatoriæ, 947.
Sea-shore — extent, 310 ; public use, 309-10.
Secretaria, 52.
Sectio bonorum, 1036.
Sectores bonorum, 1036.
Security. See Satisdatio, Cautio.
Secutorium judicium, 1002.
Seditious gathering, 21, 1066.
Seduction, 149-150.
Self-defence—how far force was permitted in, 151.
Semestria, 71, 720.
Senate, the, 7, 12 ; removal from, 1065.
Senators, restriction on marriage of, 688.
Senatus auctoritas, 65, 77.
Senatus-consultum, 13, 60, 65, 75, 81-

Senatus-consultum (*continued*).
83, 119-20; Afinianum [read, for "Sabinianum"], 83, 853; Apronianum, 83, 799; Calvitianum or Calvisianum, 82; Claudianum (cohabitation), 82, 169, 187, 188, 215, 740; (jus honorum) 82; (marriage) 82, 798; Dasumianum, 83, 186; de ædificiis non diruendis, 82; de aquæductibus, 81; de collegiis, 81; de Cyzicenis, 83; de ludis sæcularibus, 81, 82; de mense Augusto, 81; de mundinis saltus Beguensis, 83; auctore Hadriano, 83; Juncianum, 83, 186; Juventianum, 83; Largianum, 82, 872-4; Libonianum, 81; Macedonianum, 82, 473-4, 660; temp. Marci et Commodi, 687-8; Maximo et Tuberone coss. factum (wife of Flamen Dialis), 81; Neronianum, 82, 890-92; Orphitianum, 83, 857; Pegasianum, 82, 815, 819-21, 812, 823-4; Pegaso et Pusione coss. factum (favourable to certain Latini), 82, 673; Pernicianum or Persicianum, 82, 798; Plancianum (fideicommissa), 83; (liberi) 83, 222; Rubrianum, 83, 186; Rufo et Scapula coss. factum (temp. Claudii), 870-71; Sabinianum, 83, 853 [read Afinianum]; Silanianum, 81, 883; Tertullianum, 83, 674, 855-7, 887; Trebellianum, 82, 818-19, 821, 751; Turpillianum, 82, 1067; Velleianum, 82, 572-4, 718; Vitrasianum, 83, 186.
Sententia nullius momenti, 1011, 1030.
Separatio—bonorum, 748-9; fructuum, 398.
Sepulcri violati—actio, 147, 317; crimen, 1071.
Sequester, Sequestratio, 383.
Serfdom, 162-3.
Series—of Edict, of Papinian, of Sabinus, 91.
Servian constitution, the, 9.
Servitudes, 394-426, 126-7, 247, 900. Personal, 394-412; definite, indefinite, 395-6; explanation, 394-6; in connection with Possession, 384-6. See Ususfructus, Usus, Habitatio, Operæ servorum, Precarium. Prædial, 412-426: actions, 425-6; affirmative, 414, 420-23, interdicts for, 423-5, in connection with Possession, 386-8; in Bracton, 114; characteristics, general, 413-14; creation of, 419-20, restrictions on, 421-2—nulli res sua servit, 421; servitus servitutis non esse potest, 421; conditional, 420; continuous, discontinuous, 423; definition, 412; indivisible, 413; negative, positive, 414, 420-23; remedies, 423-6; reservation of, 420; rural, 414-17; termination of, 422-3; urban, 414, 417-19.
Servus. See Slave.
Set-off, 993-5, 1017-18.
Shipwreck, loss through, 514-16.
Si quid minus foret, 786.
Sicarii, 1061-2, 1066, 1068-71.
Silva cædua, 399, 417.
Sin, contrasted with Crime and Civil Wrong, 1063.
Sine—causa, 597; re (bonorum possessio), 845-6, 776.
Slander, 148-9.
Slave (servus), Slavery (servitus), 157-188, 5, 33, etc.: abandonment of, for delicts, 166-8, when sick, 183; as adstipulator, 605; as agent in acquisition, 323-4; alienation of, 159; Aristotle on, 161; how one became a, 168-71; why called servus, and mancipium, 160; claimed in causa liberalis, 184-6; accepting Christianity, set free, 183; classification, 127-8, 130, 135, 140; cohabitation of, with free woman, 169-70, 740, 801; consortium servile, 862; contubernium, 678, 686; in contract—incapacity to contract, 602-4, beneficial and technical ownership separated, 612, in joint ownership, 612-13, *bona fide* possessed, or held in usufruct or use, 613, hereditatis jacentis, 614, 802, could better, not worsen, his master's condition, 614, disabilities of his position, how removed, 614-17; as agent in conveyance, 323; corrupting a, 164, 183; taken as debtor, 1034-5; definition, 157; delicts of, 166-8; derelictio in case of, 258; exposure of infant, 183; free, how made, 171-183; fugitivus, 500; hereditatis jacentis, 614, 802; increase in numbers, 33; inexcussus, 911; ingratitude of (how punished), 170; injuria to, 164-6; killed, damages for, 1073-4; as legacy, 905, could not be legatee (except for aliment), 943; manumission of, 171-183, 223; marriage (contubernium), 678, 686; master and slave, 157-160—no action between, 159-60, complaints of slave against master, 183, limitation of master's ownership, 157-60, master's power over slave compared with his power over son, 189, master's rights as against third parties, 163-5, 184-6, 1070, master's responsibility for wrongs done by slave, 166-8, 184-6; merx peculiaris, 604; ordinarius, 905; origin of slavery, 160-62; peculium, 33, 157, 290-91, 603-4, 871, 905, 910-11 (legacy of); slave was a person, 160; servus pœnæ, 170, 162, 215; as agent in possession, 353-4, 356-7; made unwilling prostitute, 183; publicus, 716; populi Romani, 675; runaway (harbouring a), 163, 183-4; rusticus, 905; legal security of, 194-5; stipulations of, 610-617; intestate succession, 862; testamenti factio, 794-5, 797, 809-3; as

Slave (*continued*).
trader, 604 ; treatment, progressive humanity in, 157-9 ; trusts, 824 ; could not be tutor, 716-17 ; urbanus, 905 ; usufruct, 613, 400-1 ; verna, 168-9 ; vicarius, 905, 911 ; woman made, 740.
Societas — company, 314 ; partnership (q. v.), 516 seq.—leonina, 516, negotiationis alicujus, 518, unius rei vel certarum rerum, 519, universorum bonorum, 518, universorum quæ ex quæstu veniunt, 517, vectigalium, 518.
Socii, 32 ; et nomen Latinum, 32.
Sodomy, 1061, 1068.
Solarium, 403, 901.
Soldier—desertion of, to enemy, 1066 ; error of law, relief from, 660 ; lex Falcidia, 751 ; marriage, 680, 688 ; succession to intestate comrade, 865-6 ; tutela, 717, 720 ; will of, 771-2, 761, 779, 796, 807, 809, 928, 945.
Solidarity, 561-2.
Solum—Italicum, 260-61, 289-90 ; provinciale, 272.
Solutio, 633-8 ; per errorem, 657-61, 894, 923 ; imaginaria, 639, 641, 1032.
Solvere, 452.
Sources—of Roman history, 1-3 ; Law, 60-61, 75-9, 119-21.
Spadones, 211 (adoption).
Specificatio, 280.
Spendthrifts. See Prodigi.
Spiritual beings, as heirs, 799-800.
Sponsa, 525, 695.
Sponsalia, 695-6, 525, 535.
Sponsio, 565 (definition), 131, 368, 460, 526, 538, 570 (form), 575 (extinction of), 577 (co-sureties), 975, 982-3, 998, 1003 (in interdict), 1019 (costs).
Sponsor, 565, 570-77 ; as to prescription in action against, 993. See Sponsio.
Sponsus, 525, 695.
Sportulæ, 973.
Spurii, 683, 677.
Stagnum, 313.
Statuliber, 176, 602.
Status, 127-9, 138, 140, 655, 666-735 ; by birth, rules determining, 168, further illustrations, 187-8 ; reductions of, 214-220 ; tutelary relations, 666-735—cura, curatio, 731-5, husband and wife, 678-696, parent and child, 676-8, patron and freedman, 666-76, tutela impuberum, 696-727, tutela mulierum, 727-31.
Statute-process (Legis actio), 23, 37, 41-42.
Stellionatus, 1071.
Stillicidii recipiendi vel non recipiendi jus, 417.
Stipendiaria prædia, 287.
Stipendium, 403, 287.
Stipulatio, 459-66 : alternative, 579-80 ; application of, 464-6 ; Aquiliana, 639-40, 642 ; in Bracton, 115 ; com-
Stipulatio (*continued*).
mittitur, 496, 589 ; communes, 465-6 ; conventionales, 464 ; how created, 461-3 ; definition, 459-60 ; derivation of name, 460; derivative theories (Savigny, Ortolan, Maine), 536-40 ; forms, 461-2, oldest form, sponsio, 526, sponsio perhaps also oldest name, 538, relation of question and answer, 461-462, words usable, 461 ; fructuaria, 1002 ; history of, 525-6, 530-31, 534-5 ; inutiles, 593 seq. ; joint, 551-62 ; judiciales, 465, 464 ; Manilian (sale), 498 ; novatio of, 629 ; præpostera, 592 ; prætoriæ, 465, 464 ; remedy, 463-4 ; written, 463.
Stipulator, 454, 460, etc. (see Stipulatio) ; relations with adstipulator, 564, 641.
Stirpes, division of intestate inheritance in, 835, 864.
Stoics, the, on the Law of Nature, 36, 161.
Studemund, 84, 65, 81.
Students-at-law, 55, 79-80.
Stuprum, 678, 1067.
Subscriptio, in criminal proceedings, 59 ; rescript (G. 1, 94), 200.
Substitutio of heirs, 788-94 : exemplaris, 793-4 ; by fideicommissa, 822-4 ; pupillaris, 791-3 ; vulgaris, 788-91.
Subvades, 972.
Succession—intestate, 126, 830-74 ; singular, 739 ; testamentary, 764-830 ; universal, 739-887—addictio bonorum libertatis causa, 742-4, arrogatio, coemptio in manum, 740-42, enslavement of women (by Senatus Consultum Claudianum), 740, Inheritance (testamentary, intestate), 739-887.
Suffragium et honores, 5, 30.
Suggestio falsi, 596.
Suggrunda, 419.
Sui—et necessarii heredes, 876, 879-81 ; heredes, 775-9, 799, 805, 808, 833-5, 839, 882 ; juris, 193-4, 117, 128.
Summons, the, 17, 967-73 : under Imperial constitutions, 971-3, 968 ; under Prætor's Edict, 969-71, 968 ; under XII. Tables, 17, 968.
Superficies, 429-30, 383 ; contrasted with hire, 507 ; solo cedit, 276, 383.
Superinductiones, 805.
Suppellex—defined, 909, 953 ; legacy of, 907-9.
Supplicium summum, 1064.
Suppressio veri, 596.
Sureties, 565-79 : how constituted, 570-74, restrictions on, 571-4 ; forms, 565-8 ; how released, 575 ; remedies, 576 ; rights and duties of creditor, debtor, and surety, 568-70. Co-sureties, 577-9.
Surveyors, on land trials, 1013.
Suspension from professional practice, 1065, 1069.

Syngraphæ, 468-9.
Synopsis—Basilicorum, 96-97, minor, 96; Legum, 96.

Tabellio, 442, 504.
Tabula—accepti et expensi, 466; Heracleensis, 1040; XII. Tabulæ, or XII. Tabularum lex (See Twelve Tables); nuptiales, 690; tabulas testamenti—possessio bonorum contra, 860, 776, 844, 851-2, 866, 872, secundum, 860, 768, 809, 844.
Tabularis, 207, 772.
Tacit consent, 681.
Tacita hypotheca, 443.
Talio, 154.
Tascodrogi, 1056.
Taxatio, 988.
Taxation—on things bequeathed, 901; on land, 403, 901.
Telum, 1061.
Tempus—continuum, utile, 844.
Tenant farmer, 398, 447, 507 seq.
Tender, of debt, 637.
Tergiversatio, 1067.
Terminalia, 250.
Terminus motus, 249, 332.
Testamenti factio, 794-804, 717, 824-5, 942: definition, 794; incapacity of heirs, 798-802, of legatees, 942, of testator, 794-8, of witnesses, 802-4; necessary to tutores testamentarii, 717; removal of incapacity by fideicommissa, 824-5.
Testamentum (formal will), 764-809: per æs et libram, 767-8; of blind, 772; causes as to, in Bracton, 114; classification, 126, 138; codicilli (introduction of), 765, 810; made in Comitia, 766; derivation of name, 538-9; destitutum, 805 seq.; of person suffering from contagious disease, 772; disherison, 774-9, 783-4; essential elements in, 764 seq.; erasures, 805; falsum (forged), 885, 1062; forms—extant in Justinian's time, 769-91, obsolete in Justinian's time, 766-9, special forms for particular classes, 771-3; heirs, appointment and substitution of, 786-94; holograph, 770; incapacity (testamenti factio), 794-804, 717, 824-5, 942; inductiones, 805; injustum, non jure factum, 805 seq.; inofficiosum, 780-2, 785; inspection, 773-4; interlineations, 805; interpretation, 953-64; irritum, 805 seq.; legitimi, 780-86; lituræ, 805; by mancipatio, 767-8; manumission by, 175-7; nullius momenti, 805 seq.; nuncupative (or oral)—private, 770, public, 771; offences as to, 1062, 1072; opening, 773-4; of parents and children, 773; perils of will-making, 809-10; prætorian, 768-9; prescription, 807; in procinctu, 766-7; publication, 773-4; revocation, 804-9; ruptum, 805 seq.; rustici, 772; scorings out, 805; state seamen, 772; soldier, 771-2; superinductiones, 805; testamenti factio, 794-804, 717, 824-5, 942; written, 769-70. See Codicilli, Fideicommissa.
Testatio privata, 1055.
Testimony, 1050-64: admission of, 1053-6; circumstantial, direct, 1050; domesticum, 803; exclusion of, 1053-6; explained, 1050; false (punishment of), 1063-4; who cannot give, 1056; of opinions (not admitted), 1055; oral, 1055; production and recording of, 1053, 1057-60; sanctions of, 1060; sufficiency of, 1053, 1056-7; written, 1054-5.
Theft. See Furtum, Actio Furti.
Theophilus, 93; on selling up a bankrupt, 1038; tacit consent of insane person, 681; jus civile, 118; manumission—board of, 180, valid reasons of, 181, of slave (by sitting at table with his master), 178; pactum de constituto, 567; table of propinquity, 832; authority of senate, 120; Senatusconsultum Sabinianum (adoption of one of three sons), 853; free woman made slave for cohabitation, 170; vindicta, 173.
Thesaurus, 256-7.
Thief. See Furtum. Fur improbus (shameless), 241; manifestus (taken in the act), 326-7; nocturnal, 152.
Threatened—damage (damnum infectum), 39, 465, 495, 975; harm (posita aut suspensa quæ possunt, si ceciderint, alicui nocere), 150, 153-4.
Tignum, 276; tigni immittendi jus, 417.
Time—of judicial proceedings, 51-52; of performance of contract, 585-6, of legacy, 930; how reckoned, 673; for prosecuting suit (limitation of), 1010.
Title deeds—custody of, 759 (joint heirs), 904 (heir or legatee); of slave, 178; acquisition by transfer of, 282.
Titulus justus, 270, 283.
Torts, 20, 126-7.
Torture—of another man's slave, 1070; of inheritance, 1060.
Traditio, 282-8, 258, 260: acquisition by (conditions of), 282-6; by agents, 323-5; nuda, 283; restrictions on, 287; constituting prædial servitude, 420; by transfer of title-deeds, 282.
Tralatitium Edictum, 35.
Transactio, 549.
Transcriptitia nomina, 468, 466-71.
Translatio legatorum, 950-51.
Treason, 1061, 1065-7.
Treasure-trove, 256-7.
Trespass in pursuit of wild animals, 256.
Trial, 973-1029, 18 (XII. Tables); new,

Testamentum (*continued*).
1010-11; proceedings preliminary to, 967-73, 17 (XII. Tables).
Tribes—Assembly of the, 14, 25-27, 60, 66; local, 10, 26; the three, 3.
Tribonian, 90-92.
Tribunes—Consular, 27; of the Plebeians, 13, 14, 25-27, 70.
Tribus Esquilina, 33.
Tributa Comitia, 14, 25-27, 60, 66.
Tributaria prædia, 287.
Tributum, 403, 287, 901.
Trinoctium, 19, 225.
Tripertita, 54.
Tripertitum jus, 117, 769.
Triplicatio, 992.
Trumping up charges (*calumnia*), 1020-21, 827, 986, 999, 1019, 1066, 1074.
Trusts. See Fideicommissa. Trusts inter vivos, 656-7; trust upon a trust, 823.
Tum quem ex familia, 861, 869, 870.
Tutor, Tutela—classification, 126-30, 138, 140; divisions, 696-7; in XII. Tables 19.
  Impuberum, 696-727: appointment of tutores, 708-15, who could not be, 716-18, who were exempted from serving (excusationes), 718-21, 725-6, could not be appointed by fideicommissum, 825, inquisitio (by Prætor), 709-10, 716; auctoritas of tutor, 699-701; co-tutors, 706-8; dativi, 708, 713-16; definition, 697-8, opposed to cura, 698, to potestas, 698; tutor ought to certus, 922; duties of pupillus, 705-6, of tutor, 698-705; extinction of, 721-3; fiduciarii, 712 (Gaius), 713 (Justinian); honorarii, onerarii (acting), 707; legitimi, 710-13, 715; prætorius, 702; tutor's management of property of pupillus, 702-5; remedies, 723-7; responsibility of tutor, 704, of heirs of tutor, 724-5; restraints on appointment, 716-21; security required from tutores, 715-16, 724; crimen suspecti tutoris, 713, 721-2, 726-7; testamentaria, 708-710, 713, 715.
  Mulierum, 727-31: appointment (modes of), 729-31; Atiliani, 730-31; auctoritas of tutor, 728; cessicii, 730; dativi, 729-30; definition, 727 extinction, 731; fiduciarii, 730-31; legitimi, 729; optivi, 729; remedies, 731; testamentarii, 729.
  Tutela of Latins, 713; of parent over emancipated children, 712; of patron (and descendants) over freedman, 711-12.
Twelve Tables, the, 16-24; and *passim*:
Twelve Tables, the (*continued*).
accessio, 276; actiones legis, 975; adjournments in judicio, 1008; arbores—furtim cæsæ, 251-2, 332, over-shadowing, 253; beating, as punishment, 148; body, protection of, 147; carmen, 148; child, sale of, 192, 196-7; person without curator, 732, 734; damage to immoveables, 373; damnum injuria, 242; debt, judgment, 1033, 1039; debtor, judgment, 169; delict, 546; deposit, 481; divorce, 690-91; dos, 295-6; relation of Perpetual Edict to, 123; familia, 259, 757, 775; fiducia, 529; furiosus, 732, 734; furtum, 152, 169, 184, 326, 328; injuria, 154-5, 551; interest, 652; intermarriage of patricians and plebeians, 22, 688; joint heirs, 759; judicis postulatio, 978; legacies, 749, 751; legis actio, 975; lex Aquilia, 551; libellers, 1069; libertatis adsertor, 184; mancipatio, 209-10, 212, 229; manus injectio, 1030-31; paterfamilias, 190, 191, 259; pauperies, 248, 331; pecunia, 259; person—accidentally killing a, 146, execution against the, 1034, protection to the, 147; pignoris capio, 1044; procedure, 122, 124, 128, 967; prodigus, 732, 734; property—harm to, by accident, or by negligence, 146; sacra, 746-7; sacramentum, 976; sale, 284 (delivery); stipulatio, 538; succession, intestate, 779, 833-40, 848 seq.; summons, 968-72; telum, 1061; tutela, 708, 710-12, 724, 726, 729, 731; usucapio, 269-70, 272-3; usus, 225-6; vades, sub-vades, 972; via, 415; vindicatio (costs), 337; wills, 768, 775; false witness, 1064.

Ulpian, 78.
Unde—cognati, 848 seq., 861 seq.; cognati manumissoris, 861; decem personæ, 851, 860-6; legitimi, 848 seq., 860 seq., 869; liberi, 848 seq., 860 seq.; liberi patroni patronæque et parentes eorum, 861-9, 870; vir et uxor, 848, 861.
Universal succession, 739-887; sale of debtor's, 1036-42.
Universitas, 314; juris, 314.
Unskilfulness, as negligence, 246.
Usuarius, 409-11, 237, 247.
Usucapio, 265-74, 263-4, 645-6, 1015, 1038: accession, 266; acquisition—necessary conditions, 266-70, restraints on, 270-4; when bona fides of possessor not required, 269; in Bracton, 114; not applicable to property of Fiscus, 272; of immoveables, 265; libertatis, 407, 418, 428; lucrativa, 270; of moveables, 265; pro herede, 269; who could rescind a title acquired by, 271;

Usucapio (*continued*).
of servitudes, 419; XII. Tables on, 269-70.
Usuræ—legitimæ, 652, 724; pupillares, 723-4; usurarum, 653, 1032. See Interest.
Usureceptio, 270, 435-6; lucrativa, 436; ex prædiatura, 270.
Usurpatio, 267-8; civilis, 268; naturalis, 267.
Usus—marriage, 19, 225-6, 678; use, 409-11, compared with commodatum, 475-6, nudus, 409.
Ususfructus, usufructuary, 396-409, 237, 247, 253, 384-6, 900, 912-13: alienation, 401-2; contrasted with annuity, 912-13; of thing bequeathed, 900, 912; conditional, 406; creation, 404-5; definition, 396; duties of fructuarius, 402-3; in connection with Possession, 384-6; quasi-usufruct, 397-8; remedies, 409; rights of fructuarius, 398; of owner, 403, 402; securities (fidejussores) given by usufructuary, 406; how terminated, 406-8; no transvestitive facts, 408.
Uterini, 782, 860.
Uti optimus maximusque, 900, 907.
Utilis actio, 40, 1038, 244.
Utilitas, 43, 244.

Vacarius, 100, 108-9.
Vacua possessio, 368, 900.
Vades, 18, 972, 1008.
Vadimonium, 985, 526, 972, 1007; desertum, 1008.
Variance, 995-7, 1018.
Vaticana Fragmenta, 87-88.
Vectigal, 426-7, 901.
Venditio—See Sale. Bonorum, 126, 1037; imaginaria, 492.
Verdict, 59.
Verna, 168-9.
Versura, 652.
Vestal virgins—could not be heirs, 798; released from potestas, 220; no tutela of, 19, 731.
Veterani, 688, 720, 751.
Veto, 14, 1045-6.
Vi bona rapta, 241, 330, 1070.
Via—privata, publica, vicinalis, 311-13; servitude, 415.
Viator, 14, 973.
Vicarius, 74, 604, 905, 911.
Vigiles, 674; Vigilum Præfectus, 674.
Villicus, 619.
Vinculum juris, 453.
Vindex, 17, 968, 1030-31, 1034; compared with fidejussor, 969; prætorian substitute for, 969, 1032.
Vindicatio, 221, 209-210, 230, 333-7, 387, 976, 132, 1073; legacy per vindicationem, 888-93, 897.
Vindiciæ, 976-7, 982-3.
Vindicta, 173-4, 180, 210, 212, 213, 229.
Virilis pars, 562.
Vis (Force, violence)—what is? 252; armata, 250-51; civilis et festucaria, 976; in contract, 593 seq.; cottidiana, 250-251; justifiable, 151-2; laws on, 57 note 5; major, 477; privata, publica, 251, 1062, 1069.
Vitium—of animal, slave, etc., 500-1; noxæ, 501; vitia possessionis, 360, 381.
Vocatio in jus, 967-73.
Vulgo concepti, 677.

Wager. See Sacramentum, Sponsio.
Water, rights to, 415-6, 424-5.
Way, rights of, 415-16, 424.
Weights, false, 1067.
Western Empire—fall of, 69.
Wife. See Dos, Manus, Marriage. In manu, and not in manu, 195. Husband and, 678-96; authority of husband over, 223-4; divorce from husband, 691; incapacity to contract, 605, 610; inheritance (aditio), 876; injuria to, 195, 224; position of, 858; property, 813; release from manus, 224; succession to intestate husband, 835, 863; no sale of, 224; theft of, 224.
Wild beasts, criminals condemned to fight with, 1064; slaves, 158.
Will. See Testamentum, Codicilli, Fideicommissa.
Windscheid, 104-5.
Wine, 909.
Witchcraft, 20, 1068.
Witnesses—to grant of liberty, 177-8; in a trial, 1050-64—credibility of, 1050, 1055, examination, 1060, exclusion, 1055-6, false, 1063-4, expenses, oath, production, summons, torture, 1060; to a will, 769-70, 802-4.
Woman—could not adopt, 211; could not be arrogated, 206; incapacity to contract (in tutela), 606; appearance in court, 971; mother must apply for curator to insane child, 715; disherison, 776, 779; promise of dos by, 573; relief from error of law, 660; as heir, 750; intercessio by, 573-4; as legatee, 750; legitim, 781 seq.; intestate succession (disabilities of women agnates), 858-9; as procurator, 1027; property, 728, 779; made slave (by Senatus-consultum Claudianum), 740; married (See Dos, Manus, Wife); summons of, 971; testamenti factio, 795-6, 798, 803; trusts, 824; tutela of, 708, 727-31; as tutor, 718; must apply for tutor to her children, 715; wills of, 795-6.
Wood and timber, rights of usufructuary in, 399.
Workman and employer, 512-13.
Wounds, 1069.
Wrong—civil, contrasted with Sin and Crime, 1063-4; in XII. Tables, 20-21.

INDEX

TO THE

TEXTS OF THE INSTITUTES OF GAIUS

Translated and referred to in this Work.

Book	Sect.	Page
I.	1	117
„	2	119
„	3	120
„	4	120
„	5	120
„	6	121
„	7	120
„	8	124
„	9	
„	10	667
„	11	667
„	12	667
„	13	675
„	14	675
„	15	675
„	16	675
„	17	160, 264, 672
„	18	181
„	19	181
„	20	174, 180
„	21	182
„	21 A	182
„	22	672
„	23	672
„	24	672
„	25	675
„	26	675
„	27	675
„	28	673
„	29	181, 673
„	30	83, 181, 673
„	31	673
„	32	673
„	32 A	673
„	32 B	674
„	32 C	674
„	33	264, 674
„	34	264, 674
„	35	264, 674
„	36	178
„	37	178
„	38	180
„	39	181
„	40	180
„	41	180
„	42	182
„	43	182
„	44	182
I.	45	182
„	46	182
„	47	178
„	48	160
„	49	160
„	50	160
„	51	160
„	52	157, 160
„	53	159
„	54	265, 672
„	55	189, 197
„	56	197
„	57	688
„	58	683, 684
„	59	684, 685
„	60	684
„	61	684, 685
„	62	684
„	63	686
„	64	683
„	65	198
„	66	198
„	67	83, 199
„	68	83, 199
„	69	83, 199
„	70	83, 200
„	71	83, 200
„	72	197
„	73	198
„	74	200
„	75	200
„	76	688
„	77	83, 688
„	78	65, 187
„	79	65, 187
„	80	83, 187-8
„	81	83, 188
„	82	169
„	83	188
„	84	188
„	85	188
„	86	188
„	87	199
„	88	199
„	89	168
„	90	187
„	91	187
„	92	83, 187
I.	93	200
„	94	200
„	95	198, 674
„	96	262-3
„	97	203
„	98	205
„	99	205, 210
„	100	206
„	101	206
„	102	206-7
„	103	211
„	104	211
„	105	211
„	106	211
„	107	204-5
„	108	222
„	109	222
„	110	225
„	111	225
„	112	225
„	113	224-5
„	114	731
„	115	731
„	115 A	83
„	115 B	222-3, 795
„	116	228
„	117	228
„	118	228
„	118 A	228
„	119	229
„	120	260
„	121	262
„	122	229
„	123	229
„	124	214
„	125	214
„	126	214
„	127	214
„	128	218
„	129	215-16
„	130	220
„	131	218
„	132	212-13
„	133	212
„	134	209-10
„	135	208
„	135 A	208, 228
„	136	223-4

Book	Sect.	Page
I.	136 A	227
„	137	227
„	137 A	227
„	138	229
„	139	230
„	140	192, 228, 230
„	141	228-9, 230
„	142	697
„	143	697
„	144	708
„	145	731
„	146	709
„	147	709
„	148	729
„	149	729
„	150	729
„	151	729
„	152	729
„	153	729
„	154	729
„	155	711, 1038
„	156	685
„	157	729
„	158	685
„	159	215, 219
„	160	215
„	161	218
„	162	219, 220
„	163	723
„	164	711
„	165	712
„	166	712-13
„	167	713
„	168	730
„	169	730
„	170	730
„	171	730-31
„	172	730-31
„	173	83, 730
„	174	83, 730
„	175	712
„	176	83, 730
„	177	83, 730
„	178	730
„	179	730
„	180	83, 730
„	181	730
„	182	83, 713
„	183	714
„	184	701-2
„	185	714
„	186	714
„	187	714
„	188	697-8
„	189	697
„	190	727, 728
„	191	705, 731
„	192	728
„	193	727
„	194	731
„	195	228, 730
„	195 A	730
„	195 B	730
I.	195 C	730
„	196	77 note, 722
„	197	732
„	198	734
„	199	715
„	200	715
II.	1	
„	2	315
„	3	315
„	4	315
„	5	315
„	6	316
„	7	316
„	8	317-18
„	9	
„	10	
„	11	
„	12	287
„	13	287
„	14	287
„	15	77 note, 261
„	15 A	261
„	16	261
„	17	261
„	18	287
„	19	261, 287
„	20	261, 287
„	21	287
„	22	260
„	23	260
„	24	262
„	25	262
„	26	260-61
„	26 A	260-61
„	27	260-61
„	28	287
„	29	260, 419
„	30	407, 408
„	31	404, 405
„	32	404
„	33	404
„	34	881
„	35	881
„	36	881
„	37	77 note, 881
„	38	627
„	39	627
„	40	263
„	41	263
„	42	265
„	43	268
„	44	265-6
„	45	272
„	46	272
„	47	272
„	48	272
„	49	272-3
„	50	269, 272-3
„	51	269
„	52	269, 362
„	53	269, 362
„	54	269-70, 362
„	55	270, 362, 746
II.	56	270, 362
„	57	83, 270, 362
„	58	270, 362
„	59	362, 435
„	60	362, 435-6, 527
„	61	270, 362, 414
„	62	
„	63	299
„	64	232, 437
„	65	282
„	66	256
„	67	346
„	68	346
„	69	257
„	70	275
„	71	275
„	72	275
„	73	276
„	74	278
„	75	278
„	76	277
„	77	279
„	78	279-80
„	79	280-81
„	80	232
„	81	728
„	82	232, 699
„	83	728
„	84	700
„	85	728, 881
„	86	295, 323, 881
„	87	323, 881-2
„	88	265, 323
„	89	323
„	90	228, 323
„	91	401
„	92	323
„	93	324
„	94	401
„	95	324, 378
„	96	127
„	97	127
„	98	127, 223
„	99	127
„	100	127
„	101	766
„	102	767
„	103	767
„	104	528, 767-8
„	105	803
„	106	803
„	107	803
„	108	804
„	109	771
„	110	798
„	111	798
„	112	83, 795
„	113	795
„	114	794
„	115	787
„	116	787
„	117	787
„	118	795

Book	Sect.	Page	Book	Sect.	Page	Book	Sect.	Page
II.	119	528, 768	II.	182	792	II.	245	449
,,	120	768	,,	183	792	,,	246	811
,,	121	796	,,	184	792	,,	247	811
,,	122	796	,,	185	800	,,	248	812
,,	123	77 note, 776	,,	186	800	,,	249	812
,,	124	776	,,	187	800	,,	250	812
,,	125	776	,,	188	800-1	,,	251	817
,,	126	776	,,	189	801	,,	252	817-18
,,	127	774, 776	,,	190	801	,,	253	818
,,	128	776	,,	191	897	,,	254	820
,,	129	777	,,	192	888	,,	255	820-21
,,	130	777	,,	193	888-9	,,	256	820-21
,,	131	777	,,	194	889	,,	257	820-21
,,	132	777	,,	195	77 note, 889	,,	258	820-21
,,	133	777-8	,,	196	891	,,	259	812
,,	134	777-8	,,	197	891	,,	260	895
,,	135	778	,,	198	891	,,	261	895
,,	136	203, 778-9	,,	199	893	,,	262	895
,,	137	203, 778-9	,,	200	77 note, 889-90	,,	263	175
,,	138	808	,,	201	889	,,	264	176
,,	139	808	,,	202	891	,,	265	176
,,	140	808	,,	203	891	,,	266	176
,,	141	808	,,	204	890	,,	267	175, 176
,,	142	83, 808	,,	205	893	,,	268	894
,,	143	83, 808	,,	206	893	,,	269	894
,,	144	807	,,	207	893	,,	270	894
,,	145	809	,,	208	893	,,	270 A	895
,,	146	805	,,	209	889	,,	271	895
,,	147	809	,,	210	891-2	,,	272	895
,,	148	364, 845-6	,,	211	892	,,	273	827
,,	149	846	,,	212	892	,,	274	824
,,	150	866	,,	213	890	,,	275	824
,,	151	805-6	,,	214	890	,,	276	83, 824
,,	152	875	,,	215	893	,,	277	822
,,	153	260, 875	,,	216	889	,,	278	896, 1013
,,	154	875, 1038	,,	217	77 note, 890-91	,,	279	896
,,	155	875	,,	218	77 note, 890-91	,,	280	894
,,	156	876	,,	219	77 note, 890-91	,,	281	894
,,	157	876	,,	220	77 note, 892	,,	282	896
,,	158	876	,,	221	77 note, 892	,,	283	894
,,	159	876	,,	222	77 note, 892	,,	284	824
,,	160	876	,,	223	77 note, 894	,,	285	83, 824
,,	161	876-7	,,	224	749	,,	286	824
,,	162	877	,,	225	750	,,	287	83, 825
,,	163	877	,,	226	750	,,	288	896
,,	164	877	,,	227	750	,,	289	825
,,	165	878	,,	228	750	III.	1	833
,,	166	878	,,	229	894	,,	2	833
,,	167	879	,,	230	894	,,	3	835
,,	168	878	,,	231	77 note, 894	,,	4	833
,,	169	879	,,	232	895	,,	5	834
,,	170	878	,,	233	895	,,	6	834
,,	171	878	,,	234	895	,,	7	835
,,	172	878	,,	235	896	,,	8	835
,,	173	878	,,	236	896	,,	9	835
,,	174	788	,,	237	896	,,	10	836
,,	175	790	,,	238	922	,,	11	837
,,	176	789	,,	239	922	,,	12	837
,,	177	789	,,	240	922	,,	13	836
,,	178	789	,,	241	798, 895	,,	14	858
,,	179	791	,,	242	799	,,	15	837
,,	180	791	,,	243	895-6	,,	16	837
,,	181	792	,,	244	77 note, 943	,,	17	837

Book	Sect.	Page
III.	18	848
,,	19	848
,,	20	848
,,	21	836, 848
,,	22	848
,,	23	848
,,	24	848
,,	25	848
,,	26	849
,,	27	857-8
,,	28	860
,,	29	858
,,	30	861
,,	31	851
,,	32	842
,,	33	855
,,	33 A	855
,,	34	845, 847
,,	35	845
,,	36	845
,,	37	845
,,	38	741-2, 845
,,	39	866
,,	40	866
,,	41	866-7
,,	42	867
,,	43	867
,,	44	867
,,	45	867
,,	46	867
,,	47	867-8
,,	48	868-9
,,	49	868
,,	50	868
,,	51	868
,,	52	868
,,	53	868
,,	54	868
,,	55	871
,,	56	871
,,	57	871
,,	58	871
,,	59	872
,,	60	872
,,	61	872
,,	62	872
,,	63	872
,,	64	872
,,	65	872
,,	66	873
,,	67	873
,,	68	873
,,	69	873
,,	70	873
,,	71	873
,,	72	873
,,	73	83, 874
,,	74	874
,,	75	874
,,	76	874
,,	77	1039
,,	78	81, 1039
,,	79	1037-8
III.	80	843, 1033
,,	81	842, 1038
,,	82	741
,,	83	219, 223, 741
,,	84	223, 741
,,	85	881
,,	86	881
,,	87	77 note, 881-2
,,	88	455
,,	89	458
,,	90	472
,,	91	658
,,	92	461
,,	93	461, 565
,,	94	461, 526
,,	95	
,,	96	
,,	97	599
,,	97 A	599
,,	98	77 note, 591
,,	99	599, 600
,,	100	592
,,	101	592
,,	102	462
,,	103	77 note, 623-4
,,	104	602, 605
,,	105	461
,,	106	606
,,	107	607
,,	108	606
,,	109	607
,,	110	563
,,	111	564
,,	112	564
,,	113	564
,,	114	564, 605
,,	115	565
,,	116	570
,,	117	563, 565
,,	118	565
,,	119	565, 566
,,	120	576
,,	121	63, 576-7, 578-9
,,	122	577, 579
,,	123	62, 577, 579
,,	124	572
,,	125	572
,,	126	571
,,	127	569-70, 576
,,	128	468
,,	129	468
,,	130	468
,,	131	467
,,	132	467
,,	133	77 note, 469
,,	134	469
,,	135	490
,,	136	490
,,	137	490
,,	138	490
,,	139	504
,,	140	77 note, 491-2
,,	141	77 note, 491
III.	142	505
,,	143	506
,,	144	505
,,	145	427
,,	146	506
,,	147	506
,,	148	517
,,	149	522
,,	150	522
,,	151	523
,,	152	523
,,	153	523
,,	154	523
,,	155	483
,,	156	483
,,	157	600
,,	158	599
,,	159	489
,,	160	489
,,	161	486
,,	162	482
,,	163	610
,,	164	613
,,	165	613
,,	166	265, 612
,,	167	77 note, 612
,,	167A	612
,,	168	633
,,	169	639
,,	170	639
,,	171	641
,,	172	639
,,	173	641
,,	174	641
,,	175	459, 641, 892
,,	176	631
,,	177	629
,,	178	77 note, 629-30
,,	179	630
,,	180	1015
,,	181	1015
,,	182	
,,	183	328
,,	184	326
,,	185	327
,,	186	328
,,	187	328
,,	188	328
,,	189	169, 326
,,	190	326
,,	191	328
,,	192	329
,,	193	329
,,	194	329
,,	195	235-6
,,	196	235-6
,,	197	236
,,	198	234
,,	199	194, 224
,,	200	723
,,	201	246
,,	202	240
,,	203	237

Book	Sect.	Page
III.	204	237
,,	205	238
,,	206	238
,,	207	239
,,	208	241
,,	209	241
,,	210	243
,,	211	246
,,	212	331
,,	213	330
,,	214	330
,,	215	564
,,	216	564, 565
,,	217	243
,,	218	330-31
,,	219	243-4
,,	220	146, 147, 148, 149
,,	221	194, 224
,,	222	164
,,	223	154
,,	224	155
,,	225	155
IV.	1	131
,,	2	124, 131, 453
,,	3	125, 132
,,	4	329
,,	5	132
,,	6	1073
,,	7	1073
,,	8	1073
,,	9	1073
,,	10	
,,	11	974-5
,,	12	975
,,	13	975
,,	14	975-6
,,	15	1007
,,	16	50 note, 976
,,	17	977-8
,,	17 A	979
,,	18	979
,,	19	979
,,	20	979
,,	21	1030
,,	22	63, 1031
,,	23	1031
,,	24	1031
,,	25	65, 1031
,,	26	1044
,,	27	1044
,,	28	1044
,,	29	1044
,,	30	39, 81, 975
,,	31	39, 975
,,	32	1073
,,	33	1073
,,	34	843
,,	35	1037
,,	36	263-4
,,	37	342
,,	38	219, 220
,,	39	987
,,	40	987
IV.	41	368, 453, 988, 989
,,	42	988-9
,,	43	988
,,	44	989
,,	45	986
,,	46	986
,,	47	453, 986-7
,,	48	
,,	49	988
,,	50	988
,,	51	988
,,	52	988-9, 1006-7
,,	53	995, 996
,,	53 A	995
,,	54	996
,,	55	995-6
,,	56	996
,,	57	996
,,	58	996-7
,,	59	996-7
,,	60	997
,,	61	993-4
,,	62	994
,,	63	994
,,	64	994
,,	65	994
,,	66	994-5
,,	67	994-5
,,	68	994-5
,,	69	605
,,	70	614-15
,,	71	617, 618
,,	72	604
,,	73	604, 615
,,	74	620
,,	75	166
,,	76	184
,,	77	167
,,	78	77 note, 193, 1037
,,	79	77 note, 196-7
,,	80	
,,	81	
,,	82	979, 1022
,,	83	1022-3
,,	84	1023
,,	85	1022
,,	86	1022
,,	87	1022
,,	88	1023
,,	89	1023-4
,,	90	1023-4
,,	91	983
,,	92	983
,,	93	982
,,	94	982
,,	95	65, 982
,,	96	1023
,,	97	1023
,,	98	1023
,,	99	715
,,	100	1024
,,	101	1024
,,	102	1024, 1038
IV.	103	1010
,,	104	648, 1010
,,	105	648, 1010
,,	106	1015
,,	107	1015
,,	108	980, 1014-15
,,	109	1010
,,	110	646
,,	111	646
,,	112	650
,,	113	650
,,	114	77 note, 1009, 1015
,,	115	40, 990
,,	116	40, 990
,,	117	40, 990, 1016
,,	118	40, 990
,,	119	40, 990
,,	120	40, 990-91
,,	121	40, 990-91
,,	122	40, 990-91
,,	123	40, 991
,,	124	40, 991
,,	125	40, 991
,,	126	40, 991
,,	126 A	992
,,	127	40, 992
,,	128	40, 992
,,	129	40, 992
,,	130	40, 992
,,	131	40, 992
,,	131 A	992
,,	132	40, 992
,,	133	40, 993
,,	134	40, 84, 993
,,	135	84, 993
,,	136	84, 993
,,	137	84, 993
,,	138	41, 84, 998
,,	139	41, 84, 998
,,	140	41, 84, 998
,,	141	41, 84, 998
,,	142	41, 84
,,	143	41, 84
,,	144	41, 84, 842
,,	145	41, 1038
,,	146	41, 1036
,,	147	41, 448
,,	148	41, 357-8
,,	149	41, 358
,,	150	41, 358
,,	151	41, 358
,,	152	41, 358, 371
,,	153	41, 358
,,	154	41, 250-51, 390
,,	155	41, 251, 390
,,	156	41, 359, 373
,,	157	41, 359, 373
,,	158	41, 359, 373
,,	159	41, 359, 373
,,	160	41, 359, 373
,,	161	41, 999
,,	162	41, 999
,,	163	41, 77 note, 999

Book	Sect.	Page
III.	18	848
,,	19	848
,,	20	848
,,	21	836, 848
,,	22	848
,,	23	848
,,	24	848
,,	25	848
,,	26	849
,,	27	857-8
,,	28	860
,,	29	858
,,	30	861
,,	31	851
,,	32	842
,,	33	855
,,	33 A	855
,,	34	845, 847
,,	35	845
,,	36	845
,,	37	845
,,	38	741-2, 845
,,	39	866
,,	40	866
,,	41	866-7
,,	42	867
,,	43	867
,,	44	867
,,	45	867
,,	46	867
,,	47	867-8
,,	48	868-9
,,	49	868
,,	50	868
,,	51	868
,,	52	868
,,	53	868
,,	54	868
,,	55	871
,,	56	871
,,	57	871
,,	58	871
,,	59	872
,,	60	872
,,	61	872
,,	62	872
,,	63	872
,,	64	872
,,	65	872
,,	66	873
,,	67	873
,,	68	873
,,	69	873
,,	70	873
,,	71	873
,,	72	873
,,	73	33, 874
,,	74	874
,,	75	874
,,	76	874
,,	77	1039
,,	78	81, 1039
,,	79	1037-8
III.	80	843, 1033
,,	81	842, 1038
,,	82	741
,,	83	219, 223, 741
,,	84	223, 741
,,	85	881
,,	86	881
,,	87	77 note, 881-2
,,	88	455
,,	89	458
,,	90	472
,,	91	658
,,	92	461
,,	93	461, 565
,,	94	461, 526
,,	95	
,,	96	
,,	97	599
,,	97 A	599
,,	98	77 note, 591
,,	99	599, 600
,,	100	592
,,	101	592
,,	102	462
,,	103	77 note, 623-4
,,	104	602, 605
,,	105	461
,,	106	606
,,	107	607
,,	108	606
,,	109	607
,,	110	563
,,	111	564
,,	112	564
,,	113	564
,,	114	564, 605
,,	115	565
,,	116	570
,,	117	563, 565
,,	118	565
,,	119	565, 566
,,	120	576
,,	121	63, 576-7, 578-9
,,	122	577, 579
,,	123	62, 577, 579
,,	124	572
,,	125	572
,,	126	571
,,	127	569-70, 576
,,	128	468
,,	129	468
,,	130	468
,,	131	467
,,	132	467
,,	133	77 note, 469
,,	134	469
,,	135	490
,,	136	490
,,	137	490
,,	138	490
,,	139	504
,,	140	77 note, 491-2
,,	141	77 note, 491
III.	142	505
,,	143	506
,,	144	505
,,	145	427
,,	146	506
,,	147	506
,,	148	517
,,	149	522
,,	150	522
,,	151	523
,,	152	523
,,	153	523
,,	154	523
,,	155	483
,,	156	483
,,	157	600
,,	158	599
,,	159	489
,,	160	489
,,	161	486
,,	162	482
,,	163	610
,,	164	613
,,	165	613
,,	166	265, 612
,,	167	77 note, 612
,,	167 A	612
,,	168	633
,,	169	639
,,	170	639
,,	171	641
,,	172	639
,,	173	641
,,	174	641
,,	175	459, 641, 892
,,	176	631
,,	177	629
,,	178	77 note, 629-30
,,	179	630
,,	180	1015
,,	181	1015
,,	182	
,,	183	328
,,	184	326
,,	185	327
,,	186	328
,,	187	328
,,	188	328
,,	189	169, 326
,,	190	326
,,	191	328
,,	192	329
,,	193	329
,,	194	329
,,	195	235-6
,,	196	235-6
,,	197	236
,,	198	234
,,	199	194, 224
,,	200	723
,,	201	246
,,	202	240
,,	203	237

Book	Sect.	Page
III.	204	237
,,	205	238
,,	206	238
,,	207	239
,,	208	241
,,	209	241
,,	210	243
,,	211	246
,,	212	331
,,	213	330
,,	214	330
,,	215	564
,,	216	564, 565
,,	217	243
,,	218	330-31
,,	219	243-4
,,	220	146, 147, 148, 149
,,	221	194, 224
,,	222	164
,,	223	154
,,	224	155
,,	225	155
IV.	1	131
,,	2	124, 131, 453
,,	3	125, 132
,,	4	329
,,	5	132
,,	6	1073
,,	7	1073
,,	8	1073
,,	9	1073
,,	10	
,,	11	974-5
,,	12	975
,,	13	975
,,	14	975-6
,,	15	1007
,,	16	50 note, 976
,,	17	977-8
,,	17 A	979
,,	18	979
,,	19	979
,,	20	979
,,	21	1030
,,	22	63, 1031
,,	23	1031
,,	24	1031
,,	25	65, 1031
,,	26	1044
,,	27	1044
,,	28	1044
,,	29	1044
,,	30	39, 81, 975
,,	31	39, 975
,,	32	1073
,,	33	1073
,,	34	843
,,	35	1037
,,	36	263-4
,,	37	342
,,	38	219, 220
,,	39	987
,,	40	987
IV.	41	368, 453, 988, 989
,,	42	988-9
,,	43	988
,,	44	989
,,	45	986
,,	46	986
,,	47	453, 986-7
,,	48	
,,	49	988
,,	50	988
,,	51	988
,,	52	988-9, 1006-7
,,	53	995, 996
,,	53 A	995
,,	54	996
,,	55	995-6
,,	56	996
,,	57	996
,,	58	996-7
,,	59	996-7
,,	60	997
,,	61	993-4
,,	62	994
,,	63	994
,,	64	994
,,	65	994
,,	66	994-5
,,	67	994-5
,,	68	994-5
,,	69	605
,,	70	614-15
,,	71	617, 618
,,	72	604
,,	73	604, 615
,,	74	620
,,	75	166
,,	76	184
,,	77	167
,,	78	77 note, 193, 1037
,,	79	77 note, 196-7
,,	80	
,,	81	
,,	82	979, 1022
,,	83	1022-3
,,	84	1023
,,	85	1022
,,	86	1022
,,	87	1022
,,	88	1023
,,	89	1023-4
,,	90	1023-4
,,	91	983
,,	92	983
,,	93	982
,,	94	982
,,	95	65, 982
,,	96	1023
,,	97	1023
,,	98	1023
,,	99	715
,,	100	1024
,,	101	1024
,,	102	1024, 1038
IV.	103	1010
,,	104	648, 1010
,,	105	648, 1010
,,	106	1015
,,	107	1015
,,	108	980, 1014-15
,,	109	1010
,,	110	646
,,	111	646
,,	112	650
,,	113	650
,,	114	77 note, 1009, 1015
,,	115	40, 990
,,	116	40, 990
,,	117	40, 990, 1016
,,	118	40, 990
,,	119	40, 990
,,	120	40, 990-91
,,	121	40, 990-91
,,	122	40, 990-91
,,	123	40, 991
,,	124	40, 991
,,	125	40, 991
,,	126	40, 991
,,	126 A	992
,,	127	40, 992
,,	128	40, 992
,,	129	40, 992
,,	130	40, 992
,,	131	40, 992
,,	131 A	992
,,	132	40, 992
,,	133	40, 993
,,	134	40, 84, 993
,,	135	84, 993
,,	136	84, 993
,,	137	84, 993
,,	138	41, 84, 998
,,	139	41, 84, 998
,,	140	41, 84, 998
,,	141	41, 84, 998
,,	142	41, 84
,,	143	41, 84
,,	144	41, 84, 842
,,	145	41, 1038
,,	146	41, 1036
,,	147	41, 448
,,	148	41, 357-8
,,	149	41, 358
,,	150	41, 358
,,	151	41, 358
,,	152	41, 358, 371
,,	153	41, 358
,,	154	41, 250-51, 390
,,	155	41, 251, 390
,,	156	41, 359, 373
,,	157	41, 359, 373
,,	158	41, 359, 373
,,	159	41, 359, 373
,,	160	41, 359, 373
,,	161	41, 999
,,	162	41, 999
,,	163	41, 77 note, 999

Book	Sect.	Page
IV.	164	41, 998-9
„	165	41, 998-9
„	166	41, 1001-2
„	166 A	1002
„	167	41, 1002
„	168	41, 982, 1002
„	169	41, 1002
„	170	41, 1002-3
IV.	171	982, 1003, 1019
		1032
„	172	1019
„	173	1019-20
„	174	1020, 1032
„	175	1020
„	176	1021
„	177	1020
„	178	1020-21
IV.	179	1021
„	180	1021
„	181	1021
„	182	1021
„	183	970-71
„	184	985
„	185	985
„	186	985-6
„	187	986

INDEX

TO THE

TEXTS OF JUSTINIAN'S INSTITUTES

Translated and referred to in this Work.

Book	Tit.	Sect.	Page
I.	1	pr.	116
„	„	1	116
„	„	2	84
„	„	3	116
„	„	4	117, 120
„	2	pr.	117
„	„	1	117
„	„	2	118
„	„	3	119
„	„	4	120
„	„	5	120
„	„	6	120
„	„	7	120
„	„	8	121
„	„	9	119
„	„	10	119
„	„	11	117, 118
„	„	12	124
„	3	pr.	
„	„	1	157
„	„	2	157
„	„	3	160
„	„	4	171
„	„	5	162
„	4	pr.	169, 667
„	„	1	667
„	5	pr.	171, 667
„	„	1	177
„	„	2	174
„	„	3	675-6
„	6	pr.	178
I.	6	1	179
„	„	2	179
„	„	3	178-9
„	„	4	180
„	„	5	180
„	„	6	180
„	„	7	180
„	7	pr.	182
„	8	pr.	160, 193
„	„	1	157
„	„	2	159
„	9	pr.	197
„	„	1	678
„	„	2	189
„	„	3	197
„	10	pr.	678, 680
„	„	1	684, 685
„	„	2	684, 685
„	„	3	684, 686
„	„	4	684
„	„	5	685
„	„	6	686
„	„	7	686
„	„	8	686
„	„	9	687
„	„	10	684
„	„	11	686
„	„	12	683
„	„	13	201
„	11	pr.	203
„	„	1	206, 210
I.	11	2	209
„	„	3	207
„	„	4	211
„	„	5	207
„	„	6	207
„	„	7	207, 681
„	„	8	207-8
„	„	9	211
„	„	10	211
„	„	11	205
„	„	12	177-8
„	12	pr.	214
„	„	1	218
„	„	2	218
„	„	3	215
„	„	4	220
„	„	5	215-16
„	„	6	213, 214
„	„	7	212
„	„	8	210-11
„	„	9	208
„	„	10	212
„	13	pr.	697
„	„	1	697-8
„	„	2	697
„	„	3	709
„	„	4	709
„	„	5	709-10
„	14	pr.	717
„	„	1	717
„	„	2	717

Book	Tit.	Sect.	Page
I.	14	3	709
„	„	4	709
„	„	5	709
„	15	pr.	711
„	„	1	685
„	„	2	710
„	„	3	586
„	16	pr.	215
„	„	1	215
„	„	2	218
„	„	3	219
„	„	4	160, 214
„	„	5	215
„	„	6	685
„	„	7	711
„	17	pr.	712
„	18	pr.	712
„	19	pr.	713
„	20	pr.	714
„	„	1	714
„	„	2	714
„	„	3	714
„	„	4	714
„	„	5	714
„	„	6	697-8
„	„	7	705
„	21	pr.	699
„	„	1	700
„	„	2	702
„	„	3	701-2
„	22	pr.	713, 723
„	„	1	723
„	„	2	723
„	„	3	723
„	„	4	723
„	„	5	723
„	„	6	721
„	23	pr.	732
„	„	1	733, 734
„	„	2	732
„	„	3	732, 734
„	„	4	732
„	„	5	732-3
„	„	6	733
„	24	pr.	715
„	„	1	707-8
„	„	2	725
„	„	3	725
„	„	4	725
„	25	pr.	719
„	„	1	720
„	„	2	720
„	„	3	720
„	„	4	717
„	„	5	719
„	„	6	719
„	„	7	719
„	„	8	719
„	„	9	718, 720
„	„	10	718-19
„	„	11	718-19
„	„	12	718-19
„	„	13	717, 719
I.	26	14	717
„	„	15	719
„	„	16	725-6
„	„	17	698
„	„	18	735
„	„	19	735
„	„	20	718
„	„	pr.	726
„	„	1	726
„	„	2	721
„	„	3	726
„	„	4	726, 735
„	„	5	722
„	„	6	727
„	„	7	727
„	„	8	726
„	„	9	721
„	„	10	721
„	„	11	727
„	„	12	722
„	„	13	722
II.	1	pr.	
„	„	1	309
„	„	2	310
„	„	3	310
„	„	4	310
„	„	5	310
„	„	6	314
„	„	7	256
„	„	8	315
„	„	9	316-17
„	„	10	317-18
„	„	11	118
„	„	12	256, 345-6
„	„	13	346
„	„	14	346
„	„	15	346
„	„	16	346
„	„	17	257
„	„	18	256
„	„	19	
„	„	20	275
„	„	21	275
„	„	22	256, 275
„	„	23	275-6
„	„	24	276
„	„	25	280-81
„	„	26	281
„	„	27	281
„	„	28	281
„	„	29	276-7
„	„	30	277, 278
„	„	31	278
„	„	32	278, 279
„	„	33	279
„	„	34	279-80
„	„	35	336
„	„	36	398
„	„	37	400, 401
„	„	38	401, 402
„	„	39	257
„	„	40	282 287
„	„	41	284
II.	1	42	324
„	„	43	324
„	„	44	349
„	„	45	347
„	„	46	284
„	„	47	258
„	„	48	258
„	2	pr.	287
„	„	1	287
„	„	2	287
„	„	3	
„	3	pr.	415
„	„	1	417
„	„	2	415
„	„	3	412
„	„	4	420
„	„	4	pr. 396, 408
„	„	1	404, 405, 406
„	„	2	397
„	„	3	407, 408
„	„	4	407
„	5	pr.	410-11
„	„	1	409-10
„	„	2	410
„	„	3	410
„	„	4	410
„	„	5	411
„	„	6	397
„	6	pr.	290
„	„	1	272
„	„	2	272
„	„	3	272-3
„	„	4	269
„	„	5	269
„	„	6	269
„	„	7	274
„	„	8	273
„	„	9	272
„	„	10	272
„	„	11	270
„	„	12	266
„	„	13	267
„	„	14	272
„	7	pr.	915
„	„	1	916
„	„	2	318
„	„	3	308-9
„	„	4	758-9
„	8	pr.	299
„	„	1	437
„	„	2	699-700
„	9	pr.	323
„	„	1	294
„	„	2	294-5
„	„	3	323
„	„	4	323, 324
„	„	5	324, 378
„	„	6	127
„	10	pr.	766
„	„	1	766, 768
„	„	2	768
„	„	3	769
„	„	4	770

Book	Tit.	Sect.	Page
II.	10	5	770
,,	,,	6	803
,,	,,	7	803
,,	,,	8	804
,,	,,	9	803-4
,,	,,	10	804
,,	,,	11	804
,,	,,	12	770
,,	,,	13	770
,,	,,	14	770
,,	11	pr.	771
,,	,,	1	771
,,	,,	2	796
,,	,,	3	771-2
,,	,,	4	772
,,	,,	5	809
,,	,,	6	797
,,	12	pr.	796-7, 853
,,	,,	1	797
,,	,,	2	797
,,	,,	3	796
,,	,,	4	796
,,	,,	5	795
,,	13	pr.	776, 777
,,	,,	1	774, 777
,,	,,	2	778
,,	,,	3	778
,,	,,	4	778-9
,,	,,	5	779
,,	,,	6	779
,,	,,	7	779
,,	14	pr.	799, 801
,,	,,	1	800-1
,,	,,	2	802
,,	,,	3	801
,,	,,	4	
,,	,,	5	761
,,	,,	6	762
,,	,,	7	761
,,	,,	8	762
,,	,,	9	788
,,	,,	10	176, 788
,,	,,	11	788
,,	,,	12	799
,,	15	pr.	788
,,	,,	1	790
,,	,,	2	791
,,	,,	3	790
,,	,,	4	789
,,	16	pr.	791
,,	,,	1	793
,,	,,	2	791
,,	,,	3	793
,,	,,	4	792
,,	,,	5	791
,,	,,	6	793
,,	,,	7	793
,,	,,	8	791
,,	,,	9	792
,,	17	pr.	808
,,	,,	1	808
,,	,,	2	807
,,	,,	3	807
II.	17	4	809
,,	,,	5	805
,,	,,	6	809
,,	,,	7	806
,,	,,	8	802
,,	18	pr.	780
,,	,,	1	781
,,	,,	2	781
,,	,,	3	786
,,	,,	4	785
,,	,,	5	785
,,	,,	6	782
,,	,,	7	782
,,	19	pr.	875
,,	,,	1	875
,,	,,	2	876
,,	,,	3	876-7
,,	,,	4	794
,,	,,	5	877
,,	,,	6	754, 877
,,	,,	7	880
,,	20	pr.	897
,,	,,	1	897
,,	,,	2	897
,,	,,	3	897
,,	,,	4	942
,,	,,	5	900
,,	,,	6	944
,,	,,	7	891
,,	,,	8	915
,,	,,	9	944
,,	,,	10	942
,,	,,	11	942
,,	,,	12	950
,,	,,	13	913
,,	,,	14	914
,,	,,	15	11-12
,,	,,	16	903
,,	,,	17	905, 908
,,	,,	18	902
,,	,,	19	902
,,	,,	20	910, 911
,,	,,	21	913, 928
,,	,,	22	928
,,	,,	23	927
,,	,,	24	942
,,	,,	25	83, 922-3
,,	,,	26	799
,,	,,	27	799
,,	,,	28	799
,,	,,	29	923
,,	,,	30	923-4
,,	,,	31	925
,,	,,	32	943
,,	,,	33	944
,,	,,	34	918
,,	,,	35	941
,,	,,	36	944-5
,,	21	pr.	949
,,	,,	1	950
,,	22	pr.	751
,,	,,	1	760
,,	,,	2	753-4
II.	22	3	752
,,	23	pr.	811
,,	,,	1	811
,,	,,	2	812
,,	,,	3	817
,,	,,	4	818
,,	,,	5	820
,,	,,	6	820-21
,,	,,	7	821
,,	,,	8	812
,,	,,	9	822
,,	,,	10	828
,,	,,	11	823
,,	,,	12	826-7
,,	24	pr.	895
,,	,,	1	895
,,	,,	2	175, 176
,,	,,	3	812
,,	25	pr.	825-6
,,	,,	1	828
,,	,,	2	827
,,	,,	3	826
III.	1	pr.	832
,,	,,	1	833
,,	,,	2	833
,,	,,	2 A	834
,,	,,	2 B	833
,,	,,	2 C	833
,,	,,	3	876
,,	,,	4	835
,,	,,	5	835
,,	,,	6	835
,,	,,	7	834
,,	,,	8	834
,,	,,	9	849
,,	,,	10	851-2
,,	,,	11	852
,,	,,	12	852
,,	,,	13	852
,,	,,	14	852-3
,,	,,	15	854
,,	,,	16	854-5
,,	2	pr.	835
,,	,,	1	836-837
,,	,,	2	836
,,	,,	3	858-9
,,	,,	3 A	859
,,	,,	3 B	859
,,	,,	4	859-60
,,	,,	5	837
,,	,,	6	836-7
,,	,,	7	837, 860
,,	,,	8	850-51
,,	3	pr.	855
,,	,,	1	855
,,	,,	2	855-6
,,	,,	3	856
,,	,,	4	856
,,	,,	5	856-7
,,	,,	6	856
,,	,,	7	856
,,	4	pr.	857
,,	,,	1	857

Book	Tit.	Sect.	Page
III.	4	2	857
,,	,,	3	857
,,	,,	4	757
,,	5	pr.	861
,,	,,	1	858
,,	,,	2	861
,,	,,	3	851
,,	,,	4	861-2
,,	,,	5	862
,,	6	pr.	830
,,	,,	1	831
,,	,,	2	831
,,	,,	3	831
,,	,,	4	831
,,	,,	5	831-2
,,	,,	6	832
,,	,,	7	831
,,	,,	8	830
,,	,,	9	832
,,	,,	10	861
,,	,,	11	861
,,	,,	12	861
,,	7	pr.	866
,,	,,	1	866-7
,,	,,	2	867
,,	,,	3	869-70
,,	,,	4	874
,,	8	pr.	870
,,	,,	1	871
,,	,,	2	871
,,	,,	3	870-71
,,	9	pr.	799, 844-5
,,	,,	1	845
,,	,,	2	842
,,	,,	3	860-61
,,	,,	4	851
,,	,,	5	851
,,	,,	6	870
,,	,,	7	863
,,	,,	8	845
,,	,,	9	844
,,	,,	10	844
,,	,,	11	844
,,	,,	12	844
,,	10	pr.	741
,,	,,	1	219, 741
,,	,,	2	741
,,	,,	3	742
,,	11	pr.	742-3
,,	,,	1	742-3
,,	,,	2	743
,,	,,	3	743
,,	,,	4	743
,,	,,	5	743
,,	,,	6	743
,,	,,	7	743
,,	12	pr.	1039
,,	,,	1	69-70, 740
,,	13	pr.	452
,,	,,	1	454
,,	,,	2	455, 458
,,	14	pr.	172
,,	,,	1	658
III.	14	2	475, 477
,,	,,	3	480, 481
,,	,,	4	439
,,	15	pr.	459, 463
,,	,,	1	456, 461
,,	,,	2	586
,,	,,	3	913
,,	,,	4	587, 588
,,	,,	5	585
,,	,,	6	586-7
,,	,,	7	651-2
,,	16	pr.	558
,,	,,	1	555
,,	,,	2	559
,,	17	pr.	614
,,	,,	1	611, 614-15
,,	,,	2	611-12
,,	,,	3	612
,,	18	pr.	464
,,	,,	1	465
,,	,,	2	645
,,	,,	3	464
,,	,,	4	465
,,	19	pr.	599
,,	,,	1	599
,,	,,	2	599
,,	,,	3	624
,,	,,	4	624
,,	,,	5	462
,,	,,	6	605
,,	,,	7	461
,,	,,	8	606
,,	,,	9	606
,,	,,	10	606
,,	,,	11	591
,,	,,	12	463
,,	,,	13	592
,,	,,	14	592
,,	,,	15	592
,,	,,	16	592
,,	,,	17	463
,,	,,	18	462
,,	,,	19	624
,,	,,	20	624
,,	,,	21	624
,,	,,	22	600
,,	,,	23	581
,,	,,	24	606
,,	,,	25	587
,,	,,	26	586
,,	,,	27	585
,,	20	pr.	565
,,	,,	1	566
,,	,,	2	576
,,	,,	3	570
,,	,,	4	578-9
,,	,,	5	571
,,	,,	7	576
,,	,,	6	570
,,	,,	8	570
,,	21	pr.	469
,,	22	pr.	490
,,	,,	1	490
III.	22	2	490
,,	,,	3	490
,,	23	pr.	504
,,	,,	1	491-2
,,	,,	2	491
,,	,,	3	285
,,	,,	3 A	285
,,	,,	4	589
,,	,,	5	600
,,	24	pr.	505
,,	,,	1	506
,,	,,	2	505
,,	,,	3	427
,,	,,	4	506
,,	,,	5	510
,,	,,	6	514
,,	25	pr.	517
,,	,,	1	522
,,	,,	2	522
,,	,,	3	522
,,	,,	4	522-3
,,	,,	5	523
,,	,,	6	524
,,	,,	7	523
,,	,,	8	523-4
,,	,,	9	521
,,	26	pr.	483
,,	,,	1	484
,,	,,	2	484
,,	,,	3	484
,,	,,	4	484
,,	,,	5	485
,,	,,	6	483
,,	,,	7	600
,,	,,	8	486
,,	,,	9	489
,,	,,	10	489
,,	,,	11	485
,,	,,	12	589
,,	,,	13	482
,,	27	pr.	
,,	,,	1	456, 661-2
,,	,,	2	457, 697
,,	,,	3	337
,,	,,	4	747
,,	,,	5	457, 747
,,	,,	6	456, 658
,,	,,	7	659
,,	28	pr.	610
,,	,,	1	613
,,	,,	2	613
,,	,,	3	612
,,	29	pr.	633
,,	,,	1	639
,,	,,	2	639-40
,,	,,	3	629, 630, 631
,,	,,	3 A	630
,,	,,	4	642
IV.	1	pr.	
,,	,,	1	233
,,	,,	2	233
,,	,,	3	326-7, 328
,,	,,	4	328-329

Book	Tit.	Sect.	Page
IV.	1	5	326
,,	,,	6	476
,,	,,	7	236
,,	,,	8	234
,,	,,	9	194
,,	,,	10	236
,,	,,	11	240, 551
,,	,,	12	241
,,	,,	13	237
,,	,,	14	237
,,	,,	15	238, 507, 510
,,	,,	16	238
,,	,,	17	239
,,	,,	18	241
,,	,,	19	325
,,	2	pr.	241, 330
,,	,,	1	241-2
,,	,,	2	242
,,	3	pr.	243
,,	,,	1	243
,,	,,	2	152
,,	,,	3	246
,,	,,	4	246
,,	,,	5	246
,,	,,	6	246
,,	,,	7	246
,,	,,	8	246
,,	,,	9	330
,,	,,	10	331
,,	,,	11	330
,,	,,	12	243
,,	,,	13	243
,,	,,	14	330
,,	,,	15	330-31
,,	,,	16	243-4
,,	4	pr.	150
,,	,,	1	146-7-8-9
,,	,,	2	194
,,	,,	3	164
,,	,,	4	165
,,	,,	5	166
,,	,,	6	166
,,	,,	7	154, 155
,,	,,	8	149
,,	,,	9	155
,,	,,	10	156
,,	,,	11	154
,,	,,	12	152
,,	5	pr.	1006
,,	,,	1	150, 153, 155
,,	,,	2	154
,,	,,	3	241
,,	6	pr.	131, 132, 451-2
,,	,,	1	131, 132
,,	,,	2	132
,,	,,	3	264
,,	,,	4	264
,,	,,	5	271
,,	,,	6	1040-41
,,	,,	7	436, 447
,,	,,	E	566, 615
IV.	6	9	566
,,	,,	10	615
,,	,,	11	615
,,	,,	12	1073
,,	,,	13	989
,,	,,	14	329
,,	,,	15	132, 979
,,	,,	16	1073
,,	,,	17	1074
,,	,,	18	1073
,,	,,	19	1003, 1073-4
,,	,,	20	340
,,	,,	21	1074
,,	,,	22	1074
,,	,,	23	1032, 1074
,,	,,	24	973
,,	,,	25	1074
,,	,,	26	1003, 1074-5
,,	,,	27	1074-5
,,	,,	28	994
,,	,,	29	307-8, 442
,,	,,	30	1017
,,	,,	31	987
,,	,,	32	1011
,,	,,	33	1018
,,	,,	33 A	995
,,	,,	33 B	995
,,	,,	33 C	584-5
,,	,,	33 D	579, 580
,,	,,	33 E	1018
,,	,,	34	1018
,,	,,	35	1018-19
,,	,,	36	604
,,	,,	37	307
,,	,,	38	524
,,	,,	39	1017
,,	,,	40	1040
,,	7	pr.	605
,,	,,	1	614-15
,,	,,	2	617, 618
,,	,,	3	604
,,	,,	4	604, 615
,,	,,	5	620
,,	,,	6	620
,,	,,	7	473
,,	,,	8	615, 618
,,	8	pr.	166
,,	,,	1	166, 437
,,	,,	2	166
,,	,,	3	184
,,	,,	4	184
,,	,,	5	167
,,	,,	6	159-60
,,	,,	7	197
,,	9	pr.	248
,,	,,	1	249
,,	10	pr.	979, 1022
,,	,,	1	1024
,,	,,	2	1022
,,	11	pr.	1023-4
,,	,,	1	1024
IV.	11	2	1024
,,	,,	3	1025
,,	,,	4	1026
,,	,,	5	1026
,,	,,	6	1025
,,	,,	7	1025
,,	12	pr.	646
,,	,,	1	650
,,	,,	2	1009
,,	13	pr.	990
,,	,,	1	594
,,	,,	2	471
,,	,,	3	547
,,	,,	4	1016
,,	,,	5	1016
,,	,,	6	
,,	,,	7	990
,,	,,	8	1017
,,	,,	9	1017
,,	,,	10	1017
,,	,,	11	432, 1027
,,	14	pr.	991
,,	,,	1	992
,,	,,	2	992
,,	,,	3	992
,,	,,	4	578
,,	15	pr.	997-6
,,	,,	1	
,,	,,	2	
,,	,,	3	448, 842
,,	,,	4	357-8, 365
,,	,,	4 A	358, 371
,,	,,	5	358
,,	,,	6	250, 251, 390
,,	,,	7	359
,,	,,	8	998, 1001
,,	16	pr.	1020
,,	,,	1	1020, 1021
,,	,,	2	1021
,,	,,	3	971
,,	17	pr.	1006
,,	,,	1	184
,,	,,	2	336
,,	,,	3	335
,,	,,	4	883-4
,,	,,	5	339-40
,,	,,	6	337
,,	,,	7	340
,,	18	pr.	1061
,,	,,	1	1061
,,	,,	2	1061
,,	,,	3	1061
,,	,,	4	1061
,,	,,	5	1061-2
,,	,,	6	1062, 1068
,,	,,	7	1062
,,	,,	8	1062
,,	,,	9	1062, 1071
,,	,,	10	1063
,,	,,	11	1063
,,	,,	12	1063

EDINBURGH:
COLSTON AND COY. LIMITED, PRINTERS.

Coroners.—Jervis (Sir J.) on the Office and Duties of Coroners. 6th Edit. By R. E. Melsheimer. 10*s.* 6*d.* 1898.

Costs.—Johnson. Bills of Costs in the High Court of Justice and Court of Appeal, in the House of Lords and the Privy Council, Tables of Fees, Conveyancing Costs, &c., &c. By Horace Maxwell Johnson. 2nd Edit. 35*s.* 1901.

County Courts.—The Annual County Courts Practice; containing the Jurisdiction and Practice under the County Courts Act, the Bills of Exchange Act, and the Employers' Liability Act, and the Statutes, Rules of Practice, Forms and Tables of Fees and Costs. By His Honour Judge Smyly. 2 vols. 25*s.*

Criminal Law.—Archbold's (J. F.) Pleading and Evidence in Criminal Cases, with the Statutes and Precedents of Indictments, by Sir J. Jervis. 22nd Ed. 1*l.* 11*s.* 6*d.* 1900.

Chitty's Collection of Criminal Acts. By W. F. Craies. 10*s.* 1894.

Roscoe's (H.) Digest of the Law of Evidence in Criminal Cases. 12th Ed. By A. P. Keep. 31*s.* 6*d.* 1898.

Russell (Sir W. O.) on Crimes and Misdemeanours. 6th Ed. 3 vols. 5*l.* 15*s.* 6*d.* 1896.

Deeds. — Elphinstone, Norton and Clark's Rules for the Interpretation of Deeds. 2nd Edit. *In Preparation.*

Kelke's Epitome of Rules for Interpretation of Deeds. 6*s.* 1901.

Digest.—Digest of English Case Law to the end of 1897. 16 vols. 20*l.*
Continued annually.

A Digest of Cases, Overruled, &c., in the English Courts to the end of 1899.
In Preparation.

Divorce.—Browne & Powles' Law and Practice in Divorce and Matrimonial Causes; with the Statutes, Rules, Fees and Forms. 6th Ed. 25*s.* 1897.

Easements.—Gale on Easements. 7th Edition. By G. Cave. 25*s.* 1899.

Ecclesiastical Law. — Phillimore's Ecclesiastical Law of the Church of England. 2nd Ed. 3*l.* 3*s.* 1895.

Education.—Willson's Law relating to Education, with the Text of all the Statutes, Orders, etc., affecting Education. By W. R. Willson. 21*s.* 1903.

Ejectment.—Williams (J. H.) & Yates' (W. B.) Law of Ejectment. 16*s.* 1894.

Equity.—White & Tudor's Selection of Leading Cases in Equity, with Notes. 7th Edition. 2 vols. 3*l.* 15*s.* 1897.

Kelke's Epitome of Leading Cases in Equity, founded on White and Tudor. 6*s.* 1901.

Evidence.—Taylor's (Pitt) Treatise on the Law of Evidence, as administered in England and Ireland. By His Honour Judge Pitt-Taylor. 9th Ed. In 2 vols. 3*l.* 5*s.* 1895.

Best's Principles of Evidence. With Elementary Rules for conducting the Examination and Cross-Examination of Witnesses. 9th Edit. By J. M. Lely. 25*s.* 1902.

Executors.—Williams' (Sir E. V.) Treatise on the Law of Executors and Administrators. 9th Edition. 3*l.* 16*s.* 1893.

Factories.—Law relating to Factori and Workshops under the Factory a Workshop Act, 1901. With Rules, Ord &c., and other Statutes affecting the s ject. By W. Bowstead. 10*s.* 19

Forms.—Rouse's Practical Man. 1 Edit. 10*s.* 6*d.* 19

Chitty's Forms of Proceedings in t King's Bench Division. 13th Edit. 3 19

Fraud.—Kerr's Treatise on the Law Fraud and Mistake. 3rd Edit. By S. Williams. 25*s.* 19

Guide for Articled Clerks.—A G Guide for Articled Clerks, containing most recent Regulations and Examinat Papers. By H. W. Stiff, Solicitor. 6*s.* 18

Guide to the Bar.—A New Guide the Bar, containing the most recent Re lations and Examination Papers. By M and LL.B., Barristers-at-Law. 5*s.* 18

Horses.—Oliphant's Law of, includ the Law of Innkeepers, Veterinary S geons, &c., and of Hunting, Raci Wagers and Gaming. 5th Ed. By Clem Elph. Lloyd, B.A. Oxon. 21*s.* 18

Income Tax.—Income Tax Acts, w Introduction, Notes, and Cross-referen By H. St. G. Peacock. 15*s.* 19

Injunctions.—Kerr on the Law Practice of Injunctions. 4th Edit. E. P. Hewitt, S. E. Williams J. M. Paterson. 35*s.* 19

Interpleader.—Cababé (M.) on In pleader in the High Court of Justice County Courts; with Forms. 3rd Edit. 19

Justices. — Wigram's Justices' N Book. 7th Edit. 10*s.* 6*d.* 19

Landlord and Tenant.—Woodfal Law of Landlord and Tenant. 17th E By J. M. Lely. 38*s.* 19

Law Dictionary.—

Bouvier's Encyclopedic Dictionary of E lish and American Law Terms and Phra New Edit. 2 vols. 2*l.* 10*s.* net. 189

Stroud's Judicial Dictionary, or In preter of Words and Phrases by the Bri Judges and Parliament. By F. Stro 2nd Ed. 3 vols. 4*l.* 4*s.* 19

Licensing.— Montgomery's Licens Laws. 2nd Edit. 18*s.* 19

Local Government and Taxati —An Outline of, in England and Wa excluding London. By R. S. Wric and H. Horhouse. 2nd Ed. 7*s.* 6*d.* 18

Master and Servant.—Smith's La Master and Servant in every descriptio Trade and Occupation. 5th Edit. 28*s.* 19

Maxims.—Broom's Selection of Le Maxims, Classified and Illustrated. Edit. 28*s.* 19

Mercantile and Maritime Law Smith's (J. W.) Compendium of Merc tile Law. 10th Ed. By John Macdone M.A. 2 vols. 2*l.* 2*s.* 18

Merchant Shipping.—A Treatise on Law of Merchant Shipping. 4th Edit. David Maclachlan, M.A. 2*l.* 2*s.* 18

Marsden's Digest of Cases relating Shipping, Admiralty, and Insurance L from the reign of Elizabeth to the en 1897. 30*s.* 18

ULLING'S (A.) Shipping Code; being the Merchant Shipping Act, 1894. 7*s.* 6*d.* net. 1894.

lines, Minerals.—A Treatise on the Law of Mines, Quarries, and Minerals. By R. F. MACSWINNEY. 2nd Ed. 2*l.* 1897.

ortgage.—ROBBINS' (L. G. G.) Treatise on Mortgages, Pledges, and Hypothecations. 3*l.* 1897.

unicipal Corporations.—RAWLINSON'S Municipal

Hunter, William Alexander, 1844-1898
A systematic and historical exposition of Roman Law in the order of a code . . .
Law
Rom
H9476.3

UNIVERSITY OF TORONTO LIBRARY

Do not remove the card from this Pocket.

Acme Library Card Pocket
Under Pat. "Ref. Index File."
Made by LIBRARY BUREAU

dents. 4th E.
PHINSTONE, and J. ...
1897.

ELKE'S Real Property Law. An Epitome of Real Property Law, for the Use of Students. By W. H. HASTINGS KELKE, ...d Ed. 6*s.* 1899.

...SON'S Real Property Statutes, comprising, among others, Prescription, Limitations, Wills, Trustees, Conveyancing, Settled Lands, Partition, &c. 10th Edit. By T. H. CARSON, K.C., and H. B. COMPAS. 35*s.* 1902.

Receivers.—A Treatise on the Law and Practice as to Receivers appointed by the Court of Chancery. By W. W. KERR. 4th Edition. 10*s.* 1900.

Roman Law. KELKE'S Epitome of Roman Law. 6*s.* 1901.

Sale, Contract of.—BENJAMIN'S (J. P.) Treatise on the Law of Sale of Personal Property, with reference to the American Decisions and the French Code and Civil

In Preparation.

...(W. C. A) and ...) Commentary on ..., 1893; forming a ...in on Sale. 18*s.* 1894.

...and Execution ...ER. 30*s.* 1903

...Statutes of Practice. By J. M. LELY. ...01. In 14 vols. ...y Annual Supple-

...Statutes. By Sir ...ord Ed. By A. B. 1896.

...to advising on Title. ...H. GOVER. 8*s.* 1896.

...f Torts, by J. F. CLERK ...NDSELL. 2nd Ed. 25*s.* 1896.

...Law of Torts. By H. ...it. 8*s.* 1902.

KERLY, D. M. A Law of Trade Marks, ...l Merchandise Marks. 1901.

...Trade Union Law and ...HEN and G. HOWELL. 1901.

(THOMAS) Practical ...of Trusts. 10th Edit. 1898.

...Judicial Trustees' ...Law and Practice, ...rms of Procedure, 8*s.* 1898.

...ser.—Law re... ...urchasers of Real ...LLIAMS.

In the Press.

...to Waters, Sea, ...J. W. COULSON ...Edit. 35*s.* 1902.

...reatise on Wills. ...10*s.* 1893.

...N'S (T.) Concise ...actical Notes. 11th Ed. 21*s.* 1898.

Workmen's Compensation.—Law relating to Workmen's Compensation. With Rules, Regulations, Orders and Forms. By W. BOWSTEAD. 9*s.* 1901.

Accidents to Workmen.—A Treatise on the Employer's Liability Act, Lord Campbell's Acts, and the Workmen's Compensation Acts. By R. M. MINTON-SENHOUSE. 2nd Edit. 25*s.* 1902.